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## Denialism and the Death Penalty

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# DENIALISM AND THE DEATH PENALTY

JENNY-BROOKE CONDON\*

## ABSTRACT

*The persistence of capital punishment as a constitutional form of punishment in the United States reflects deep denialism about the practice and the role of the courts in regulating it. Denialism allows judges to embrace empirically contested narratives about the death penalty within judicial decisions, to sanction execution methods that shield and distort the pain associated with state killing, and to ignore the documented influence of race on the death penalty's administration. This Article draws upon the concept of denialism from the transitional justice context, a theory that explicates denial in responses to mass human rights violations and collective violence. It describes mechanisms of denial in judicial regulation of capital punishment and argues that conditions will not be ripe for judicial abolition of the death penalty until this denialism is better understood and confronted. I identify potential entry points for exposing and overcoming denialism in Eighth Amendment analysis.*

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## INTRODUCTION

The death penalty’s ineffectiveness and irremediable unfairness will one day lead to its end<sup>1</sup>—or so the theory goes. That assumption animates many contemporary critiques of capital punishment.<sup>2</sup> Notwithstanding the limited

1. Many commentators portend that the end of capital punishment is on the horizon even while there is disagreement as to whether its end will be at the hands of the courts or the legislatures. See Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment*, 31 LAW & SOC. INQUIRY 149, 172 (2006) (positing that if “capital punishment is abolished, it will be by the Supreme Court”); David Cole, *Justice Breyer v. the Death Penalty*, NEW YORKER (June 30, 2015), <https://www.newyorker.com/news/news-desk/justice-breyer-against-the-death-penalty> [<https://perma.cc/DPA5-PPJK>] (noting that “the abolition of capital punishment is probably only a matter of time” and “[w]hether its end will come at the hands of the Supreme Court or the people remains to be seen”); Brandon L. Garrett, *Why Jurors Are Rejecting the Death Penalty*, SLATE (July 11, 2017, 2:31 PM), <https://slate.com/news-and-politics/2017/07/why-jurors-are-rejecting-the-death-penalty.html> [<https://perma.cc/39NP-PSJ3>] (stating that jurors’ increasing reticence to return death sentences signals to prosecutors that “[t]he death penalty’s time has come and gone”); David Von Drehle, *The Death of the Death Penalty: Why the Era of Capital Punishment Is Ending*, TIME (June 8, 2015), <https://time.com/deathpenalty/> [<https://perma.cc/D7ZK-TUT4>].

2. See Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. (forthcoming 2020) (manuscript at 5), <http://dx.doi.org/10.2139/ssrn.3440828> [<https://perma.cc/Z62A-APQM>] (noting the Court’s increasing “willingness to consider well-controlled empirical studies” and expert predictions that it will “pivot away from the overtly moral debates of the twentieth century in favor of more instrumental or utilitarian assessments of the costs and benefits of the modern death

audience receptive to such arguments at the current Supreme Court,<sup>3</sup> critics continue to cite evidence of the death penalty's race-based arbitrariness in death sentences, excessively long and expensive delays from sentence to execution, and the number of innocent persons convicted of capital crimes.<sup>4</sup> Important research continues to document the death penalty's many flaws,<sup>5</sup> reinforcing the perception that the more information that is available about how the death penalty *really* functions in practice, the sooner capital punishment will be abolished.<sup>6</sup>

This Article sounds a cautionary note to that prevailing account. It argues that America's exceptional retention of capital punishment<sup>7</sup> is not based

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penalty"); John J. Donohue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL'Y 51, 104–06 (2016) (concluding that "empirical evaluation will be at the heart of the case" against the death penalty); see also Catherine M. Grosso, Barbara O'Brien, Abijah Taylor & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 525 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014).

3. Compare *Glossip v. Gross*, 135 S. Ct. 2726, 2755, 2759 (2015) (Breyer, J., dissenting) (relying upon research-based evidence to question the constitutionality of the death penalty separate from the methods used to carry it out), with *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123, 1134 (2019) (stating that "[u]nder our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve," and "the judiciary bears no license to end a debate reserved for the people and their representatives").

4. Legal scholars Carol and Jordan Steiker have noted that morally-based arguments against the death penalty have largely disappeared from discourse about capital punishment in favor of pragmatic ones. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 245 (2016). They note the prevalence of cost-benefit analyses and arguments that the death penalty's problems in administration cannot be fixed. *Id.* Steiker and Steiker remain skeptical, however, about the success of a constitutional challenge to the death penalty based upon its arbitrariness and discriminatory application. *Id.* at 274. They note that the Court has typically avoided decision making based upon empirical evidence, conscious of its limited "institutional competence." *Id.* at 274.

5. See *infra* note 22.

6. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (reiterating that greater knowledge of the death penalty's flaws would cause the public to deem it "shocking, unjust, and unacceptable"); Phillips & Marceau, *supra* note 2 (manuscript at 34) ("[T]here is no question that the arc of the death penalty's future will turn on the quality and availability of the empirical data."); Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 76, 77 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) ("I have come to believe that whatever one's views of the death penalty in the abstract, reasonable people of goodwill, if armed with the facts about how the death penalty is actually administered in this country, ought to conclude that the death penalty should be abolished.").

7. America's retention of capital punishment is unique when compared to other democracies. See AMNESTY INT'L, *DEATH SENTENCES AND EXECUTIONS 2016*, at 11 (Apr. 11, 2017) (noting that for the eighth consecutive year, the United States was the only country in the Americas and the only democracy in the West to execute someone). Commentators have cited sociological, historical, cultural, and political factors to explain the death penalty's persistence in the United States when so many other countries have moved away from capital punishment. See, e.g., FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 66 (2003); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3 (2003); DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 12 (2010). Which of these drivers, or combination of them, best explains America's retention of the death penalty remains debatable.

upon ignorance of the death penalty's worst problems; it is sustained through choices that ignore those problems in the face of overwhelming evidence. As explained below, denialism captures a complex set of factors that defines judicial regulation of the death penalty as a constitutional form of punishment in the United States. This includes the Court's embrace of dominant, yet empirically contested, narratives about the death penalty within judicial decisions,<sup>8</sup> its sanctioning of execution methods that shield and distort the pain associated with state killing,<sup>9</sup> and its decision to ignore the documented influence of race upon the death penalty's administration.<sup>10</sup> This Article conceptualizes and begins to troubleshoot the denialism that characterizes judicial regulation of the American death penalty, which it pinpoints as a formidable and under-appreciated barrier to judicial abolition.<sup>11</sup>

Empirical arguments against the death penalty have long dominated strategies to invalidate it.<sup>12</sup> During the 1960s and 70s, the NAACP Legal Defense Fund ("NAACP-LDF" or "LDF") methodically litigated challenges to capital punishment based upon statistical evidence of racial disparities in death sentencing.<sup>13</sup> LDF teamed up with a social scientist to first show racial disparities in sentencing for rape.<sup>14</sup> Its empirically-focused strategy culminated in *Furman v. Georgia*,<sup>15</sup> the Court's 1972 decision holding that the death penalty could not, in the cases before it, be fairly administered without arbitrary results. The decision effectively invalidated the death penalty, but LDF's victory was short-lived: four years later, the

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8. One example is the notion that the death penalty is reserved for the "worst of the worst." See *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (recounting how the Court "sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called 'the worst of the worst'" (quoting *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting))).

9. As Judge Alex Kozinski, former chief judge of the federal Ninth Circuit Court of Appeals, acknowledged in a news interview before his retirement, execution drugs serve as "a mask." Von Drehle, *supra* note 1 (quoting Patt Morrison, Opinion, *Column: Judge Alex Kozinski on Bringing Back Firing Squads: No, I Wasn't Kidding*, L.A. TIMES (July 30, 2014, 5:40 PM), <https://www.latimes.com/opinion/op-ed/la-oe-0731-morrison-kozinski-20140729-column.html> [<https://perma.cc/4QCK-CKAQ>]). He noted that America's approach to killing "[o]f course . . . raise[s] the question of whether we are really comfortable with having a death penalty that literally sheds blood." *Id.*

10. See *infra* Part III.A.

11. To be sure, one might resist my diagnosis of denial and characterize the barriers to judicial abolition as value-laden, driven by the justices' political orientation, or their deference to parochial political consensus. While such explanations have undeniable weight, see *infra* Part II.C's discussion of cultural cognition bias, they fail to fully explain the Court's avoidance of uncomfortable facts about the death penalty. Denialism provides an additional lens to assess these features.

12. Phillips & Marceau, *supra* note 2 (manuscript at 34) (noting that "[e]mpirical data has always been relevant to the constitutionality of the death penalty").

13. STEIKER & STEIKER, *supra* note 4, at 53.

14. *Id.* at 52–53.

15. *Furman v. Georgia*, 408 U.S. 238 (1972).

Court reinstated capital punishment in *Gregg v. Georgia*,<sup>16</sup> after states enacted new capital statutes in response to *Furman*.

Following this turnaround, many opponents retained their faith in the power of the empirical case against the death penalty. Scholars and advocates continued to use research-based evidence to question the fairness and utility of capital punishment. Justice Thurgood Marshall also famously contended that greater knowledge and understanding of capital punishment's flaws would eventually lead to its repudiation.<sup>17</sup> This argument, dubbed the Marshall Hypothesis,<sup>18</sup> posited that average citizens would be shocked and reject capital punishment as unjust if they knew more about racial disparities in capital sentences and the number of innocent people wrongly convicted.<sup>19</sup>

More than forty years later, in his 2015 dissent in *Glossip v. Gross*,<sup>20</sup> Justice Breyer similarly questioned the death penalty's sustainability based upon empirical evidence. He concluded that the death penalty likely no longer serves any valid penological purposes that could withstand Eighth Amendment scrutiny and expressed interest in full briefing on "whether the death penalty violates the Constitution."<sup>21</sup>

Meanwhile, an extensive body of evidence continues to grow documenting the death penalty's many problems, including its ongoing geography- and race-based arbitrariness.<sup>22</sup> Researchers predict that the

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16. 428 U.S. 153 (1976).

17. Justice Marshall opined in both his *Furman* concurrence and *Gregg* dissent that if the public better understood the death penalty in practice, more people would repudiate it as an arbitrary and unjust practice. *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting); *Furman*, 408 U.S. at 314, 362–64 (Marshall, J., concurring).

18. See, e.g., Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 527 (2009); Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171.

19. *Furman*, 408 U.S. at 360 (Marshall, J., concurring) (reasoning that the death penalty is "morally unacceptable to the people of the United States at this time in their history"); *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting) ("[T]he American people know little about the death penalty, and . . . the opinions of an informed public would differ significantly from those of a public unaware of [its] consequences and effects . . ."). He cited the death penalty's relative cost and ineffectiveness in achieving its penological goals, *Furman*, 408 U.S. at 314, 362–63 (Marshall, J., concurring), its discriminatory imposition based upon race, its disproportionate impact upon "the poor, the ignorant, and the underprivileged members of society," *id.* at 364–66, and the likelihood that innocent defendants have been and will continue to be executed, *id.* at 365, 368.

20. 135 S. Ct. 2726, 2756, 2759 (2015) (Breyer, J., dissenting) (citing evidence showing the death penalty's unreliability, arbitrariness, and "unconscionably long delays" and the presence of "significantly more research-based evidence today" showing that death sentences are meted out to people who are either actually innocent or less culpable under the law).

21. *Id.* at 2755.

22. See, e.g., HOWARD W. ALLEN & JEROME M. CLUBB, RACE, CLASS, AND THE DEATH PENALTY 12 (2008) ("It is clear that over the long sweep of American history, racial and ethnic disparity in the use of the death penalty has been of substantial magnitude."); Stevenson, *supra* note 6, at 86 (noting that since 1987 when the Supreme Court decided *McCleskey v. Kemp*, 481 U.S. 279 (1987), "evidence of racial bias in the capital punishment system has continued to mount," including a 1990

“death penalty’s future will turn on the quality and availability” of this data.<sup>23</sup>

Judicial decision making that minimizes, disregards, and distorts the brutality, arbitrariness, and inequality that defines capital punishment in the United States, however, complicates the empirical case against the death penalty.<sup>24</sup> This Article draws upon the literature assessing denial in the aftermath of collective violence and mass atrocity to conceptualize and describe these patterns as denialism.<sup>25</sup> The point is not that two dissimilar contexts are neatly analgous. Rather, the project draws on understandings of denial in other contexts to spark further reflection and study on why constitutional regulation of the death penalty appears to habitually manifest elements of denial.<sup>26</sup>

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report by the United States General Accounting Office that concluded that “82 percent of the empirically valid studies on the subject show that the race of the victim has an impact on capital charging decisions or sentencing verdicts or both”); Phillips & Marceau, *supra* note 2 (manuscript at 4) (noting that “dozens of studies have documented the impact of race in modern death sentencing decisions”); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1229 (2013) (noting that in spite of the Supreme Court’s message in *McCleskey*, 481 U.S. 279, that statistics showing racial disparities in the administration of the death penalty do not matter to its constitutionality, “in the twenty-five years since *McCleskey*, empirical studies of the death penalty have proliferated,” exposing disparities “based on race, gender, geography and other factors”). Recent contributions to this body of empirical evidence include a study showing that the geographic location of the crime is one of the most powerful indicators of whether or not a defendant will receive the death penalty. See *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting) (discussing study addressing death penalty rate for Hartford, Connecticut); Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259 (2016) (describing concentration of death sentences in specific local counties); Robert J. Smith, Essay, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 265–75 (2012) (addressing disparities in death sentencing from 2004 to 2009 at the county level). Researchers have also recently documented how race influences which condemned defendants the government actually executes. Phillips & Marceau, *supra* note 2 (manuscript at 5).

23. Phillips & Marceau, *supra* note 2 (manuscript at 34).

24. CRAIG HANEY, *DEATH BY DESIGN*, at xii (2005) (arguing that the “death penalty creates tensions and strains in our legal culture that are managed largely through a process of collective denial”).

25. The theory seeks to explain the role of denial in the occurrence and aftermath of human rights violations, including the denial that such violations occurred. See STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001) (analyzing denial in multiple contexts of collective violence); FATMA MÜGE GÖÇEK, *DENIAL OF VIOLENCE: OTTOMAN PAST, TURKISH PRESENT, AND COLLECTIVE VIOLENCE AGAINST THE ARMENIANS 1789–2009*, at 3 (2015) (studying Turkey’s denial of the Armenian genocide and the concept of denialism more broadly); see also Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1844 (2005). Only a few scholars have questioned or identified the role of denialism in the domestic criminal justice system. See, e.g., Joëlle Anne Moreno & Brian Holmgren, *Dissent into Confusion: The Supreme Court, Denialism, and the False “Scientific” Controversy over Shaken Baby Syndrome*, 2013 UTAH L. REV. 153, 153–54 (describing one form of denialism as “the rejection of scientifically sound information in favor of purported ‘truth’ claims that cannot be empirically supported” and arguing that in a 2011 decision three members of the Supreme Court contributed their “authoritative voices” to one such “false scientific controversy” involving shaken baby syndrome); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 402 (2011) (arguing “that the psychological concept of denial goes a long way in explaining prosecutors’ conduct”).

26. STEIKER & STEIKER, *supra* note 4, at 40 (describing how the United States “charted a novel

In Part I, I define the concept of denialism, drawing upon the literature addressing mass atrocity and collective violence. In Part II, I identify the need for a theory to capture a complex set of factors relevant to the persistence of the death penalty in spite of its overwhelming flaws. Part III identifies facets of denialism in our current system of capital punishment. I show that this includes willful blindness about capital punishment's systemic failings, as well as denialism about the judiciary's own place in the system of state killing.<sup>27</sup> Though there are many, I focus on four areas where I argue that denialism infects judicial regulation of capital punishment: assessing the role of race, the fallacy of reserving this punishment for the worst-of-the-worst, the Supreme Court's assessment of the cruelty of execution methods, and the more fundamental refusal to question the disconnect between a justice system that values human dignity and requires judges to closely regulate state killing. I identify some of the tools that fuel denialism including secrecy and state distortion. Ultimately, this Article identifies entry points in Eighth Amendment analysis where courts can better confront hard truths about the death penalty.

## I. INSIGHTS FROM DENIALISM

### A. *The Meaning and Significance of Denial*

What does it mean to be in denial? Denial is a term with varied and complex meanings, including psychological, political, and popular understandings. We speak of people being in denial when they discount facts that make them uncomfortable or which do not conform to their preferred world view.<sup>28</sup> Denialism is commonly used to describe the

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third course between the options of retention and abolition: it authorized the continued use of capital punishment, but sought to tame its arbitrary, discriminatory, and excessive applications through a growing set of constitutional doctrines").

27. Justice Kennedy in the 2008 case, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), appeared to recognize this odd tension. In that case, which held that the Eighth Amendment prohibited the death penalty in the case of child rape, he wrote: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Id.* at 420. Leading criminologists James Whitman and Frank Zimring have described how America's system of capital punishment allows decision makers, including the Court, "to support capital punishment without participating in the morbid processes of execution." Kaplan, *supra* note 1, at 150; *see also* WHITMAN, *supra* note 7; ZIMRING, *supra* note 7.

