Black Lives Matter and the call for death penalty abolition

Citation for published version:

Digital Object Identifier (DOI):
10.1086/695988

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
Ethics: An International Journal of Social, Political, and Legal Philosophy

Publisher Rights Statement:
This is an Accepted Manuscript of an article published in Ethics by The University of Chicago Press in April 2018, available online: https://doi.org/10.1086/695988

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The Black Lives Matter movement has called for the abolition of capital punishment in response to what it calls "the war against Black people" and "Black communities". This article defends the two central contentions in the movement's abolitionist stance: first, that U.S. capital punishment practices represent a wrong to Black communities rather than simply a wrong to particular Black capital defendants or particular Black victims of murder, and second, that the most defensible remedy for this wrong is the abolition of the death penalty.
The Black Lives Matter movement has called for a number of social, political, and legal reforms in response to what it calls “the war against Black people” and “Black communities” in the United States. Among these is the abolition of capital punishment on the grounds that the death penalty in the U.S. is a “racist practice” that “devalues Black lives.”¹

The movement’s abolitionist stance invites at least two crucial philosophical questions. As the movement’s platform notes (and as we document later in section 1), a wide body of studies indicates that (a) Black capital defendants are more likely to be subject to execution than defendants of other races, and (b) those who murder Blacks are less likely to be subject to execution than are those who murder members of other races. But those philosophers and jurists who, unlike the movement, do not find capital punishment “morally repugnant”² are likely to doubt that such statistical findings indicate that capital punishment is a racist practice that wrongs Black communities, even when viewed in the historical context of troubling ‘policing’ practices that devalue Black lives (e.g., lynchings). Some death penalty retentionists may concede that this statistical evidence shows that American capital punishment has mistreated particular Black capital defendants or murder victims unjustly and may therefore welcome reforms aimed at reducing the likelihood of such mistreatment. But they may well be unmoved (as U.S. courts largely have been) by the claim that