28. *See* Mark Hertsgaard, *Climate Denialism Is Literally Killing Us*, NATION (Sept. 6, 2017), <https://www.thenation.com/article/archive/climate-denialism-is-literally-killing-us/> [<https://perma.cc/3669-QKZK>]; Lee McIntyre, *The Price of Denialism*, N.Y. TIMES: OPINIONATOR (Nov. 7, 2015, 2:30 PM), <https://opinionator.blogs.nytimes.com/2015/11/07/the-rules-of-denialism/> [<https://perma.cc/9968-PXBH>] ("When we withhold belief because the evidence does not live up to the standards of science, we are skeptical. When we refuse to believe something, even in the face of what most others would take to be compelling evidence, we are engaging in denial."); *Truth or Denial: From Climate Change to the*



rejection of facts supported by science, as in the case of climate change, the safety of vaccines,<sup>29</sup> and some governments' denial of a link between HIV and AIDS.<sup>30</sup>

Science skepticism may reflect its own version of conspiratorial thinking or cynical political strategies,<sup>31</sup> but it also shares dynamics common in post-conflict denialism too. Skepticism of science similarly grows out of cognitive bias<sup>32</sup> and is often inextricably linked with politics surrounding racial injustice.<sup>33</sup> The version of denial that inevitably emerges following episodes of mass atrocity and collective violence provides the most useful lens for assessing the mechanisms of denial evident in judicial regulation of the death penalty.<sup>34</sup> For starters, this version of denialism prompts further

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*Anti-Vaccine Movement, Is Denial on the Rise in America?*, WASH. POST: BRANDSTUDIO, <https://www.washingtonpost.com/sf/brand-connect/bleecker-street/denial/> [<https://perma.cc/66ZC-Z5FT>].

29. See, e.g., MICHAEL SPECTER, DENIALISM: HOW IRRATIONAL THINKING HINDERS SCIENTIFIC PROGRESS, HARMS THE PLANET, AND THREATENS OUR LIVES 3 (2009) (criticizing individuals who question the harm caused by vaccines, believe organic foods are healthier, or take alternative medicines as discounting “reality in favor of a more comfortable lie”); Leila Barraza, Daniel G. Orenstein & Doug Campos-Outcalt, *Denialism and Its Adverse Effect on Public Health*, 53 JURIMETRICS 307 (2013).

30. See Lisa Forman, *Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy*, 33 J.L. MED. & ETHICS 711, 717 (2005) (“Denialists assert that immune failure attributed to AIDS results instead from the toxicity of antiretroviral treatment (ARV), promiscuous, drug-abusive gay ‘lifestyles,’ and in Africa, from poverty-related malnutrition and illness.”); see also Nathaniel Bruhn, Comment, *Litigating Against an Epidemic: HIV/AIDS and the Promise of Socioeconomic Rights in South Africa*, 17 MICH. J. RACE & L. 181, 188 (2011). Former South African President Mbeki’s AIDS denialism is most well-known, but similar official policies have occurred in Nigeria and Eritrea. See Daniel R. Mekonnen, *Mandatory Premarital HIV Testing as a Challenge to Human Rights: A Case Study of Eritrea*, 5 INTERDISC. J. HUM. RTS. L. 1, 22 (2010).

31. See Martin McKee, *Denialism: What Is It and How Should Scientists Respond?*, 19 EUR. J. PUB. HEALTH 2 (2009). McKee states that denialism is a process that employs “some or all of five characteristic elements in a concerted way” including “the identification of conspiracies,” the “use of fake experts,” drawing selectively on research, the “creation of impossible expectations” regarding what research can deliver, and “misrepresentation and logical fallacies.” *Id.* at 2–3.

32. See Dan M. Kahan, Hank Jenkins-Smith & Donald Braman, *Cultural Cognition of Scientific Consensus*, 14 J. RISK RES. 147 (2011); Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 23 (2011) (noting that people tend “to conform their perceptions of risk and other [beliefs] to their cultural worldviews”).

33. Salil D. Benegal, *The Spillover of Race and Racial Attitudes into Public Opinion About Climate Change*, 27 J. ENVTL. POL. 733, 733 (2018) (finding that “high levels of racial resentment are strongly correlated with reduced agreement with the scientific consensus on climate change”); Ibram X. Kendi, *What the Believers Are Denying*, ATLANTIC (Jan. 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/what-deniers-climate-change-and-racism-share/579190/> (“The denial of climate change and the denial of racism rest on the same foundation: an attack on observable reality.”); see also Edwin Cameron, *AIDS Denial in South Africa*, 5 GREEN BAG 2D 415, 418 (2002) (Justice Edwin Cameron of the Supreme Court of Appeal of South Africa stating that “[I]ike holocaust denialism, AIDS denial has a fundamental racial impulse: a racial suspicion, a racial anger, a racial fear, and a racial conspiracy”); Mandisa Mbali, *AIDS Discourses and the South African State: Government Denialism and Post-Apartheid AIDS Policy-Making*, 54 TRANSFORMATION 104, 104 (2004) (describing how “the South African version of [AIDS] denialism espoused by Mbeki and other high profile government officials has been obsessed with colonial and late apartheid discourses of race, sexuality and disease in Africa”); see also Jessica C. Nelson, Glenn Adams & Phia S. Salter, *The Marley Hypothesis: Denial of Racism Reflects Ignorance of History*, 24 PSYCHOL. SCI. 213 (2012).

34. This Article draws upon literature addressing mass atrocity and transitional justice but does

reckoning with the ways slavery and racial subjugation have impacted the American criminal justice system. It forces hard questions about whether that history powerfully shapes the death penalty's administration today.

### *B. Denialism in the Aftermath of Atrocity*

Following history's most egregious episodes of collective violence, states, perpetrators, and bystanders alike have invariably denied that violence and mass human rights violations occurred.<sup>35</sup> This phenomenon has occurred on an individual and collective level.<sup>36</sup>

For example, nearly twenty years after the atrocities committed during the 1990s in the former Yugoslavia, many Serbian citizens denied that the Serbs perpetrated most of the mass violence following the breakup of Yugoslavia or were "unwilling to acknowledge what they know."<sup>37</sup> This sentiment was inconsistent with the publicly available evidence of Serb atrocities.<sup>38</sup> As a human rights activist who helped survey Serbian attitudes regarding the work of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") put it, "[t]he question is whether you really don't know or you refuse to know."<sup>39</sup>

A central purpose of transitional justice models, including truth and reconciliation commissions, is to counter denial's inevitable emergence in

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not suggest that any model of accountability has been successful in achieving justice or eliminating denial. There is much debate about the best mechanisms for achieving justice and overcoming denial in post-conflict societies. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 5 (1998) (examining "the incompleteness and inescapable inadequacy of each possible response to collective atrocities" while still "join[ing] in the resistance to forgetting").

35. GÖÇEK, *supra* note 25. In her study of Turkey's denial of the Armenian genocide, Göçek cites the emergence of denial in the aftermath of numerous episodes of collective violence including with respect to the genocide of Native People and enslavement of African Americans in the United States; massacres by Great Britain in India, Kenya, and other locations; France's colonization and occupation of Algeria; Japan's atrocities in Korea and China during World War II; and, unfortunately, many others, including Bosnia and Chechnya in modern periods. *Id.*; see also DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993); Marko Milanović, *Establishing the Facts About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*, 47 GEO. J. INT'L L. 1321 (2016).

36. Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7, 12 (1995).

37. DIANE F. ORENTLICHER, *OPEN SOC'Y, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* 18 (2008), [https://www.justiceinitiative.org/uploads/a0be82c5-aa8a-4bcd-9d23-bcef4d94f93c/serbia\\_20080501.pdf](https://www.justiceinitiative.org/uploads/a0be82c5-aa8a-4bcd-9d23-bcef4d94f93c/serbia_20080501.pdf) [<https://perma.cc/H63U-EB6G>].

38. Genevieve Parent, *Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)*, GENOCIDE STUD. & PREVENTION, Oct. 2016, at 38, 39 ("A vast body of literature indicates that while the Serbs are not the only ones who committed crimes of war, they are the primary perpetrators of the 1990's wars in ex-Yugoslavia, where the disproportionate suffering experienced by Bosniaks is indisputable.").

39. ORENTLICHER, *supra* note 37, at 19 (recounting comments by Vojin Dimitrijević of the Belgrade Center for Human Rights).

the wake of mass human rights abuses.<sup>40</sup> Denialism's span across varied contexts and its distinct motivations, however, has complicated the development of "a social science theory of denial."<sup>41</sup> Nevertheless, scholars studying the holocaust, the Armenian genocide, military dictatorships in Latin America, the genocides in Rwanda and the former Yugoslavia, and other episodes of mass atrocities have long attempted to understand the significance and recurrence of denial.<sup>42</sup>

Stanley Cohen provides the most comprehensive classification of denial.<sup>43</sup> He posits that denial encompasses both unconscious defense mechanisms and conscious choice to reject or ignore threatening facts.<sup>44</sup> Although the line between the two—unwitting avoidance and purposeful evasion—is not always clear, Cohen identifies three possible versions of denial: literal, interpretative, and implicative.<sup>45</sup>

Literal denial involves refuting knowledge, evidence, or facts.<sup>46</sup> Claims that a massacre never took place, despite the factual evidence to the contrary, fall within this category.<sup>47</sup> Literal denial may reflect, according to Cohen, a range of psychological intentions. It may result from ignorance, the avoidance of facts that are too painful to bear, or purposeful distortion and lies.<sup>48</sup> Perpetrators employ denial when they cannot come to terms with their responsibility for harm.<sup>49</sup> Conversely, survivors rely upon denial for

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40. Many advocates of truth and reconciliation proceedings believe they provide a more effective means of countering denial than criminal processes. *See, e.g.*, Antje du Bois-Pedain, *Accountability Through Conditional Amnesty: The Case of South Africa*, in *AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES* 238, 260 (Francesca Lessa & Leigh A. Payne eds., 2012) ("[South Africa] succeeded in a fair and effective ascription of responsibility for politically motivated crimes, and it did so by breaking through the criminal law responsibility paradigm that can so easily ground denials of responsibility by anyone beyond the reach of *this* paradigm."); Richard J. Goldstone, *Peace Versus Justice*, 6 *NEV. L.J.* 421, 422 (2005–2006) (arguing that "justice as an aid to peace and reconciliation cannot be doubted" and noting that "court proceedings and truth and reconciliation commissions officially and credibly record fraught history and put an end to false denials").

41. GÖÇEK, *supra* note 25, at 3. *But see* Israel W. Charny, *A Classification of Denials of the Holocaust and Other Genocides*, in *THE GENOCIDE STUDIES READER* 518 (Samuel Totten & Paul R. Bartrop eds., 2009); COHEN, *supra* note 25, at 5–6. Both Charny and Cohen have endeavored to conceptualize denialism into a social science theory, mapping its common, yet variable features.

42. MINOW, *supra* note 34 (emphasizing the need to confront history and contest denial in responding to collective violence and atrocities).

43. Parent, *supra* note 38, at 40. Genocide scholar and psychologist Israel Charny has also classified denial into six broad groupings, though his categories are specific to genocide. *Id.* (citing Cohen and Charny's classifications of denial as the most "comprehensive" to date among the many types identified in the literature).

44. COHEN, *supra* note 25, at 6 (noting "grey areas between consciousness and unconsciousness" with respect to persons' knowledge of atrocities and human suffering).

45. *Id.* at 7.

46. *Id.*

47. *Id.*

48. *Id.*

49. Cohen, *supra* note 36, at 12.

protection. Indeed, “complex psychic mechanisms” allow one “to ‘forget’ unpleasant, threatening, or terrible information” producing “a personal amnesia.”<sup>50</sup> Cohen’s account tracks with psychological descriptions of denial as an unconscious “defense mechanism” that permits one to maintain a “favorable view of self.”<sup>51</sup>

Interpretative denial functions differently. A person may acknowledge that an event or crime took place, but attribute it a different meaning.<sup>52</sup> For example, a person might admit the deaths of a large number of people, but disclaim that the killings were perpetrated with genocidal intent.<sup>53</sup> According to Cohen, this can arise out of a genuine inability to understand the meaning of facts or can be a strategic effort to avoid justice or ostracization.<sup>54</sup>

Cohen’s final category—implicatory denial—describes the minimization of events and attempts to exempt oneself from responsibility for harm.<sup>55</sup> In this category, a person may justify their failure to intervene or argue that worse harms have been inflicted upon victims in other settings.<sup>56</sup> This can operate as bad faith—a false denial designed to prevent justice-related responsibility<sup>57</sup> that is familiar to any criminal justice system.<sup>58</sup> But even for individuals engaged in implicatory denial, denialism may be less a deliberate strategy of self-preservation and more a form of self-delusion.<sup>59</sup> An inability to release deeply held beliefs, biases, or grievances can cloud perpetrators’ beliefs about personal responsibility or the justness of their acts.<sup>60</sup>

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50. *Id.* at 12–13. We filter out disturbing “[m]emories of what we have done or what has been done to us, what we have seen or been told about.” *Id.* at 12.

51. Roy F. Baumeister, Karen Dale & Kristin L. Sommer, *Freudian Defense Mechanisms and Empirical Findings in Modern Social Psychology: Reaction Formation, Projection, Displacement, Undoing, Isolation, Sublimation, and Denial*, 66 J. PERSONALITY 1081, 1084 (1998). The authors note: “Purely conscious maneuvers are not generally considered full-fledged defense mechanisms. Like self-deception generally, defense mechanisms must involve some motivated strategy that is not consciously recognized, resulting in a desirable conclusion or favorable view of self that is conscious.” *Id.*

52. COHEN, *supra* note 25, at 8.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 47.

58. See Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 231–32 (2005). Maruna and Copes describe the tendency of offenders to “define the situation in a way that relieves them of responsibility for their actions[.] then they can mitigate both social disapproval and a personal sense of failure.” *Id.* They note that claiming that actions were accidental or forced by circumstances they could not control enables perpetrators to see “themselves as victims of circumstance or as products of their environment.” *Id.* at 232.

59. Indeed, denialism spans a spectrum from unconscious to conscious self-delusion. See COHEN, *supra* note 25, at 6 (noting that for Sartre “denial is indeed conscious”); see also Milanović, *supra* note 35, at 1368 (describing denialism as “an exercise in persuasion”).

60. COHEN, *supra* note 25, at 96–97 (describing multiple narratives and motivations that lead

Although denial often involves cognitive, moral, and emotional dimensions, it is variable.<sup>61</sup> It occurs at the personal, official, or cultural level; may be invoked by different actors, whether perpetrators, victims, or bystanders; and operates in different time frames.<sup>62</sup> Denial not only shapes narratives during transitional justice periods as post-conflict societies reckon with recently experienced atrocity, it shapes historical memory and contemporary thinking about the past.<sup>63</sup> As Göçek has emphasized in studying the Armenian genocide, it can define the thinking of societies and governments for generations.<sup>64</sup>

For bystanders to mass atrocities—meaning members of the public who did not individually perpetrate crimes but either stayed quiet or enabled the harm—denial may serve as a salve against guilt.<sup>65</sup> Those with personal connections to the events, such as having a family member who served in the armed services, are more likely to embrace denialism as a means of reconciling their proximity to what occurred.<sup>66</sup>

The views and postures of local political leaders involved in the conflict, or those leading the efforts to recover from it, heavily influence denial during periods of transitional justice.<sup>67</sup> For example, political leaders' resistance to holding perpetrators accountable for atrocities committed in the former Yugoslavia reinforced denial among the public.<sup>68</sup> The public

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perpetrators to blame victims and claim “justice is on [their] side”).

61. Parent, *supra* note 38, at 40 (summarizing Cohen’s taxonomy of denial). Parent notes that Cohen believes denial entails “cognition (no acknowledgement of the facts), emotion (not feeling disturbed), morality (no recognition of responsibility or of immorality), and action (perpetuating the violence or not acting on known facts).” *Id.*

62. *Id.*

63. GÖÇEK, *supra* note 25, at 3.

64. GÖÇEK, *supra* note 25, at 3; Cohen, *supra* note 36, at 13 (describing denial at the “collective level, what is sometimes called ‘social amnesia’—the mode of forgetting by which a whole society separates itself from its discreditable past record”). Cohen notes that this can occur at an “organized, official, and conscious level—the deliberate coverup, the rewriting of history—or through the type of cultural slippage that occurs when information disappears.” *Id.*

65. MINOW, *supra* note 34, at 74 (noting that bystanders “often experience guilt because they avoided harm or else participated, through ignorance and denial, in the regimes producing collective violence”).

66. See ORENTLICHER, *supra* note 37, at 18–19.

67. See ORENTLICHER, *supra* note 37, at 19. The tension between forgetting and facing the past is felt most acutely by survivors of horrific violence. MINOW, *supra* note 34, at 66 (citing the view of therapists who work with survivors of torture that “[f]acing, rather than forgetting, the trauma is crucial if a victim hopes to avoid reproducing it in the form of emotional disturbances”). Minow notes that victims “who seek to forget ironically may assist the perpetrators by keeping silent about their crimes. . . . lock[ing] perpetrators and victims in the cruel pact of denial, literally and psychologically.” *Id.* at 16.

68. See Vladimir Petrović, *A Crack in the Wall of Denial: The Scorpions Video in and out of the Courtroom*, in NARRATIVES OF JUSTICE IN AND OUT OF THE COURTROOM 89, 89 (Dubravka Zarkov & Marlies Glasius eds., 2014) (tying reluctance of leaders in successor states in the former Yugoslavia “to put to trial wrongdoers from their own ranks” with “the inability of the population to come to terms with the past”). As Petrović puts it, “[i]mpunity and denial were reinforcing each other.” *Id.*

continued to question the extent of atrocities that occurred, who committed them, and whether they were carried out with genocidal intention.<sup>69</sup>

Although transparency and public acknowledgement are often cited as critical antidotes to denial, they are not cure-alls. At trial, perpetrators still deny facts, discount evidence, and refute responsibility.<sup>70</sup> Even transitional justice approaches aimed at limiting denial<sup>71</sup> are not always successful in holding perpetrators to account and certainly have not prevented mass human rights violations from occurring elsewhere.<sup>72</sup>

As the summary above demonstrates, notwithstanding the permutations of denial in the aftermath of collective violence, denialism has common characteristics across time and place. The next section draws on the literature from these varied contexts and outlines characteristics of denialism that resonate with America's failure to fully reckon with the atrocities that shaped the United States, and which may likewise be at work when courts deny systemic problems that plague the death penalty.

### C. *The Function and Tools of Denial*

Invoking denialism as a lens for examining America's constitutional retention of capital punishment does not equate judicially regulated state killing with the extralegal atrocities described in the previous section. More simply, insights from the literature addressing denial in the aftermath of collective violence provide a framework for assessing why denialism exists with respect to capital punishment and how it functions.

The first, most basic function of denial is that it operates as a shield. It protects the person engaging in it from grappling with the consequences of acknowledging profound moral failings of humans as individuals and the collective failures of society. By shielding the person who engages in denial from acknowledging any complicity in acts or systems that have caused or continue to cause great harm, denial permits moral disengagement.<sup>73</sup> That,

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69. *Id.* at 106. Petrović calls this “astonishing” given that “Srebrenica remains among the best-documented atrocities ever and its perpetrators have been on trial at the [International Tribunal for the Former Yugoslavia (“ICTY”)] from 2001 onwards.” *Id.* But see Parent, *supra* note 38, at 44 (noting that denial in the region is “supported and reinforced by members of the international community from diverse spheres (political, academic, media, law)”).

70. Genevieve Parent has noted that in Bosnia and Herzegovina “many of the facts regarding the killings are not denied per se but the interpretation is such that genocidal intent is effectively denied.” Parent, *supra* note 38, at 39.

71. MINOW, *supra* note 34, at 88 (describing “overcom[ing] communal and official denial of the atrocity and gain[ing] public acknowledgement” as one of twelve aspirations for any societal response to collective violence).

72. Petrović, *supra* note 68, at 90 (noting that the ICTY experience “added new insights into some old debates” regarding whether transitional justice or trials are the best mechanism to achieve justice).

73. See Michael J. Osofsky et al., *The Role of Moral Disengagement in the Execution Process*,

in turn, allows individuals to continue to avoid difficult questions about their own responsibility for—and perhaps proximity to—profound harm and injustice.<sup>74</sup>

Second, denial provides separation. It permits a psychological clean slate, creating distance between trauma or injustice and the present. On a grand scale, this allows people to view current injustices and inequities as disconnected from the legacy of the past, absolving current actors of responsibility. In the context of legal decision making and legal process, it similarly permits individual actors to view their role in state killing as separate from the act of extinguishing human life. Their role remains noble and untainted, confined to applying the law, even those they may view as unjust.<sup>75</sup>

Finally, denial serves as a mask. It hides and distorts the ugliness of incomprehensible harm, reinventing events. For this reason, in nearly all contexts, denialism thrives in the absence of transparency or acknowledgement of the facts. While facts alone may not overcome denial, testimony, evidence, and other forms of public acknowledgment contract the space in which denialism persists.<sup>76</sup>

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29 LAW & HUM. BEHAV. 371, 375–76 (2005) (“In most social systems that trade in death, . . . moral self-restraints are gradually weakened through participation in a progression of committing inhumanities . . .”); Phyllis Goldfarb, *Arriving Where We’ve Been: Death’s Indignity and the Eighth Amendment*, 102 IOWA L. REV. ONLINE 386, 410 (2018) (arguing that challenges to execution methods “force us to confront the brutal material reality of how state employees use bureaucratic processes to kill other human beings”). Goldfarb has noted that the Supreme Court’s oral argument in the lethal injection case *Glossip v. Gross* was uncharacteristically fractious and clamorous. *Id.* at 413; see also Dahlia Lithwick, *A Horrifying Day at Court*, SLATE (Apr. 30, 2015, 5:48 PM), <https://slate.com/news-and-politics/2015/04/glossip-v-gross-supreme-court-justices-argue-about-lethal-injection-abolition-burning-at-the-stake.html> [<https://perma.cc/X9WK-XR4S>]. She contends that “the dissolution of decorum . . . may be related to the manner in which participating in a death penalty system—as Supreme Court justices surely do—requires moral disengagement that can undermine our better natures.” Goldfarb, *supra*, at 421 n.227.

74. HANEY, *supra* note 24, at 155. Haney describes how the process of death sentencing works to distance and disengage people from the true nature of the task. *Id.* He notes that features of capital trials “facilitate death sentencing by diffusing responsibility, reducing or removing the moral tenor from much of the decision making, and minimizing the costs of a death sentence by failing to emphasize what such a verdict actually means.” *Id.*

75. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) (discussing the role of judges who professed opposition to slavery, but nevertheless enforced fugitive slave laws, professing they were bound to respect the law). Cover notes that in decisions from this time the “judiciary paraded its helplessness before the law; lamented harsh results; intimated that in a more perfect world, or at the end of days, a better law would emerge, but almost uniformly, marched to the music.” *Id.* at 5–6.

76. See ORENTLICHER, *supra* note 37.

Denialism serves these functions through resort to a variety of tools, including euphemism,<sup>77</sup> secrecy,<sup>78</sup> and an exaggerated conception of role restraint.<sup>79</sup> These tools help minimize harm as well as the denier's responsibility for them.

As explained in the sections that follow, the Court has employed many of these hallmarks of denialism and the tools that facilitate it when refusing to do something about racial disparities in capital sentencing. The Court has cited the legislature's role in setting punishments and skepticism of statistical evidence to shield the Court from responsibility for reckoning with racial injustice. The idea that the Court is bound to enforce laws—even those that fuel inequality rejected by the Constitution—is a prototypical version of the separation provided by denial; it allows judges to minimize their role in the process of state killing and emphasize their inability to undermine the choices of the political process.<sup>80</sup> The Court has also used empirically contested narratives that those executed are the “worst of the worst” to mask, hide, and distort a more troubling and less comfortable reality about who is executed and why. Judicially sanctioned secrecy also serves to render execution methods less perceptible, thereby masking the reality of state killing.<sup>81</sup> Likewise, discussion of the death penalty, including within legal opinions, often depends upon euphemism or what Camus called “padded words.”<sup>82</sup>

The next section traces the literature addressing capital punishment and its racialized history and argues that leading critiques of capital punishment

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77. See Parent, *supra* note 38, at 4 (discussing Serbian prime minister's attempt to reinterpret meaning and memory by describing the Srebrenica massacre by using the word “crime” instead of genocide or massacre); COHEN, *supra* note 25, at 8 (describing how interpretative denial functions by attributing a different meaning to events and employing different language: so that it was not a massacre but “collateral damage”).

78. See Petrović, *supra* note 68 (analyzing impact of public disclosure of video documenting executions on public perceptions of denial).

79. See COHEN, *supra* note 25, at 8 (describing implicatory denial as minimization and disclaiming of responsibility: these killings have “nothing to do with me,” why should I intervene and risk “being victimized myself”); COVER, *supra* note 75, at 5–6 (describing a similar *my-hands-are-tied* approach when judges enforced slavery laws).

80. Judges have long insisted that their role as neutral arbiters and deference to the political process limit their ability to do anything about problems in the administration of the death penalty. William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441 (2011) (discussing role of professed commitment to judicial restraint in Justices Powell, Blackmun, and Stevens's initial votes to uphold the death penalty, prior to each justice repudiating that position); COVER, *supra* note 75.

81. See generally DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES (2018), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/behind-the-curtain-secrecy-and-the-death-penalty-in-the-united-states> [<https://perma.c/c/6J9R-SKFJ>].

82. See HANEY, *supra* note 24, at ix (quoting Albert Camus's critique of the death penalty as “smothered under padded words” to prevent candid debate about what state execution “really is” and given “what it is, [whether] it is to be considered necessary” (quoting ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 173 (1960))).



recognize, albeit not explicitly, the role of denialism in sustaining capital punishment. I then apply the more explicit components and function of denialism outlined here to the constitutional regulation of the death penalty, examining how it serves to shield and separate legal decision makers from state killing, while employing techniques, whether deliberately or unwittingly, to distort the process.

## II. CONCEPTUALIZING DEATH PENALTY RETENTION IN THE FACE OF SYSTEMIC FLAWS

### A. *Threads of Denial*

Scholars have gestured toward the historical, social, and psychological mechanisms of denial that tend to make the death penalty impervious to complete and durable abolition, notwithstanding its well-documented problems.<sup>83</sup> But none have identified these features of death penalty retention as a separate force bearing upon the death penalty's future.

Commentators have considered arguments against the death penalty within two categories.<sup>84</sup> One group of contingent criticisms includes concerns about its administration—for example, that the death penalty cannot be administered free of discrimination, and that it is rarely used and arbitrarily enforced.<sup>85</sup> For these reasons, and other problems with its fairness in operation, contingent criticisms maintain that the death penalty cannot achieve its penological purposes, most significantly deterrence.<sup>86</sup> The other group of anti-death-penalty arguments are moral—the notion that no matter how perfect and fair the state's administration of the death penalty, and whether it serves its purported aims, state killing violates the dignity of the person, sacrifices the morality of the state and those who act on its behalf, and is simply wrong.<sup>87</sup> The contingent and moral claims against the death penalty converge in that capital punishment is immoral if it cannot be administered free of racial and economic bias.<sup>88</sup>

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83. See *infra* notes 88–108.

84. See Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1284–85 (2006) (characterizing prevailing critiques of the death penalty as falling into contingent or moral critiques).

85. *Id.*

86. *Id.* at 1285.

87. *Id.* (describing the second group of opposition as “categorical” claims); see also Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (concluding that capital punishment was “uniquely degrading to human dignity”).

88. Stevenson, *supra* note 6, at 96 (“Beyond the abstract debate itself, the racial and economic features of the modern death penalty present moral questions about the death penalty that cannot be adequately answered.”).

The discourse about capital punishment, however, lacks a theory with which to describe and understand an overlapping and arguably latent criticism of the death penalty relevant to all grounds of opposition: that constitutional regulation of the death penalty includes mechanisms that permit and even encourage courts to avoid honest engagement with its well-documented flaws. This tendency to minimize or ignore the death penalty's hard truths also keeps judges from candidly contemplating their own role in the flawed project of state killing.<sup>89</sup>

Many leading critics of the death penalty have criticized these features of America's exceptional retention of the death penalty, albeit without fully analyzing the role of denial in the death penalty's constitutional preservation. For example, social psychologist Craig Haney, who has analyzed the fairness and effectiveness of death-sentencing, has criticized the Court for its "idealized" and inaccurate depiction of the system.<sup>90</sup> He argues that the Court has maintained the death penalty "in part by denying the problems that still plague its administration"<sup>91</sup> and excluding from its own view some of the most critical facts.<sup>92</sup>

Haney's critique focuses on the Court's elision of research regarding the role of media bias and misinformation on juror impartiality, and the negative effects of death-qualifying jurors.<sup>93</sup> He charges that this has created a "conspiracy of silence" of sorts" whereby "broad-based social scientific analyses of how the system really works—including many of its systemic flaws, procedural imperfections, and sometimes irreparable consequences—have been excluded from consideration."<sup>94</sup>

Scholars Carol and Jordan Steiker have identified similar patterns in the Court's death penalty jurisprudence, addressing how the Court has avoided historical evidence and empirical research related to the impact of race.<sup>95</sup> They note that the Court's major decisions constitutionalizing the death penalty during the 1960s and 70s strangely avoid mentioning its "racially

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89. HANEY, *supra* note 24, at 142 ("Writing about judges who participate in the act of death sentencing, Robert Cover commented on the 'special measure of . . . reluctance and abhorrence' that they are required to overcome in order to do the 'deed of capital punishment.'" (alteration in original) (quoting Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986))).

90. HANEY, *supra* note 24, at 6. Haney notes:

The Court, in particular, has refused to consider, acknowledge, or be influenced by social research that describes a system that is too often plagued by error and tilted toward death. Many of the justices have refused to talk candidly in their opinions about the problems that undermine the fair administration of the death penalty. As a result, the language by which they describe the system of capital punishment has been robbed of much of its truth-telling power.

*Id.*

91. *Id.* at 7.

92. *Id.* at 6.

93. *Id.* at 6, 27, 115.

94. *Id.* at 6.

95. STEIKER & STEIKER, *supra* note 4, at 78–79.

inflected history” even though the nation’s preeminent racial justice organization, the NAACP-LDF, led the charge against the death penalty, and the issue of race was central to its litigation strategy.<sup>96</sup>

Even if capital punishment’s racialized history was not lost on the Justices entirely, the Steikers emphasize that the Court refused to address race openly when regulating capital punishment.<sup>97</sup> This, they note, created a “false impression” that the death penalty’s most significant problems are discrete and isolated.<sup>98</sup> The Court’s focus, for example, on juror death qualification, unitary trials, and standardless capital sentencing statutes, in the Steikers’ account, obscured the more monumental problem of race in the death penalty’s administration.<sup>99</sup> The Court’s silence on this issue, the Steikers contend, has allowed “the unjust influence of race in the capital punishment process [to] continue[] unchecked.”<sup>100</sup>

Bryan Stevenson has gone further, contending that most decision makers in the United States are indifferent to evidence of racial bias in the administration of capital punishment.<sup>101</sup> He claims that America deliberately avoids honest engagement with the country’s history of slavery and racial apartheid, citing an unwillingness to “talk about our history” and to acknowledge how slavery and lynching are linked with capital punishment.<sup>102</sup> Stevenson has contrasted America’s avoidance of its history with the experience of nations like Rwanda and South Africa that have confronted genocide and mass atrocities through truth and reconciliation commissions.<sup>103</sup>

Austin Sarat has most explicitly described the legal system’s collective denial about the death penalty.<sup>104</sup> He notes that technological adaptations in execution methods have masked the pain associated with state killing and have allowed the public to imagine it as painless.<sup>105</sup> According to Sarat, this

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96. *Id.* at 79.

97. *Id.* at 78–79.

98. *Id.* at 109. In *Courting Death*, the Steikers explore the possible “strategic, institutional, ideological, and psychological” reasons for the Court’s avoidance. *Id.* at 98–108.

99. *Id.* at 109.

100. *Id.* at 109–10.

101. Stevenson, *supra* note 6, at 92.

102. Bryan Stevenson, *We Need to Talk About an Injustice*, TED TALK (Mar. 2012), [https://www.ted.com/talks/bryan\\_stevenson\\_we\\_need\\_to\\_talk\\_about\\_an\\_injustice/details?language=en](https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/details?language=en) [<https://perma.cc/W9GL-7R66>] [hereinafter *We Need to Talk About An Injustice*]; see also BRYAN STEVENSON, JUST MERCY 298–99 (2014). Although legal decision makers have avoided the legacy of lynching and slavery and its connection to the death penalty, numerous scholars have explored this connection. See *infra* note 127.

103. See *We Need to Talk About an Injustice*, *supra* note 102, at 9:51–10:08 (“We have a hard time talking about race, and I believe it’s because we are unwilling to commit ourselves to a process of truth and reconciliation.”).

104. See AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001).

105. *Id.* at 64.

is partly about shielding the public from gruesome executions, but also serves the additional purposes of displacing responsibility for state killing and avoiding “the difficult, often frustrating work of understanding what in our society breeds such heinous acts of violence.”<sup>106</sup> Sarat notes that the law’s language further works “to veil the ugly realities of execution, separating cause and effect, and making it unclear who is actually ordering and doing the killing.”<sup>107</sup> This diffuses responsibility for state killing and encourages denial of responsibility for the horrors of the system.<sup>108</sup>

Justices of the Supreme Court have similarly recognized the law’s role in blurring the reality of, and responsibility for, state killing. When Justice Blackmun announced his opposition to capital punishment after many years of constitutional regulation of the death penalty, stating that he would no “longer . . . tinker with the machinery of death,” he did not simply voice disagreement with the Court’s jurisprudence.<sup>109</sup> Instead, he called the Court’s insistence of constitutionality a “delusion.”<sup>110</sup> More charitably, in his concurring opinion in a lethal injection case, *Baze v. Rees*, Justice Stevens described the decision by legislatures and the Court to retain the death penalty as “the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits.”<sup>111</sup>

These critiques have begun to acknowledge a dormant feature of death penalty retention in the United States: courts’ unwillingness to openly acknowledge and respond to some of the death penalty’s most troubling and potentially irremediable defects along with the tendency to obfuscate and minimize the gravity of state killing.<sup>112</sup> Scholars, however, have not yet

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106. *Id.* at 14, 64.

107. *Id.* at 64.

108. *Id.* (“[I]t has become too easy to believe that nobody in particular is responsible for capital punishment . . .”).

109. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

110. *Id.* Justice Blackmun stated:

Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative.

*Id.* at 1145.

111. 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

112. Sarat describes the search for “more invisible” forms of state killing as a means to “differentiate state killing from murder.” SARAT, *supra* note 104, at 65. He quotes an execution witness’s observation that the quest for so-called “humane” forms of execution “is not about sparing the condemned, but sparing ourselves.” *Id.* “We like to keep the whole awful business at arms length, to tell ourselves capital punishment is civilized.” *Id.*

devoted sustained attention to diagnosing and understanding the reasons for these features of death penalty regulation nor offered prescriptives to confront this willful blindness. The concept of denialism provides an opportunity to build upon the scholarly critiques summarized above and examine whether these features of death penalty regulation present a separate hurdle to constitutional abolition of the death penalty.

### *B. Deliberateness, Ignorance, or Denial*

But is the Court really in denial about capital punishment in the United States? One could plausibly claim that denialism is an inapt lens—or worse, an unfair charge—because the Court’s constitutional regulation of the death penalty has not avoided and denied empirical facts, but simply rejected the validity of empirical evidence.<sup>113</sup> Or perhaps the Court is not yet collectively informed of empirical facts that undermine the death penalty’s reliability and fairness because such issues have not yet been fully presented to the Court.<sup>114</sup> One could similarly contend that constitutional acceptance of the death penalty reflects a judicial conclusion that its merits as a punishment outweigh its problems,<sup>115</sup> or it is simply an issue to be decided by the political process.<sup>116</sup> Denialism as a systemic account of death penalty retention is also potentially problematic given that multiple impulses motivate individual legal actors.<sup>117</sup>

These conceptual problems and possibilities, however, do not explain away scholars’ important insights described above identifying patterns of denial in the American death penalty. Moreover, denialism is a thought-

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113. The decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), could be viewed as simply a rejection of McCleskey’s evidence of racial discrimination. For the reasons described in Part III.A., however, that is not a sufficient explanation given the Court’s acceptance of the Baldus study’s scientific validity.

114. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). Justice Breyer’s *Glossip* dissent practically challenged defense lawyers to bring a case to the Court testing his thesis, stating he would “ask for full briefing on . . . whether the death penalty violates the Constitution.” *Id.*

115. Denialism may not accurately describe a justice’s belief that the death penalty on the whole can be administered fairly and justly. Berry, *supra* note 80, at 449. Berry notes that before reversing course and rejecting the validity of the death penalty or voicing regret for their decisions upholding it, Justices Powell, Blackmun, and Stevens “sought to apply the constitutionality of capital punishment not on ideological grounds but instead on pragmatic ones.” *Id.* For them this meant assessing whether capital punishment could “be applied even-handedly and if so, *how* the criminal justice system should be structured, including adding necessary safeguards, to insure that the *process* is equitable.” *Id.*

116. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123, 1134 (2019) (stating that “[u]nder our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve,” and “the judiciary bears no license to end a debate reserved for the people and their representatives”).

117. See generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 530 (2016) (discussing the problems with treating a “collective legislature” as possessing a “shared intent” where individual legislators of course have diffuse and personal “intentions and motivations”).

provoking frame for analyzing America's retention of capital punishment even if it alone cannot explain the retention phenomenon.

First, denialism powerfully surfaces how America's history of collective violence and atrocity—genocide of native people, slavery, and centuries of violence against black citizens, including torture and lynching—is part of America's unresolved past.<sup>118</sup> The frame of denial generates much needed further inquiry into the legacy of this history with respect to contemporary institutions and systems, including the death penalty's persistence as a constitutional form of punishment.

To be sure, literal denial, to use Cohen's taxonomy,<sup>119</sup> has not, for the most part, marked discussion of native genocide, slavery, or Jim Crow in the United States; slavery is taught in our schools,<sup>120</sup> is part of our acknowledged history, and is the subject of constitutional amendment.<sup>121</sup> Moreover, the Court's awareness of the role of race in the criminal justice system, as Michael Klarman has contended, arguably helped bring about the Court's criminal procedure revolution.<sup>122</sup> Nevertheless, as some reactions to the recently published New York Times Magazine's *1619 Project* demonstrate,<sup>123</sup> and the Court's own unwillingness to honestly acknowledge the racialized history of the death penalty suggest,<sup>124</sup> many in America,

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118. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (“To ignore the fact that one of the oldest republics in the world was erected on a foundation of white supremacy, to pretend that the problems of a dual society are the same as the problems of unregulated capitalism, is to cover the sin of national plunder with the sin of national lying.”); Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG.: 1619 PROJECT (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [<https://perma.cc/6FRH-FYZ3>] (essay as part of project that “aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative”).

119. COHEN, *supra* note 25, at 7.

120. Yet, there are good reasons to be skeptical of the importance placed on this history by most Americans and our country's institutions. The Southern Poverty Law Center reported last year that most high-school students in the U.S. do not know that slavery led to the Civil War, that the original Constitution preserved slavery yet makes no explicit mention of it, and that the 13th Amendment was enacted to abolish slavery. See KATE SHUSTER, S. POVERTY LAW CTR., *TEACHING HARD HISTORY* (2018), <https://www.splcenter.org/20180131/teaching-hard-history> [<https://perma.cc/D43L-VF7Z>].

121. U.S. CONST. amend. XIII.

122. See, e.g., Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 62 (2000).

123. Adam Serwer, *The Fight over the 1619 Project Is Not About the Facts*, ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/> (“A dispute between a small group of scholars and the authors of *The New York Times Magazine's* issue on slavery represents a fundamental disagreement over the trajectory of American society.”). Serwer observed that the critical reaction to the *1619 Project* was more than a dispute about the interpretation of specific historical facts—dissenters took the greatest offense to the series' pessimistic accounts of America's progress toward racial justice. *Id.*

124. STEIKER & STEIKER, *supra* note 4, at 78–79.

including members of the Court, still contest the meaning and legacy of that history.<sup>125</sup>

Like individual and societal responses to so many other instances of collective violence across the globe, denialism captures features of America's insufficient reckoning with its history of slavery and racial subjugation.<sup>126</sup> It helps describe society's and legal actors' unwillingness to engage with the racialized history of capital punishment and the history of genocide that is part of America's undeniable heritage of state killing.<sup>127</sup> This includes many Americans' unwillingness to acknowledge how their own lives have been shaped from this history and how power and privilege persist from it.<sup>128</sup>

Second, denialism invites closer examination at a more granular level of how America's unique path of constitutional regulation of the death penalty<sup>129</sup> has been marked by self-conscious conflict, minimization of hard truths, and a resistance to empirical evidence of racial bias and other problems. Indeed, the Court has shown itself to be enormously conflicted about its role in overseeing the constitutionality of state killing. That is evident from the Court's unusual reversal of course between *Furman v. Georgia*<sup>130</sup> in 1972 and *Gregg v. Georgia*<sup>131</sup> in 1976, when it professed faith in the power of state's discretionary sentencing schemes that responded to *Furman*. It was evident again when the Court appeared to reverse course and expressed profound skepticism about empirical research regarding how the death penalty actually functions in *Lockhart v. McCree*,<sup>132</sup> even though

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125. Justice Robert's reasoning in a 2007 case involving a school district's efforts to address racial segregation in residential housing that impacted diversity in schools noted that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

126. Coates, *supra* note 118.

127. Phillips & Marceau note that "[t]he problem of racial disparity and discrimination in the administration of the death penalty is so persistent as to be regarded as inextricable by many leading scholars." Phillips & Marceau, *supra* note 2 (manuscript at 4 n.20) (citing Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 906 (2018) (describing issues of race as "at the heart" of the U.S. death penalty and its origins)); Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts "Legal Lynchings,"* in CRIMINAL PROCEDURE STORIES 1 (Carol S. Steiker ed., 2006); STEIKER & STEIKER, *supra* note 4, at 17.

128. Coates, *supra* note 118 ("America was built on the preferential treatment of white people—395 years of it. . . . [But t]oday, progressives are loath to invoke white supremacy as an explanation for anything."); Ibram X. Kendi, *The Heartbeat of Racism Is Denial*, N.Y. TIMES (Jan. 13, 2018), <https://www.nytimes.com/2018/01/13/opinion/sunday/heartbeat-of-racism-denial.html> [<https://perma.cu/J9GK-TWN5>] ("Where there is suffering from racist policies, there are denials that those policies are racist. The beat of denial sounds the same across time and space.").

129. STEIKER & STEIKER, *supra* note 4, at 39–40, 72.

130. 408 U.S. 238 (1972).

131. 428 U.S. 153 (1976).

132. 476 U.S. 162 (1986). In *Lockhart*, the Court was presented with research showing that disqualifying jurors who oppose the death penalty, known as death-qualification, leads to a jury that is biased toward the prosecution. Rejecting that claim, Justice Burger reportedly bristled at the notion of being "'bossed around' by social scientists." John Charles Boger, *McCleskey v. Kemp: Field Notes from*

*Furman* and *Gregg* helped construct “intricate rules and procedures” to govern the modern death penalty based upon empirical evidence.<sup>133</sup>

Moreover, the number of justices who have endeavored to regulate the death penalty but then expressed regrets and repudiated their prior positions<sup>134</sup> similarly shows ambivalence. Thus, the project of constitutional regulation of the death penalty remains tainted by recurrent judicial uncertainty about capital punishment’s sustainability and the Court’s role in state killing. This discomfort is mirrored in other aspects of the capital system.<sup>135</sup>

No single explanation—deliberate design, ignorance of the death penalty’s problems, or denialism about judicially regulated state killing<sup>136</sup>—is likely a sufficient account of America’s exceptional relationship with the death penalty. Some or all of these features may describe aspects of the system, and many explanations may be in tension with one another.<sup>137</sup>

Indeed, contemplating America’s capital punishment system as one sustained through denial may appear too forgiving. To say that our legal system is in denial when it reflects a systemic unwillingness to confront racial disparities in death sentences,<sup>138</sup> or permits racial bias in jury selection in the absence of smoking gun evidence of impermissible motives,<sup>139</sup> could

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1977–1991, 112 NW. U. L. REV. 1637, 1672 (2018) (quoting EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 189 (1998)).

133. Phillips & Marceau, *supra* note 2 (manuscript at 30).

134. Berry, *supra* note 80, at 449.

135. HANEY, *supra* note 24, at 160–61 (describing “morally disengaging features of the capital trial process” and other “mechanisms of disengagement [that] serve to minimize the perceived personal responsibility and consequences of the legal violence in which the jurors are asked to participate”).

136. These various approaches to the death penalty’s problems may resonate with other deeply rooted historical and cultural factors that drive death penalty retention. *See, e.g.*, WHITMAN, *supra* note 7; ZIMRING, *supra* note 7. Criminologists James Whitman and Franklin Zimring have explained America’s exceptional retention of capital punishment as based on “deep, long-standing cultural differences between the United States and Western Europe that equate to very different understandings of the death penalty.” Kaplan, *supra* note 1, at 149. But others have questioned these cultural explanations for American exceptionalism, contending they discount “the issue of racism and inequality in the U.S. legal landscape.” *Id.* at 150. Paul Kaplan, for example, has contended that American “uniqueness has as much to do with its complex history of racialized inequality as with other long-standing sociocultural forces.” *Id.* David Garland has also rejected cultural explanations for American exceptionalism, emphasizing the far greater influence of recent political forces, including the politics of crime control. David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC’Y 347 (2005).

137. Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 101 (2002) (noting that the “the number of possible theories” for American exceptionalism “is large, and the provenance of such theories is broad”).

138. *See* discussion of *McCleskey v. Kemp*, *infra* Part III.

139. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (reversing conviction and death sentence of condemned prisoner Curtis Flowers). The Court concluded that the prosecutor engaged in a race-based peremptory strike of a juror in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), but only after an all-white or nearly all-white jury tried and convicted Flowers in six different trials—all marked by prosecution errors. *Flowers*, 139 S. Ct. 2228.



suggest that these results are the product of unconscious accidents. Of course, there are other much bleaker possibilities.

The public and decision makers may accept the flawed and discriminatory system of capital punishment because the death penalty is primarily deployed against racial minorities and other marginalized members of society.<sup>140</sup> In challenging the constitutionality of the death penalty as a racial justice matter during the 1960s and 1970s, LDF candidly raised that possibility.<sup>141</sup>

LDF's view stood in contrast to the more optimistic Marshall hypothesis,<sup>142</sup> which posited that support for capital punishment depended upon the public's ignorance of its unjust flaws, rather than antipathy or apathy toward the marginalized groups most often subjected to it.<sup>143</sup> Given that Justice Marshall certainly shared LDF's understanding of the death penalty's racialized history and legacy, it might be tempting to view his theory as a normative vision of what *should* occur with greater public exposure of the death penalty's flaws.<sup>144</sup> But Justice Marshall appeared to have more than an aspirational vision in mind. Instead, he predicted that the public would actually turn against the death penalty if they knew more about it.<sup>145</sup>

That view echoes what researchers have described as the "knowledge deficit" hypothesis—the notion that with greater knowledge people will

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140. See, e.g., Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 264 (2007) (criticizing the Court in *McCleskey* for focusing on whether racial discrimination in the death penalty was an "aberrational abuse of discretion or [an] unexplained discrepancy" when evidence of racial disparities showed the system was "working precisely the way it was designed").

141. See, e.g., STEIKER & STEIKER, *supra* note 4, at 90. The organization claimed that the American public and their elected representatives tolerated the death penalty, notwithstanding its flaws, because the public and legislatures were aware "of its exclusive application against the outcasts of society, including racial minorities." *Id.* at 91.

142. See *supra* notes 17–19.

143. *Furman v. Georgia*, 408 U.S. 238, 360 (1972) (Marshall, J., concurring). Justice Marshall's prediction about the public's reaction to more facts about the death penalty reflected an arguably generous view of what the public in 1972 already thought. In spite of public support for the death penalty reflected in public opinion polls and criminal statutes, he concluded that the death penalty was "morally unacceptable to the people of the United States." See Steiker, *supra* note 18, at 527 (quoting *Furman*, 408 U.S. at 360 (Marshall, J., concurring)).

144. Much attention has been directed to "testing" the Marshall hypothesis. See Steiker, *supra* note 18; Sarat & Vidmar, *supra* note 18. Acknowledging that research, Carol Steiker has noted that "Marshall's conviction that death penalty attitudes would be responsive to certain kinds of information has turned out to find support in all kinds of places—from the laboratory, to the wider world, to the Supreme Court itself." Steiker, *supra* note 18, at 553.

145. *Gregg v. Georgia*, 428 U.S. 153, 232–33 (1976) (Marshall, J., dissenting). Justice Marshall recognized, however, that the view of an informed citizenry is not the only one that matters and would have "no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive." *Id.* at 233. "An excessive penalty is invalid under the Cruel and Unusual Punishments Clause," he noted "even though popular sentiment may favor it." *Id.* (quoting *Furman*, 408 U.S. at 331 (Marshall, J., concurring)).

care more about social and policy issues, particularly those informed by scientific research, and feel “higher degrees of personal efficacy and responsibility” with respect to policy problems.<sup>146</sup> Not surprisingly, the knowledge deficit theory has fueled strategies in response to many public policy dilemmas, including climate change.<sup>147</sup>

But as some researchers have found, a lack of information often does not reliably account for the public’s views on policy issues, even those susceptible to evidence-based research. Public opinion also does not often move in response to increased information and knowledge. Research has shown that, particularly in the context of policy debates informed by scientific data, the public is either impervious to greater knowledge and factual understanding or unswayed by greater knowledge.<sup>148</sup>

Cultural cognition theory provides one explanation for this resistance. It posits that a set of psychological mechanisms render individuals likely to selectively “credit or dismiss evidence” in accordance with their values.<sup>149</sup> In other words, people’s beliefs are influenced more by their pre-existing values, which tend to be shaped by their experiences and cultural perspectives, rather than access to information.<sup>150</sup> Thus, cultural cognition scholars attribute “political conflict over empirical policy questions” largely to parties’ different cultural perspectives.<sup>151</sup>

Legal scholars have invoked cultural cognition theories in explaining how some of the “most fiercely contested policy disputes” including the death penalty and gun control resist resolution through empirical study.<sup>152</sup>

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146. Paul M. Kellstedt, Sammy Zahran & Arnold Vedlitz, *Personal Efficacy, the Information Environment, and Attitudes Toward Global Warming and Climate Change in the United States*, 28 RISK ANALYSIS 113, 116 (2008). For example, applying the theory to climate change, social scientists explained the long-existing absence of “public outcry about global warming,”—which may be changing over time—as a knowledge-deficit problem. *Id.* at 114. Under this theory, a longstanding lack of public outcry was “not because the public does not *care enough* about global warming;” it was because the public did not “*know enough* about it.” *Id.* at 114, 116 (describing this conventional wisdom as “straightforward applications of the knowledge-deficit model to the issue of global warming”).

147. For example, in the climate change context, the belief that greater public knowledge would lead to greater action and changes in behavior resulted in campaigns aimed at increasing public awareness and efforts to translate science into popular understanding. *Id.*

148. *Id.* at 122. One group of researchers noted that “contrary to the assumptions underlying the knowledge-deficit model . . . the effects of information on both concern for global warming and responsibility for it are exactly the opposite of what were expected.” *Id.* Their study showed that greater information about global warming caused people to feel both less responsible for it and less concerned about it. *Id.*

149. Kahan, Jenkins-Smith & Braman, *supra* note 32, at 148.

150. Kahan, *supra* note 32, at 23 (noting that people tend “to conform their perceptions of risk and other [beliefs] to their cultural worldviews”).

151. David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1476 (2014).

152. *Id.*

This is so even when questions like public safety or deterrence are capable of objective measurement.<sup>153</sup>

Cultural cognition theory may have particular salience in understanding support for the death penalty including by the Court. Contrary to assumptions made by the Marshall hypothesis, research shows that factors other than knowledge about the death penalty—such as race, political affiliation, values, and personality characteristics—are influential in shaping the public’s views about the death penalty.<sup>154</sup>

Others believe, however, that greater factual knowledge has, and will continue to, impact the public’s and judiciary’s views about the death penalty. Bryan Stevenson, for example, has contended that “media accounts of exonerations” and “reports about the unreliability” of capital punishment have started to shift both the “public’s and decision makers’ views about the death penalty.”<sup>155</sup> Carol Steiker has noted that Justice Marshall’s theory seems to have had the greatest resonance with respect to the impact of increased knowledge on members of the Court.<sup>156</sup> It is now a familiar pattern that individual jurists, after laboring for years to constitutionally regulate the death penalty, later give up on the idea of a constitutional death penalty and repudiate their prior positions, even in retirement.<sup>157</sup>

Momentum toward abolition at the state level may similarly suggest that greater exposure of how the death penalty really works in practice and its persistent flaws is leading to its decline. Since 1976 when *Gregg* was decided, states have continued to abolish the death penalty.<sup>158</sup> This has

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153. *Id.*

154. See Steiker, *supra* note 18, at 533–34 (discussing burgeoning sociological literature on “cultural cognition” and noting studies showing “that factors beyond mere information—such as emotional or cultural commitments—are at work in the maintenance of support for capital punishment”). Steiker notes:

Death penalty opinion researchers outside of the context of testing the Marshall hypothesis have found strong correlations between death penalty attitudes and attributes such as race and political affiliation, and personality characteristics such as emotionality, authoritarianism, and personal attributional style. The most recent attempt to study the Marshall hypothesis in an experimental setting finds evidence, consistent with these correlations, that death penalty attitudes are often “value-expressive” in the sense that they should be viewed as “an expression of underlying values rather than a more rational or instrumental assessment of policy.”

*Id.* at 534 (footnotes omitted) (quoting Scott Vollum, Stacy Mallicoat & Jacqueline Buffington-Vollum, *Death Penalty Attitudes in an Increasingly Critical Climate: Value-Expressive Support and Attitude Mutability*, 5 S.W. J. CRIM. JUST. 221, 224 (2009)).

155. Stevenson, *supra* note 6, at 78.

156. Steiker, *supra* note 18, at 545–46 (“It is a delicious irony—and one that I suspect Justice Marshall himself would have savored—that the Marshall hypothesis has fared the best not in the laboratory, and not in the wider world, but rather on the Supreme Court itself.”).

157. See Berry, *supra* note 80, at 442 (describing how Justices Powell, Blackmun, and Stevens reversed course in their belief in the constitutionality of the death penalty, noting that “one by one, most recently in 2008, each concluded that capital punishment should be abolished after twenty years of deciding capital cases on the United States Supreme Court”).

158. *State by State: States with and Without the Death Penalty—2020*, DEATH PENALTY INFO.

occurred legislatively and through the courts. Most recently, in 2018, the state's highest court in Washington struck down the death penalty as unconstitutional—the fourth time in the history of the state's use of capital punishment.<sup>159</sup> In 2020, Colorado abolished the death penalty through legislation.<sup>160</sup> Accordingly, twenty-two states and the District of Columbia now reject the death penalty, while twenty-eight retain it.<sup>161</sup> In addition, governors of three states—Oregon, Pennsylvania, and California—have issued death penalty moratoriums pending study or revision of the states' systems.<sup>162</sup> Additionally, public campaigns to limit states' access to execution drugs and decisions by drug manufacturers to prevent their products' use in executions have thrown sand in the wheels of capital punishment.<sup>163</sup>

These developments suggest that public acceptance of the death penalty is waning—a conclusion reinforced by public opinion polling.<sup>164</sup> In 2017, a nationwide survey by Gallup suggested that Americans' support for capital punishment is the lowest in forty-five years.<sup>165</sup> Indeed, only 55 percent of Americans voice support for the death penalty in the case of murder, down from 60 percent only a year earlier.<sup>166</sup>

This arguable abolition momentum, however, should not be overstated. Over half of the states still retain capital punishment, even though fewer actively carry out death sentences.<sup>167</sup> Among the states that retain the death penalty, a subset account for the majority of executions and appear firmly committed to death penalty retention.<sup>168</sup> Moreover, a majority of the

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CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/XM2U-5ZP5] [hereinafter *State by State*].

159. *State v. Gregory*, 427 P.3d 621 (Wash. 2018). The court emphasized that it was not finding the death penalty unconstitutional “per se” but that it was “invalid because it is imposed in an arbitrary and racially biased manner.” *Id.* at 626–27.

160. Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html> [https://perma.cc/67YD-HASW].

161. *State by State*, *supra* note 158.

162. *Id.*

163. See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1344 (2014) (noting that “the dominance of lethal injection . . . imperiled all capital punishment when lethal injection faced legal challenges”).

164. Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255, 1256 (2019) (“Death sentencing has fallen to a modern low and executions are increasingly rare.”).

165. Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP NEWS SERV. (Oct. 26, 2017), <https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx> [https://perma.cc/95LR-ASM2]; Jeffrey M. Jones & Lydia Saad, *Gallup Poll Social Series: Crime*, GALLUP NEWS SERV. (Oct. 26, 2017), <https://files.deathpenaltyinfo.org/legacy/files/pdf/GallupDeathPenaltyTopline171026.pdf> [https://perma.cc/ZSE6-LYCU].

166. Jones & Saad, *supra* note 165.

167. Desai & Garrett, *supra* note 164, at 1258.

168. See Desai & Garrett, *supra* note 164, at 1262 (“The American death penalty has always been dominated by the practices of the most active death sentencing jurisdictions[;] . . . three states, California, Florida, and Texas, play an outsized role (and constitute a growing share) of death sentencing.”).

Supreme Court appears unwilling to question the legality of the death penalty under the Eighth Amendment, notwithstanding flaws in the system exposed through four decades of closer judicial scrutiny.<sup>169</sup>

The reasons for the recent turn against the death penalty at the state level are not self-evident, but may suggest at least some evidence of a willingness within American society to acknowledge the death penalty's worst features.<sup>170</sup> This iterative progress toward death penalty abolition in some parts of the country does not fully explain the mechanisms that continue to drive death-penalty states' retention of capital punishment or the commitment to judicial regulation of it as an accepted constitutional punishment.<sup>171</sup>

Moreover, the exorbitant financial cost of the death penalty has carried significant weight in the debates that have led states to reject capital punishment.<sup>172</sup> On the one hand, this suggests that the public and legal decision makers have concluded that the death penalty is not worth it. Still, economically driven rejections of the death penalty do not necessarily tell us anything about the impact of empirically driven arguments regarding the death penalty's utility or unjust administration. Thus, one cannot easily presume that abolition momentum, assuming one exists, vindicates the Marshall hypothesis and reflects public recognition of the death penalty's irreconcilable flaws.

Overall, greater information about the death penalty's problems has not yet resulted in sweeping rejection of it by the public, and certainly not by

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California may be an exception to this group following Governor Gavin Newsom's announcement in March 2019 that he was imposing a moratorium on executions in the state, which at the time had 737 persons on death row, the largest in the nation. See Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/california-death-penalty.html> [<https://perma.cc/B8E6-C385>].

169. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123, 1134 (2019) (emphasizing judicial deference to political process on death penalty retention).

170. See *supra* note 165 and accompanying text.

171. See Desai & Garrett, *supra* note 164, at 1256 (noting that empirical research has not yet fully analyzed the reasons for the death penalty's decline).

172. Studies across the country have found that states would each save millions of dollars through death penalty abolition because of the exorbitant costs associated with prosecuting such cases. RICHARD WILLIAMS, NAT'L CONFERENCE OF STATE LEGISLATURES, THE COST OF PUNISHMENT (2011), <https://www.ncsl.org/research/civil-and-criminal-justice/the-cost-of-punishment.aspx> [<https://perma.cc/A947-VM9C>] (noting that "recent legislative action abolishing the death penalty has been spurred by practical concerns" including, for example, New Jersey, which "abolished its death penalty in 2007 in large part because the state had spent \$254 million over 21 years administering it without executing a single person"); see also Kelly Phillips Erb, *Death and Taxes: The Real Cost of the Death Penalty*, FORBES (Sept. 22, 2011, 11:01 PM), <https://www.forbes.com/sites/kellyphillipserb/2011/09/22/death-and-taxes-the-real-cost-of-the-death-penalty/#59bd6bef673e> [<https://perma.cc/P9GU-4T2C>] (noting that arguments based upon race, justice, and ineffectiveness for years have "failed to sway a majority of Americans" against the death penalty "[b]ut now, something else may be turning the tide of public opinion—and it has little to do with ethical, moral or legal arguments. It's all about cold, hard cash").

the Court.<sup>173</sup> Even if Justice Marshall's theory was partially prescient,<sup>174</sup> it did not contemplate that with exposure of the death penalty's worst features, members of the public and legal decision makers, including on the Court, would discount such data or simply deny its relevance to the legality of capital punishment.<sup>175</sup>

The instinct that greater empirical data about the death penalty's unjust flaws will eventually lead to its demise also does not account for the potential "legitimizing" effect of the Supreme Court's constitutional regulation of capital punishment.<sup>176</sup> As the Steikers have noted, the long-term project of judicial regulation of the death penalty arguably helps to normalize capital punishment, encasing it with a thicker shell of legitimacy that helps to insulate its defects from broader condemnation and repudiation perhaps even by the Court.<sup>177</sup>

In the end, the reason for death penalty retention as a constitutional form of punishment is contested<sup>178</sup> and explanations for its partial decline are still understudied.<sup>179</sup> Denialism provides an additional lens through which to

173. The Court has restricted the death penalty for certain categories of defendants for whom capital punishment's asserted penological purposes are not served. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring execution for the crime of rape of a child when death did not, and was not intended to, result); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the execution of children); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the execution of the intellectually disabled). But on the current Supreme Court, only Justice Breyer along with Justice Ginsburg, who joined his dissent in *Glossip*, has gone on the record suggesting the likely unconstitutionality of capital punishment in and of itself. *See Glossip v. Gross*, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting).

174. *See Steiker*, *supra* note 18.

175. *See* discussion of *McCleskey*, *infra* Part III.A.

176. *See generally* STEIKER & STEIKER, *supra* note 4; Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 782 (2012) (reviewing GARLAND, *supra* note 7) (calling for greater analysis of "the legitimizing role of the Supreme Court's constitutional imprimatur on capital punishment"); *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 8–9 (1999) (noting that "the Supreme Court validates the results of the criminal justice system as fair" given the theoretical provision of rights to defendants, but that such "formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–38 (1995) (discussing the legitimating function of the Supreme Court's death penalty jurisprudence).

177. Steiker, *supra* note 176, at 777 (noting that "the nature and timing of the Supreme Court's intervention" crucially shaped the direction of the American death penalty, which moved attention away from "the path of human rights discourse embraced in Europe"); William W. Berry III, *American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POL'Y 481 (2008) (examining how the capital justice system's hyper-emphasis on procedure impacts death penalty retention in the United States); Jonathan Yehuda, Note, *Tinkering with the Machinery of Death: Lethal Injection, Procedure, and the Retention of Capital Punishment in the United States*, 88 N.Y.U. L. REV. 2319 (2013) (describing how the process of lethal injection similarly legitimatizes capital punishment).

178. *See supra* note 7.

179. *See* Desai & Garrett, *supra* note 164, at 1257 ("[E]mpirical research has just begun to examine the question.").

consider death penalty retention, surfacing the unacknowledged mechanisms and ways of thinking that help to sustain capital punishment.

### C. *Implications for Criminal Justice*

Surfacing denialism in the administration of capital punishment naturally exposes similar threads in the broader criminal justice system. Before explaining what denialism can teach us about the retention of the death penalty as a constitutional form of punishment, this section first addresses why the implications of this Article's analysis for the broader criminal justice system do not detract from the importance of that inquiry in regard to the death penalty.

The disproportionate impact of race is present in every sphere of the criminal justice system<sup>180</sup>—from the juvenile justice system,<sup>181</sup> to municipal courts<sup>182</sup> and state and federal systems.<sup>183</sup> Race plays a role in policing, charging, and sentencing decisions, powerfully determines who is arrested and prosecuted, and impacts how severely the convicted are penalized, even upon release from incarceration.<sup>184</sup>

In response, one might reasonably charge that any denialism that exists with regard to the legal system's acceptance of capital punishment cannot be confined to that specific problem. In spite of the known problem of racial injustice in the enforcement of criminal laws, vast segments of the public and legal decision makers still overwhelmingly put their faith in the criminal justice system and proceed as if those problems do not exist, are inevitable,

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180. See COLE, *supra* note 176; KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MICROAGGRESSIONS* (1998).

181. See, e.g., Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 405 (1996) (finding “clear disadvantages for nonwhites at multiple stages in delinquency case processing” that, while varying in effect “from stage to stage,” show “a consistent pattern of unequal treatment”).

182. See, e.g., Stephen B. Bright, *Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts*, 14 OHIO ST. J. CRIM. L. 263, 270 (2016). Addressing the role of race in Ferguson, Missouri's municipal courts, Bright explained: “Despite making up 67% of the city's population, blacks accounted for 85% of traffic stops, 90% of citations, and 93% of arrests from 2012 to 2014.” *Id.* He noted a 2011 study showing that “black defendants [were] more likely to have their cases persist for longer durations, more likely to face a higher number of mandatory court appearances and other requirements, and more likely to have a warrant issued against them for failing to meet those requirements.” *Id.* (alteration in original) (quoting U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 68 (2015)).

183. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* (2014); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

184. See *supra* note 183; see also Roberts, *supra* note 140, at 262–63 (contending that “racism is engrained in the very construction of the system and implicated in its every aspect—how crimes are defined, how suspects are identified, how charging decisions are made, how trials are conducted, and how punishments are imposed”).

or simply do not matter.<sup>185</sup> As David Cole has noted, the rhetoric and legal traditions of the legal system emphasize a formal fairness that permits society to ignore these systemic problems.<sup>186</sup>

Even with growing bipartisan attention to the issue of criminal justice reform, too many legal decision makers and members of the broader public still turn a blind eye to the criminal justice system's most dysfunctional and damaging features. One could thus persuasively make the case that collective denial about the presence of equal justice in the criminal justice system allows the uniquely American phenomenon of mass incarceration to continue without drastic and immediate solutions.<sup>187</sup> One could surely also focus on a number of other specific features of the criminal justice system—whether juvenile incarceration or solitary confinement—and find evidence of societal delusions about the efficacy, purpose, and human costs of each practice.<sup>188</sup>

The prospect of broader denialism throughout the criminal justice system in no way undercuts, however, the value of examining why the death penalty as a specific practice and institution may be resistant to abolition notwithstanding evidence documenting its serious flaws. As the most extreme punishment and form of state power over the individual, capital punishment plays a distinct role in illuminating the values and priorities of our criminal justice system.<sup>189</sup> Moreover, as Anthony Amsterdam put it, the death penalty “extends the boundaries of permissible inhumanity so far that every lesser offense against humanity seems inoffensive by comparison, leading us to tolerate them relatively easily.”<sup>190</sup>

Special and initial attention is thus warranted to understand retention of the death penalty and how legal decision makers distance themselves from

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185. See COLE, *supra* note 176, at 8–9.

186. *Id.*

187. See ALEXANDER, *supra* note 183, at 139 (“The Supreme Court has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing.”).

188. See generally Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 972 (2018) (“Solitary confinement is a practice . . . that uniquely harms people in prisons and jails while producing little if any correlative benefit.”).

189. Others, including Bryan Stevenson, have acknowledged that the problems with the death penalty are reflective of broader system-wide failures in the justice system. See Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 511 (1994) (“The death penalty is the criminal justice system’s most serious and most notorious punishment. How capital punishment is imposed reveals a great deal about the entire criminal justice system.” (footnote omitted)). Justice Marshall similarly believed that the death penalty had “deleterious effects” throughout the criminal justice system, charging that its “existence ‘inevitably sabotages a social or institutional program of reformation.’” *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring) (quoting B. ESHELMAN & F. RILEY, *DEATH ROW CHAPLAIN* 222 (1962)).

190. Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007).



its realities through a deliberate unwillingness to acknowledge and respond to its severe flaws and human costs. The possibility that reckoning with denialism about the death penalty might in turn expose a broader willful blindness in the justice system only confirms, rather than undermines, the need for the discussion.<sup>191</sup>

In this regard, *McCleskey v. Kemp*,<sup>192</sup> the Court's 1987 decision rejecting an equal protection and Eighth Amendment challenge to statistically documented racial disparities in Georgia's capital punishment scheme, is instructive. There, the fear that recognizing problems with the death penalty would reveal system-wide problems in the criminal justice system<sup>193</sup> was the sort of denialist-thinking—or “fear of too much justice,” as Justice Brennan famously put it—that led the Court to shut its eyes to racial injustice.<sup>194</sup>

### III. THE SUPREME COURT AND THE DEATH PENALTY'S OPEN SECRETS

After decades of constitutional regulation, including the Court's temporary abolishment of capital punishment in *Furman*, the unjust defects of America's death penalty are no longer secrets.<sup>195</sup> Rather, the problems are transparent. This section utilizes the concept of denialism to examine the role of denialism with respect to the Court's embrace of contested narratives about the death penalty,<sup>196</sup> its sanctioning of pain-distorting

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191. As Bryan Stevenson has argued, the American death penalty undermines the legitimacy of the broader criminal justice system. See Stevenson, *supra* note 6, at 78. He argues that it has “increasingly come to symbolize a disturbing tolerance for error and injustice that has undermined the integrity of criminal justice administration and America's commitment to human rights.” *Id.*

192. 481 U.S. 279 (1987).

193. See *McCleskey*, 481 U.S. at 314–15. In rejecting *McCleskey*'s Fourteenth and Eighth Amendment challenges to Georgia's capital sentencing scheme based upon racial bias, the Court candidly admitted that it was fearful that if *McCleskey*'s claim that “racial bias has impermissibly tainted the capital sentencing decision” were accepted, “similar claims as to other types of penalty” would follow. *Id.* at 315.

194. Indeed, in rejecting what it acknowledged was statistically valid evidence of racial disparities in the administration of Georgia's death penalty, the Court found such imbalance “an inevitable part of our criminal justice system.” *McCleskey*, 481 U.S. at 312. Justice Brennan in dissent aptly labeled this reasoning “a fear of too much justice.” *Id.* at 339 (Brennan, J., dissenting).

195. Nevertheless, many still refer to the problems of the capital punishment system as “secrets” rather than acknowledged and accepted features of an unjust system. See Ed Pilkington, *Landmark US Case to Expose Rampant Racial Bias Behind the Death Penalty*, GUARDIAN (Aug. 25, 2019, 2:00 PM), <https://www.theguardian.com/world/2019/aug/24/landmark-us-case-to-expose-rampant-racial-bias-behind-the-death-penalty> [<https://perma.cc/W5J8-92MQ>] (noting that a trial in North Carolina under the state's Racial Justice Act would “la[y] bare” “[t]he dark secret of America's death penalty—the blatant and intentional racial bias that infects the system, distorting juries and throwing inordinate numbers of African Americans on to death row”).

196. One example is the notion that the death penalty is reserved for the “worst of the worst.” See discussion *infra* Part III.B; *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (recounting how the Court “sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called ‘the worst of the worst’” (quoting *Kansas v. Marsh*,

execution methods,<sup>197</sup> and its decision to allow the documented influence of race on the death penalty's administration to go unanswered.<sup>198</sup> These are just three areas where denialism in judicial regulation of the death penalty surfaces, though there are certainly many others.<sup>199</sup>

### A. *Shielding Racial Bias*

The Supreme Court has declined to meaningfully examine the systemic role of race in our capital punishment system<sup>200</sup> other than in egregious cases where racial animus is apparent on the surface.<sup>201</sup> A vast literature has criticized the Court's refusal to act in the face of evidence showing overwhelmingly the "death penalty's racialized history and current practice."<sup>202</sup>

On this point, Bryan Stevenson's voice is the most powerful. He argues that America's current system of capital punishment was shaped by the nation's history of slavery and lynchings and that America is unwilling to confront this history and explore its legacy today.<sup>203</sup> Stevenson lodges his critique at America broadly, but his call to action has specific relevance for the Court, given its 1987 decision in *McCleskey v. Kemp*.<sup>204</sup> In *McCleskey*, the Court rejected an equal protection and Eighth Amendment challenge to racial disparities in Georgia's administration of the death penalty<sup>205</sup> in a decision that provides a blueprint of denialism about the death penalty.

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548 U.S. 163, 206 (2006) (Souter, J., dissenting)); *see also* *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))).

197. *See* SARAT, *supra* note 104, at 67 ("Whereas once the technologies of killing deployed by the state were valued precisely because of their gruesome effects on the body of the condemned, today we seek a technology that leaves no trace."); Von Drehle, *supra* note 1 (quoting Morrison, *supra* note 9 (L.A. Times interview with Judge Kozinski)).

198. *See supra* Part I.C.

199. *See* HANEY, *supra* note 24, at 213 (discussing avoidance of reality and empirical evidence in Court's regulation of death sentencing by juries).

200. *See* STEIKER & STEIKER, *supra* note 4, at 274 ("[T]he Court has a long history of avoiding or deflecting the race issue in capital cases, and a sudden change of course does not seem likely.").

201. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (concluding that a condemned prisoner's trial counsel rendered ineffective assistance of counsel by introducing expert testimony positing that the defendant's race indicated that he was likely to act violently in the future).

202. STEIKER & STEIKER, *supra* note 4, at 110–11 (describing the Court's avoidance of race in death penalty jurisprudence); *see also* GARLAND, *supra* note 7, at 12 (addressing undeniable connections between the American death penalty and racial violence, in particular lynching); ZIMRING, *supra* note 7, at 66 (addressing the link between capital punishment and lynching); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243 (2015).

203. *See* Stevenson, *supra* note 6; *We Need to Talk About an Injustice*, *supra* note 102.

204. 481 U.S. 279 (1987).

205. Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).

The challenge in *McCleskey* relied upon a validated study by David Baldus showing that in Georgia a defendant was more likely to receive a death sentence if the victim was white or when the defendant was black.<sup>206</sup> Although the Court accepted the statistical validity of Baldus's multiple regression analysis, it rejected the data as insufficient proof of discriminatory purpose in *McCleskey*'s case. The Court reasoned that such data should play no role in assessing the presence of discriminatory purpose in death penalty cases because it simply showed a correlation with race and not a discriminatory purpose.<sup>207</sup> The Court has never since examined "the risk of racial bias in capital sentencing or the criminal justice system more generally."<sup>208</sup>

On one level, the Court's refusal to find evidence of racial bias in the death penalty's administration simply reflected the Court's broader approach to examining racial discrimination.<sup>209</sup> Indeed, *McCleskey* is often understood simply as an application of the Court's approach to ascertaining discriminatory purpose set forth a decade earlier in *Washington v. Davis*.<sup>210</sup> *Davis*'s requirement that litigants show evidence of intentional discrimination to establish an equal protection violation has been widely criticized in its own right,<sup>211</sup> and many have viewed *McCleskey* as simply a demonstration of this same problem.<sup>212</sup>

However, as Reva Siegel has argued, *McCleskey* exhibited a skepticism of the type of evidence—statistical proof—presented by *McCleskey*'s lawyers that stood apart from other applications of *Davis* in the years between the two decisions.<sup>213</sup> Indeed, Justice Powell found *McCleskey*'s

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206. *McCleskey*, 481 U.S. at 312.

207. *Id.* at 291 n.7.

208. See Siegel, *supra* note 205, at 1276.

209. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781 (2012) (critiquing the Court's requirement of intent when it "evaluates claims of discrimination against non-Whites"); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 38 (2013) ("Judicial interpretation responsive to the aggrievement of white citizens threatened to divide equal protection law into two bodies of doctrine: one body of law governing minority complaints that was deferential to democratic actors, and another body of law responsive to majority complaints that closely scrutinized democratic decisionmaking.").

210. 426 U.S. 229, 242 (1976); Siegel, *supra* note 205, at 1277. Siegel notes that "[t]he standard story points to the Court's decision in *Washington v. Davis* barring disparate impact claims in constitutional cases as shielding the operations of the criminal justice system from equal protection challenge." *Id.* But as Siegel notes, while much "work is performed by subsequent cases that restrict how discriminatory purpose can be proved," *id.*, the Court's approach in *McCleskey* was not entirely faithful to the approach it purported to apply, since the statistical evidence presented by *McCleskey*'s lawyers certainly gave rise to an inference of intentional discrimination in light of the Court's intervening decisions and the standards set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

211. See Haney-López, *supra* note 209, at 1806–08, 1812–14; Siegel, *supra* note 209, at 47.

212. Siegel, *supra* note 205, at 1277–78 (noting this standard account of *Washington v. Davis*'s impact).

213. *Id.*

reliance “solely on statistical evidence to prove discriminatory purpose in his case” troubling and “expressed wide-ranging skepticism about the use of statistical evidence to prove discriminatory purpose in any equal protection challenge in a criminal case.”<sup>214</sup>

This hostility to empirical evidence of race-motivated decision making is striking given the Court’s willingness to consider empirically-backed evidence of discriminatory purpose in Title VII cases and with respect to group representation in grand jury selection.<sup>215</sup> The Court attempted to justify this different approach by emphasizing the discretion that necessarily surrounds decision making in the criminal justice system.<sup>216</sup> The Court deemed it problematic that McCleskey challenged “discretionary judgements” “at the heart of the State’s criminal justice system.”<sup>217</sup> Noting that “discretion is essential to the criminal justice process,” the Court refused to make any inferences about motive based upon statistics, demanding “exceptionally clear proof” of bias or abuse of discretion.<sup>218</sup>

Likewise, the Court refused to attribute discriminatory motives to the State for its decision to adopt and keep the capital punishment statute on the books irrespective of its discriminatory application.<sup>219</sup> To show purposeful discrimination, the Court said McCleskey would have to “prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”<sup>220</sup> Given the Legislature’s legitimate reasons for enacting criminal laws and penalties, its wide discretion in doing so, and the absence of evidence, in the Court’s view, of

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214. *Id.* at 1275 & n.41 (“Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decision makers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.” (quoting *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987))).

215. The Court acknowledged that it had accepted multiple regression statistical analysis in evaluating Title VII and grand jury venire cases but unpersuasively endeavored to distinguish those contexts. *McCleskey*, 481 U.S. at 294–95. Specifically, the Court posited that the use of statistics in those other contexts “relate to fewer entities, and fewer variables are relevant to the challenged decisions.” *Id.* at 295 (footnotes omitted). The Court also expressed concern that unlike in those contexts, where “the decision maker has an opportunity to explain the statistical disparity,” in the case of racial disparities in capital sentencing, the State would have “no practical opportunity to rebut the Baldus study.” *Id.* at 296.

216. *Id.* at 296 (noting prosecutors’ “traditionally ‘wide discretion’” (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). Finding legitimate, neutral grounds for seeking the death penalty in McCleskey’s case—his commission of the crime—the Court refused to require the State to defend its decision to seek the death penalty, noting that such challenges would often occur “years after” such decisions were made. *Id.* at 296–97 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425–26 (1976)).

217. *Id.* at 297.

218. *Id.*

219. *Id.* at 298.

220. *Id.* Indeed, according to the Court, “[d]iscriminatory purpose” requires that a legislature adopt the law “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Id.* (alteration in original) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

another improper legislative purpose, the Court declined to infer that Georgia had a discriminatory purpose in adopting the capital punishment scheme.<sup>221</sup>

The Court also concluded that McCleskey's sentence was not disproportionate under the Eighth Amendment. The Court reasoned that he was sentenced pursuant to Georgia law that properly focused discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant."<sup>222</sup>

But the real clue to the Court's unwillingness to respond to racial disparities in *McCleskey* is evident from the "[t]wo additional concerns" it cited outside of its primary Fourteenth and Eighth Amendment analysis.<sup>223</sup> First, the Court admitted that it was fearful that McCleskey's claims, if accepted, would throw into question whether "racial bias has impermissibly tainted . . . other types of penalt[ies]" throughout the "entire criminal justice system."<sup>224</sup> The Court worried specifically that ruling for McCleskey would lead to claims based upon other protected statuses, "even" including gender.<sup>225</sup> Citing absurd examples of arbitrariness that could conceivably be statistically proven, like disparities based upon facial characteristics of the defendant, the Court claimed that there would be "no limiting principle to the type of challenge" brought under the Eighth Amendment were the Court to rule for McCleskey.<sup>226</sup>

In doing so, the Court suggested that disparities based upon race are equivalent to disparities based upon any irrelevant factor, even those that do not garner a constitutional guarantee of equal treatment.<sup>227</sup> Summing up, it reasoned that the Constitution does not "plac[e] totally unrealistic conditions" on the use of capital punishment—but the Court never justified why insistence on a system free of racial bias should be considered "unrealistic."<sup>228</sup> The Court essentially threw up its hands at the prospect of

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221. *Id.* at 298–99.

222. *Id.* at 308 (quoting *Gregg v. Georgia*, 428 U.S. 153, 206, 207 (1976)) (reasoning that McCleskey's death sentence was not "wantonly and freakishly" imposed and thus not "disproportionate within any recognized meaning under the Eighth Amendment").

223. *Id.* at 314.

224. *Id.* at 314–15.

225. *Id.* at 316–318 (dreading that if the Court focused on whether the punishment were "arbitrary and capricious" under the Eighth Amendment, then it would have to consider whether any "any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking" were also arbitrary and capricious under the Eighth Amendment (footnotes omitted)).

226. *Id.* at 318–19.

227. *Id.* ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.").

228. *Id.* at 319 (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976)).

eradicating racial bias from the legal system, while also emphasizing that it was no different than disparities based upon non-protected characteristics.

The second giveaway that denialist thinking influenced *McCleskey* was its conclusion that such “arguments are best presented to the legislative bodies.”<sup>229</sup> Even while acknowledging that “[i]t is the ultimate duty of courts to determine on a case-by-case basis” whether laws, including capital sentencing laws, “are applied consistently with the Constitution,” and notwithstanding that *McCleskey* did not challenge the constitutionality of the death penalty in the abstract, only whether it was administered in a way that violated the Constitution, the Court minimized its role and its responsibility for correcting racial injustice.<sup>230</sup> Noting that it lacked “responsibility—or indeed even the right . . . to determine the appropriate punishment for particular crimes,”<sup>231</sup> the Court directed the question back to the legislature. But a request to reimagine appropriate punishments for crimes was not part of *McCleskey*’s case. The question—whether the Constitution prohibits death sentences from being determined in part by race— was one uniquely for the courts.

The Court added to this disavowal of judicial responsibility its doubts about courts’ institutional competence “to weigh and ‘evaluate the results of statistical studies,’” positing that legislatures are better able than the courts to flexibly assess such information “in terms of their own local conditions.”<sup>232</sup> Finally, the Court suggested a resigned view of discrimination as inevitable, rejecting *McCleskey*’s claim as an untenable challenge to “the validity of capital punishment in our multiracial society.”<sup>233</sup>

A closer reading of these parts of the *McCleskey* decision contradicts any suggestion that the Court merely rejected contested evidence, or even espoused some broader hostility to empiricism informing constitutional decision making.<sup>234</sup> Instead, the decision is consonant with what Stephen Bright has described as courts’ “state of denial.”<sup>235</sup> That is, “instead of

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229. *Id.* at 319.

230. *Id.*

231. *Id.* (“It is the legislatures, the elected representatives of the people, that are ‘constituted to respond to the will and consequently the moral values of the people.’” (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting))).

232. *Id.* (quoting *Gregg*, 428 U.S. at 186).

233. *Id.*

234. Writing for the Court in *Glossip*, Justice Alito reaffirmed the Court’s statement in *Baze* that the “federal courts should not ‘embroil [themselves] in ongoing scientific controversies beyond their expertise.’” *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015) (alteration in original) (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)).

235. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 469 (1995) (“Despite the racial discrimination which has been a major aspect of the death penalty throughout American history, the Supreme Court and lower federal and state courts have been reluctant to face racial issues

confronting and dealing with the difficult and sensitive issue of race,”<sup>236</sup> *McCleskey* showcases a Court deflecting responsibility for racial injustice to others while at the same time minimizing the existence of racial disparities as both inevitable and equivalent to other disparities based upon non-protected characteristics. The decision thus lays bare many of the hallmarks of denial.

Specifically, the Court used doubts about institutional competence and vague, unnecessary notions of judicial restraint as shields to openly spare the Court from grappling with a profound failing of the legal system.<sup>237</sup> That, in turn, allowed the Court to continue to avoid difficult questions about the justices’ own role in state killing, and its responsibility for, and proximity to, profound racial injustice.<sup>238</sup> This has provided separation between the Court, along with the supposedly neutral, fair legal processes it upholds, and any racial disparity that it characterizes as beyond judicial supervision.<sup>239</sup> The potential discriminatory application of capital laws are euphemistically recast as discretion and the need for judicial restraint exaggerated.<sup>240</sup>

### B. *The Fallacy of “the Worst”*

A second area of death penalty regulation where denialism thrives is with respect to the Court’s embrace of the empirically tenuous claim that the death penalty is reserved for the “worst of the worst.”<sup>241</sup> The Court has described this in terms of the seriousness of the crime and also which offenders are most “deserving of execution.”<sup>242</sup> But in reality, a wide body of evidence, much of it produced in part through judicial regulation of capital punishment, makes plain that capital punishment is plagued by racial

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presented by capital cases.”).

236. *Id.*

237. See *supra* note 73 and accompanying text.

238. HANEY, *supra* note 24, at 160–61 (describing how the system of juror sentencing encourages a similar moral disengagement by jurors that permits them to distance themselves from the reality of their role in state killing).

239. See COVER, *supra* note 75, at 5–6 (describing how the judiciary that enforced fugitive slave laws “paraded its helplessness before the law”).

240. See COHEN, *supra* note 25, at 8 (describing implicatory denial as minimization and disclaiming of responsibility: “[these killings have] nothing to do with me”, “[w]hy should I take a risk of [intervening]?”).

241. See *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (recounting how the Court “sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called ‘the worst of the worst’” (quoting *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting))).

242. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))).

and geographic disparities, and that those who end up on death row do not necessarily reflect the most dangerous, but the most damaged.

Indeed, beyond racial disparities in death sentences, the condemned are also likely to be poor,<sup>243</sup> to be survivors of “nightmarish” childhoods,<sup>244</sup> and a striking number are intellectually disabled.<sup>245</sup> Though these characteristics are not inconsistent with committing horrific crimes, it complicates the Court’s unbending commitment to the “worst of the worst” story, which has come to symbolize the entire constitutional justification for capital punishment post-*Furman* and *Gregg*. An irony of the Court’s constitutional regulation of the death penalty since those decisions is the exposure through judicial decision making of a common counter-factual that challenges the Court’s prevailing “worst of the worst” narrative.<sup>246</sup>

Indeed, the Court’s Eighth Amendment jurisprudence in *Atkins v. Virginia*,<sup>247</sup> which declared the execution of persons with intellectual disabilities a violation of the Eighth Amendment, and *Roper v. Simmons*,<sup>248</sup> which declared the execution of juveniles a violation of the Eighth Amendment, itself undermines the idea that the modern death penalty has only singled out the “worst of the worst.” Moreover, as Justice Breyer noted in his dissent in *Glossip v. Gross*, empirical evidence suggests that whether death sentences are imposed depends less on the “egregiousness” of the crimes, and more on “arbitrary” factors, including the location where the crime was committed.<sup>249</sup> This evidence, which Justice Thomas dismissed as “empirical studies performed by death penalty abolitionists,”<sup>250</sup> illustrates

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243. See Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 16 (“Throughout history, the death penalty has been reserved almost exclusively for those who are poor.”).

244. In *Williams v. Taylor*, 529 U.S. 362, 395 (2000), the Court found trial counsel ineffective for failing to investigate evidence of Williams’s “nightmarish” childhood, which included physical abuse and neglect, dislocation, and his intellectual disability. Yet, these factors in Williams’s life are not unique to his case. Indeed, psychologists and other experts consider them to be forensic risk factors for susceptibility to criminal behavior without therapeutic interventions and social support, and the Supreme Court’s death penalty jurisprudence is full of decisions recounting the similar early lives of other condemned men.

245. *List of Defendants with Intellectual Disability Executed in the United States (1976–2002)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/list-of-defendants-with-mental-retardation-executed-in-the-united-states-1976-2002> [https://perma.cc/DZ2Z-QMX3].

246. See SARAT, *supra* note 104, at 14 (arguing that the death penalty deflects attention away from the root causes and societal responsibility for “heinous acts of violence”).

247. 536 U.S. 304, 321 (2002).

248. 543 U.S. 551, 578 (2005).

249. *Glossip v. Gross*, 135 S. Ct. 2726, 2755, 2760 (2015) (Breyer, J., dissenting) (“Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do.”).

250. *Id.* at 2751 (Thomas, J., concurring).



how the Court has willingly embraced dominant, yet empirically contested, narratives about the death penalty within its judicial decisions.<sup>251</sup>

This commitment to narrative again exhibits elements of denial. The notion that those accused, convicted, and sentenced to die are the “worst of the worst” serves to mask the reality of state killing. To be sure, many persons convicted of capital crimes have committed heinous crimes. But as noted above, the reality of who is sentenced to die and actually executed is far more varied and troublesome. It is only by reliance upon the “worst of the worst” frame that legal decision makers can justify their roles in the system of state killing. And thus, the narrative, even if untrue, hides and distorts the ugliness of incomprehensible harm, reinventing events into a more comfortable and sustainable version of reality.

### C. Judging Cruelty

The United States’ current approach to methods of execution has permitted the public and legal decision makers a level of moral detachment that would be less sustainable if the reality of state killing were more widely apparent.<sup>252</sup> Some of the customary tools of denialism, secrecy and state distortion,<sup>253</sup> facilitate this detachment by helping to render imperceptible the reality of state killing.

Other features of denialism are built into the current execution method-of-choice: lethal injection. Specifically, the second lethal injection drug used in many states’ three-drug protocols is a paralytic, which functions to conceal condemned prisoners’ experience of painful deaths.<sup>254</sup> As the

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251. Indeed, the Court’s opinions continue to adhere to the assumption that the death penalty is administered only to the “worst of the worst” notwithstanding that the answer to that question is empirically knowable. *See supra* note 8.

252. *See* Editorial, *The Humane Death Penalty Charade*, N.Y. TIMES (Jan. 27, 2015), <https://www.nytimes.com/2015/01/27/opinion/the-humane-death-penalty-charade.html> [<https://perma.cc/NGQ3-76CS>].

253. *See* COHEN, *supra* note 25, at 145 (noting that “[e]ven the most repressive and closed regime cannot achieve total secrecy or information control”). Cohen explains that when a “culture[] of denial . . . permeate[s] a whole society” denial occurs through “direct state coercion, subtle encouragement or self-imposed concern with your country’s image.” *Id.* Cohen describes how governments’ control of narrative and visual representations facilitates a culture of denial as occurred with the sanitized presentation of the Gulf War’s “collateral damage” and digital images of “smart bombs.” *Id.* at 280–85.

254. The first drug is supposed to render a person unconscious, while the second drug paralyzes a person, and the third triggers cardiac arrest, causing a burning, excruciating pain, which Justice Sotomayor described in her dissent in *Glossip* as “the chemical equivalent of being burned at the stake.” 135 S. Ct. at 2781 (Sotomayor, J., dissenting); *see also Cruel and Unusual*, MORE PERFECT (June 2, 2016), <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/cruel-and-unusual> [<https://perma.cc/3UHJ-QBDW>] (describing Maya Foa, Director of Reprieve’s death penalty comments about the function and purpose of the second drug in many states’ three-drug lethal injection protocols: concealing pain from witnesses and the world).

former chief judge of the Ninth Circuit recently suggested, lethal injection drugs work as a “mask.”<sup>255</sup>

Indeed, the Defendant in *Baze v. Rees*,<sup>256</sup> a challenge to Kentucky’s use of a three-drug lethal injection protocol, claimed that the state’s use of the second drug in the protocol, pancuronium bromide, “serve[d] no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of the first drug.”<sup>257</sup> But Justice Roberts, writing for a plurality of the Court, suggested some value in obscuring the physical impact of lethal injection. He described the “prevent[ion of] involuntary physical movements” as justified under the Eighth Amendment because it “preserv[es] the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”<sup>258</sup>

This was an odd, arguably unparalleled,<sup>259</sup> invocation of dignity in the Court’s jurisprudence. Justice Roberts emphasized the dignity of the procedure as the relevant focus, as opposed to the dignity of the prisoner (though arguably believing the former provided dignity to the dying prisoner as well).<sup>260</sup> This rationale echoes of denialism: judges who cannot know of a potentially painful death are no longer implicated in failing to stop it. Indeed, as Stanley Cohen has stated, “[w]e didn’t know,” or “[w]e didn’t see anything,” are familiar expressions of individual or collective denial in the aftermath of collective violence.<sup>261</sup>

Additional features of denialism were evident in the Court’s 2015 decision in *Glossip v. Gross*.<sup>262</sup> There, the Court’s approach to lethal injection adopted an unusual rule for assessing the risk of severe pain experienced by condemned prisoners. Specifically, the Court held that a State’s method of execution may be constitutional even if it creates a substantial risk of severe pain, so long as an alternative less painful measure is not readily identified by the condemned prisoner at the time of a challenge.<sup>263</sup> Indeed, the Court read its decision in *Baze* to require the prisoner himself to identify a less-painful method of execution in order to

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255. Von Drehle, *supra* note 1 (quoting Morrison, *supra* note 9).

256. 553 U.S. 35, 57 (2008).

257. *Baze*, 553 U.S. at 57 (plurality opinion).

258. *Id.*

259. *But see* *McCleskey v. Zant*, 499 U.S. 467, 491 (1991), where Justice Kennedy imposed new, strict rules for handling successive habeas petitions. As Jeffrey L. Kirchmeier has noted, the Court emphasized the justice system’s strong interest in the finality of criminal judgments suggesting that “[a]llowing long litigation of capital cases would impugn the dignity of the courts, and the courts should be able to use their limited resources efficiently.” JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 38 (2015) (discussing *McCleskey*, 499 U.S. 467).

260. *Baze*, 553 U.S. at 57.

261. Cohen, *supra* note 36, at 14.

262. 135 S. Ct. 2726 (2015).

263. *Id.* at 2737–38.

succeed in an Eighth Amendment challenge to a specific execution method.<sup>264</sup> The Court explained that “prisoners ‘cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative[;]’ [i]nstead, prisoners must identify an alternative that is ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’”<sup>265</sup>

This analysis ignored that, as a practical matter, foregoing an execution until it can be accomplished without a “substantial risk of severe pain” is necessarily always an option available to the State. In placing the burden on the prisoner challenging the State’s execution method, the Court reasoned that “because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’”<sup>266</sup> While this was not the first time the Court has stated this syllogism, in *Glossip* the Court relied upon it in a new way. It reasoned that because the death penalty is constitutional, the execution method in question had to be constitutional because the challenger did not identify a less painful alternative. As Justice Sotomayor suggested in her dissent, simply because the State possesses authority, does not justify “any and all means” to exercise it.<sup>267</sup>

In this regard, *Glossip* reflects an unusual form of willful blindness about the death penalty. The Court was unwilling to acknowledge state responsibility for the methods and pain caused during executions, transferring responsibility and arguably blame for such harm to condemned prisoners.<sup>268</sup> Scholars have criticized *Glossip*’s addition of “a requirement that offenders find an alternative method of execution before any specific Eighth Amendment challenge to an execution method can succeed [as] a corruption of Eighth Amendment doctrine, lacking a sound basis in constitutional thought.”<sup>269</sup> Denialism again provides a helpful lens to understand this unusual doctrinal requirement.

Specifically, blaming challengers for failing to identify execution methods consistent with the Eighth Amendment distances the decision maker from complicity in acts alleged to amount to torture.<sup>270</sup> It also treats the presumed justness of the death penalty as dispositive in Eighth Amendment challenges to particular executions no matter the harm

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264. *Id.*

265. *Id.* at 2737 (third alteration in original) (quoting *Baze*, 553 U.S. at 51–52).

266. *Id.* at 2732–33 (alteration in original) (quoting *Baze*, 553 U.S. at 47).

267. *Id.* at 2795 (Sotomayor, J., dissenting).

268. Craig Haney has similarly argued that the process for securing capital sentences relies upon a system that distances and disengages people from the true nature of the task. HANEY, *supra* note 24, at 142–44.

269. Goldfarb, *supra* note 73, at 417.

270. See *Glossip*, 135 S. Ct. at 2781 (Sotomayor, J., dissenting).

caused.<sup>271</sup> This also echoes the rhetoric used to disclaim state responsibility for violence in other settings: the justness of the State's cause and motivation means it cannot be blamed for its own violence.

#### *D. Dignity and Death*

Ultimately, the role of the courts in America's system of capital punishment reflects a seminal contradiction. In its Eighth Amendment jurisprudence,<sup>272</sup> including in the capital context,<sup>273</sup> as well as when interpreting individual rights,<sup>274</sup> the Supreme Court has increasingly recognized and enforced constitutional commitments to human dignity.<sup>275</sup> At the same time, within its constitutional regulation of the death penalty and specifically when exercising the final say on whether condemned prisoners' executions may imminently proceed, the Court occupies a proximate and decisive space in the process of state killing. This latter feature of capital punishment in the United States is a significant, but underappreciated dimension of American exceptionalism with respect to the persistence of the death penalty.

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271. Cohen, *supra* note 36, at 15 (describing the rhetoric of justification as “[w]hat happened anyway was justified.” That is, we acted for morally good, even noble reasons”).

272. See, e.g., *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”); *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that Congress had no war powers authority to impose a loss of citizenship upon a natural born citizen on account of court martial for wartime desertion). In *Trop*, three justices joined Chief Justice Warren’s opinion for the Court stating that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Id.* at 100 (plurality opinion).

273. See *Hall v. Florida*, 572 U.S. 701, 708 (2014) (invalidating Florida’s refusal to find condemned prisoners with IQ scores above 70 to be intellectually disabled as a violation of the Eighth Amendment and stating that the Amendment’s “protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (concluding that the execution of minors violated the Eighth Amendment and reasoning that “[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons”); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . .” (quoting *Trop*, 356 U.S. at 100 (plurality opinion))); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (“[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)).

274. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (recognizing that Due Process liberties “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating Texas law criminalizing sodomy by members of the same sex, recognizing that gays and lesbians “retain their dignity as free persons” and thus have a Due Process liberty right to enter personal relationships of their choosing and engage in private conduct).

275. See generally Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383 (2017) (arguing that the Supreme Court’s dignity jurisprudence developed in the context of the 14th Amendment Due Process and Equal Protection Clauses should apply to Eighth Amendment reviews of capital punishment).

The Court's controversial order in *Dunn v. Ray*<sup>276</sup> is a powerful and recent illustration. In a 5–4 split, the Court vacated a stay of execution granted by the United States Court of Appeals for the Eleventh Circuit<sup>277</sup> after a condemned Muslim prisoner challenged on Establishment Clause grounds Alabama's refusal to allow an Imam to be present with him during his execution.<sup>278</sup> The Supreme Court's brief order reversing the Court of Appeals' stay cleared the way for Ray's immediate execution without any religious advisor present.<sup>279</sup>

Given the religious context, factual disputes about whether Ray had acted expeditiously in bringing the claim, and the fact that the Court of Appeals wanted more time to explore the First Amendment claim, the Court's decision to intervene appears as a particularly unnecessary affront to human dignity.<sup>280</sup> That is particularly true because the case involved not a broad-based challenge to a prisoner's sentence that could be extended in litigation seemingly indefinitely, but a far more limited but substantial question related to the circumstances of the execution. The Court's intervention—which was purportedly based upon a narrow technical ruling regarding exhaustion—was easily avoidable. The Court's easy disregard for condemned prisoners' dignity at the moment of death by denying religious counsel to all but Christians seemed to signal in a cruel and specific way that dignity matters little to the Court when it comes to the death penalty.

The Court's decision to vacate the stay in *Ray* makes visible the deep tension that exists when an institution arguably charged with protecting human dignity<sup>281</sup> simultaneously closely regulates the process of state killing.<sup>282</sup> The weighty and important interest sacrificed, a person's spiritual

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276. 139 S. Ct. 661 (2019).

277. *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 695 (11th Cir. 2019).

278. *Id.* at 694–95 (finding that Ray demonstrated “a substantial likelihood of success on [his] Establishment Clause” claim after prison officials claimed that only the prison's Christian minister had security clearance to be present during executions).

279. *Ray*, 139 S. Ct. at 661. Asserting that Ray waited too long to seek relief, the Court rejected the position of Justice Kagan and the dissenters that Ray was informed only two weeks before his execution that the prison would exclude his Imam from the execution chamber. *Id.* at 662 (Kagan, J., dissenting). Justice Kagan noted that “the relevant statute would not have placed Ray on notice” any earlier “that the prison would deny his request.” *Id.*

280. The Court chose to intervene and remove the stay notwithstanding the appearance of judicially-sanctioned Christian preferentialism that hung over the dispute. Justice Kagan and three colleagues dissented, citing Ray's “powerful claim that his religious rights [would] be violated at the moment the State puts him to death” and the Court's typical hesitancy to “interfere with the substantial discretion Courts of Appeals have to issue stays when needed.” *Id.* (Kagan, J., dissenting) (calling majority's decision profoundly wrong and “against the Establishment Clause's core principle of denominational neutrality”); see also Editorial, *Is Religious Freedom for Christians Only?*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/opinion/supreme-court-alabama-execution.html> [<https://perma.cc/5VY9-CEPQ>] (criticizing the Court's decision).

281. See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2005).

282. *But see Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (recognizing the death penalty's

resources at death, exposes the weakness of the Court's procedural justification for its ruling: that the prisoner failed to timely challenge such restriction.<sup>283</sup>

The deep tension that exists when courts play a proximate role in state killing is evident in lower court decisions as well. Take, for example, the emergency judicial hearing during the 2014 execution of Joseph Wood. The hearing resembled a routine judicial conference in which a federal judge, applying Eighth Amendment law, assessed competing narratives and proffers. But the choice before the court—ordering procedures to save a man's life or allowing the State to “push” additional chemicals to hasten his death—highlighted in a way rarely so visible<sup>284</sup> the contradictions of a legal system that aspires to value human dignity,<sup>285</sup> while simultaneously enforcing constitutional rules that normalize state killing.<sup>286</sup>

The emergency conference occurred by telephone ninety minutes into Wood's execution after his public defender filed a motion for an emergency stay, citing Wood's “gasping” and “snorting” and that he was “not dying.”<sup>287</sup> She moved for an order directing the Department of Corrections pursuant to Arizona's lethal injection protocol to begin medical procedures to save Wood's life.<sup>288</sup>

The Assistant Attorney General for Arizona responded with what might be aptly described under Cohen's terms as interpretative denial: the activity

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theoretical tension with the legal system's commitment to “decency and restraint”).

283. See Will Baude, *The Execution of Domineque Ray*, VOLOKH CONSPIRACY (Feb. 8, 2019, 12:25 AM), <https://reason.com/2019/02/08/the-execution-of-domineque-ray/> [<https://perma.cc/VX6P-M59L>] (expressing concern that the Court's “conclusion seemed to rest on the questionable application of a technicality, with extremely high stakes”).

284. Of course, courts routinely make life and death decisions in capital cases, albeit at various degrees of separation from executions.

285. In his concurring opinion in *Furman v. Georgia*, Justice Stewart wrote that the death penalty is an “absolute renunciation of all that is embodied in our concept of humanity.” 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Justice Brennan, in his concurrence in the same case, questioned “whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death,” ultimately concluding that capital punishment was “uniquely degrading to human dignity.” *Id.* at 291, 296 (Brennan, J., concurring). Since *Furman*, there has been a “striking shift” in discourse about capital punishment with a “virtual disappearance” of arguments premised upon the death penalty's “denial of human dignity.” STEIKER & STEIKER, *supra* note 4, at 246–47 (explaining that today opponents largely ground their arguments in the death penalty's “arbitrariness and discrimination” or highlight new problems “like delays between sentence and execution” and the availability of execution drugs); Steiker, *supra* note 176, at 781–82 (noting that arguments that the death penalty “violates a fundamental human right (to life or dignity) are virtually absent” from the death penalty debate in the United States, including within successful abolitionist movements in New Jersey, New Mexico, and Illinois).

286. STEIKER & STEIKER, *supra* note 4.

287. Transcript of Telephonic Motion for Emergency Stay of Execution at 3, *Wood v. Ryan*, No. cv-14-1447-PHS-NVW (D. Ariz. July 23, 2014), <https://www.theguardian.com/world/interactive/2014/jul/24/arizona-joseph-wood-execution-court-hearing-transcript> [<https://perma.cc/E873-6NWM>] [hereinafter TR].

288. *Id.*

Wood's lawyer described was indeed happening, but the physical signs were not consistent with a belabored, painful death.<sup>289</sup> According to the State, Mr. Wood's gasping was an involuntary "snoring-type" reaction; he was unconscious.<sup>290</sup>

Lamenting the difficulty of determining for Eighth Amendment purposes whether Wood faced a risk of pain should the execution continue, the district judge questioned whether reversing course and "suspending the execution" would "do more harm than good."<sup>291</sup> Thirty minutes into the call and before the judge could resolve the dispute, the State reported that Mr. Wood was dead.<sup>292</sup>

On one view, Wood's hearing was not so unusual. It merely reflected judicial interpretation of the Eighth Amendment, albeit in exigent circumstances. After all, the district court was merely overseeing enforcement of laws duly enacted by the people of Arizona. Yet, that explanation inadequately captures the proximate role of the courts in the process of state killing made powerfully visible in Wood's hearing. Indeed, a seemingly routine ritual of judicial process arbitrated the fate of a man teetering between life and death. The juxtaposition is at once jarring and illuminating. It forces the question of how an institution that recognizes and is arguably charged with protecting human dignity,<sup>293</sup> simultaneously can closely regulate the process of state killing. This Article argues that denialism plays a role in this strange duality.

Scholars, death penalty opponents, including the Catholic Church, and individual jurists have all contended that capital punishment is incompatible with the value of human dignity.<sup>294</sup> But these critiques rarely explore the complex, dignity-erasing function attributable to the Court itself through its constitutional regulation of state killing.<sup>295</sup> To break free of denialism in the

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289. Cohen, *supra* note 36, at 15 (describing standard rhetoric of government denial, including claims that "[y]es, something happened, but this was not what you call it, not what it looks to be, but really something else").

290. TR, *supra* note 287, at 7. Based upon the observations of state medical officials on site, the State further claimed that Mr. Wood's condition was "the type of reaction that one gets if they were taken off of life support." *Id.* at 8. "The brain stem is working but there's no brain activity." *Id.*

291. *Id.* at 12.

292. *Id.* at 16. Documents released to Wood's lawyers after the execution showed that the state injected him with fifteen times the dose of midazolam and hydromorphone called for in Arizona's lethal injection protocol. Tom Dart, *Arizona Inmate Joseph Wood Was Injected 15 Times with Execution Drugs*, GUARDIAN (Aug. 2, 2014), <https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood> [<https://perma.cc/ER3V-383X>]. The documents also confirmed that Woods took more than two hours to die. *Id.*

293. See Goodman, *supra* note 281.

294. *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (concluding that capital punishment is "uniquely degrading to human dignity").

295. It may be only in the most extreme moments of judicial regulation of the death penalty—when a court steps in to upend a stay or mediates between court-ordered resuscitation or injecting further drugs to kill a prisoner—that the reality of judicial regulation of constitutional punishment comes into

constitutional regulation of the death penalty, this dimension of death penalty retention must be directly considered, not avoided.

#### IV. CONFRONTING DENIALISM THROUGH THE EIGHTH AMENDMENT

The concept of denialism offers another way to understand America's retention of the death penalty and ultimately to better engage with questions about the purposes it serves, and whether it can be sustained in a constitutional system committed to human dignity, of which the Eighth Amendment is a critical part. Indeed, confronting and responding to hard truths about the death penalty is necessary to advance "the fundamental respect for humanity underlying the Eighth Amendment."<sup>296</sup>

In a series of dissents,<sup>297</sup> Justice Breyer has led the charge to expose the "fundamental constitutional defects" in the death penalty that a majority of the Court and public have largely declined to acknowledge.<sup>298</sup> For example, in his dissent in *Glossip*, a case challenging Oklahoma's lethal injection protocol, Justice Breyer charged that capital punishment is likely unconstitutional under the Eighth Amendment separate and apart from the legality of the specific methods chosen to carry it out.<sup>299</sup> He pointed to the death penalty's unreliability, arbitrariness, and "unconscionably long delays" that undermine capital punishment's penological purposes.<sup>300</sup>

Since *Glossip*, Justice Breyer has continued to dissent when the Court has declined to stay or review condemned prisoners' cases.<sup>301</sup> In doing so, he has cited the role of race in the death penalty's implementation and the cruel and unusual nature of excessively long delays in execution while many condemned prisoners are subjected to prolonged solitary confinement.<sup>302</sup>

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focus for those not impacted by capital punishment.

296. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (holding that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty").

297. *Boyer v. Davis*, 136 S. Ct. 1446, 1447 (2016) (Breyer, J., dissenting) (dissenting from denial of certiorari); *Conner v. Sellers*, 136 S. Ct. 2441 (2016) (Breyer, J., dissenting) (dissenting from denial of certiorari and denial of stay); *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting); *Valle v. Florida*, 564 U.S. 1067 (2011) (Breyer, J., dissenting) (dissenting from denial of stay); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting) (dissenting from denial of certiorari).

298. *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting).

299. See *supra* note 20.

300. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting).

301. Justices Sotomayor and Kagan have also issued vigorous dissents in denial of stays in capital cases in recent years, particularly during this past fractious term for death penalty decisions at the Supreme Court. See Jenny-Brooke Condon, *A Cruel and Unusual Term: The Distortion of Decency and Restraint in the Supreme Court's 2018–2019 Death Penalty Decisions*, 32 FED. SENT'G REP. 15 (2019).

302. *Sireci v. Florida*, 137 S. Ct. 470, 470 (2016) (Breyer, J., dissenting) (dissenting from the denial of certiorari and decrying the fact that the defendant was imprisoned under "threat of execution for 40 years"). Justice Breyer's dissent in *Sireci* also took issue with the Court's denial of certiorari in two other recent cases, which he described as requesting review of "execution[s] taking place in what



Justice Breyer's sustained attack on the death penalty breaks from the Court's typical refusal to talk honestly about capital punishment since the Court invalidated the death penalty for a short four-year period in *Furman v. Georgia*.<sup>303</sup> But for this critique to have broader influence requires a candid confrontation with denialism itself. This is no small task given the layers of denial—on the part of citizens, legislators, and the judiciary—that sustain capital punishment in the United States.<sup>304</sup> Yet, there are several entry points for confronting denialism through Eighth Amendment analysis.

Confronting denialism would at the very least accomplish the following: (1) it would treat the impact of race on the death penalty as unfinished business never resolved by *McCleskey* and the assurance of race-neutral administration of the criminal law as a constitutional imperative not just under the Fourteenth Amendment but as an “evolving standard of decency” under the Eighth Amendment; (2) it would scuttle prevailing narratives about how the death penalty works and test those propositions with proof; and (3) it would prompt the Court to be suspicious of methods and arguments that shield it and the public from the reality of state killing. These principles could be put into action through the Court's Eighth Amendment “evolving standards of decency” doctrine.

The Eighth Amendment's prohibition on “cruel and unusual punishment” plays two related roles with respect to the regulation of criminal sentences.<sup>305</sup> One strand of Eighth Amendment doctrine imposes a proportionality principle that prohibits criminal punishments that are excessive in relation to the crime.<sup>306</sup> A lack of proportionality may be found notwithstanding any showing that a specific form of punishment is cruel in and of itself.<sup>307</sup>

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[he] would consider especially cruel and unusual circumstances.” *Id.* Justice Breyer would have heard a claim by Romell Broom that Ohio's attempt to execute him by lethal injection a second time after a first botched execution would constitute cruel and unusual punishment. *Id.* at 471. He also would have heard the case of Ronald B. Smith, a case in which the Court denied a stay of execution to an Alabama man who was sentenced to death after a trial judge overrode a jury's recommendation of a life sentence, at a time when Alabama remained the only state in the country that permitted elected judges to override jury's capital sentencing decisions. *Id.* (citing *Smith v. Alabama*, 137 S. Ct. 588 (2016) (denying stay of execution by an equally divided vote)).

303. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

304. Courts defer to legislative judgments about the criminal sentences warranted for particular offenses, recognizing that such penalties express the people's prerogatives about appropriate punishment. *See generally* Reinert, *supra* note 188, at 935 (examining the layers of deference that lead to uncritical judicial acceptance of solitary confinement). Such deference ossifies popular judgments that may themselves be based upon an unwillingness to grapple with the realities of capital punishment or driven by an unconscious desire to turn away from what is staring them directly in the face.

305. U.S. CONST. amend. VIII.

306. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Gregg*, 428 U.S. at 206–07.

307. Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 113 (1995).

The second strand of Eighth Amendment jurisprudence requires that punishments not violate “evolving standards of decency that mark the progress of a maturing society.”<sup>308</sup> The Court has relied upon this strand of Eighth Amendment doctrine to find the death penalty unconstitutional as applied to specific crimes and categories of offenders.<sup>309</sup>

Within that second category of Eighth Amendment analysis, the Court considers two components relevant to the nation’s “evolving standards of decency.” First, the infrequency of a punishment’s imposition can suggest that society has relinquished support for particular punishments.<sup>310</sup> Second, if the death penalty’s use no longer serves valid penological ends, it violates evolving standards of decency.<sup>311</sup>

Eradicating from Eighth Amendment jurisprudence the characteristics of denial described in this Article could further an “evolving standards of decency” analysis. First, as LDF argued in *McCleskey*, unequal imposition of the death penalty based upon a defendant’s or victim’s race cannot possibly further a just penological goal of the criminal justice system.

The *McCleskey* Court did not disagree with this proposition, but instead rejected the notion that race actually determined capital sentencing decisions in Georgia, imposing the “discriminatory purpose” requirement of the Court’s equal protection jurisprudence. But a Court committed to the principle that race cannot be a relevant factor in the administration of the criminal law could not rest after acknowledging statistically valid evidence of racial disparities. A Court committed to enforcing racial equality as a “standard of decency” would invite briefing and further challenges to examine how race determines outcomes in the context of capital punishment and consider evidence-based proof of discrimination consistent with its own doctrines.

Similarly, a Court committed to a jurisprudence free of reflexive denialism about the death penalty would jettison narratives suggesting that the death penalty is reserved for the “worst of the worst” when saying so only serves to further encase the death penalty within a shell of unexamined legitimacy, without first establishing that this Eighth Amendment shibboleth is actually true. That would require examination of racial and

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308. *Hutto v. Davis*, 454 U.S. 370, 386 (1982) (Brennan, J., dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

309. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (finding it unconstitutional to execute defendant for rape of a child); *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005) (prohibiting execution of juvenile offenders under the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (prohibiting execution of persons with intellectual disability under the Eighth Amendment).

310. Barry, *supra* note 275, at 418–22 (arguing that declining acceptance of the death penalty shows that it is an affront to human dignity).

311. Goldfarb, *supra* note 73, at 393.

geographic arbitrariness in the administration of the death penalty urged by Justice Breyer.<sup>312</sup>

Finally, a Court seeking to rid its jurisprudence of denialist tendencies would be particularly suspicious of methods and arguments that shield the Court and the public from the realities of state killing. As a practical matter, this would mean heightened skepticism of lethal injection protocols that make it harder to perceive a prisoner's pain and abandoning doctrines that make the "cruelty" of one execution method turn on whether a condemned prisoner can identify a less harmful alternative. Doing so would provide assurance that the Court has not immunized itself from assessing the actual "cruelty" of the penalties it upholds.

#### CONCLUSION

The concept of denialism described in this Article illuminates patterns in judicial regulation of the death penalty that facilitate uncritical acceptance of capital punishment as a constitutional form of punishment. Removing denialism will not alone produce a more just Eighth Amendment analysis, but that does not excuse reliance upon it as a justification for willful blindness. Ultimately, acknowledging and naming denialism can help clear the space within our Eighth Amendment jurisprudence for a more rigorous and honest confrontation with hard truths about the death penalty. Doing so inevitably provokes further exploration of a proposition only surfaced in this Article, but which deserves further attention: whether judicial regulation of capital punishment is compatible with a legal system that purports to value human dignity and charges the judiciary with protecting those values under the Constitution.

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312. *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (citing studies of arbitrary death penalty sentences and stating "40 years of further experience [post-*Gregg*] make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands" (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982))).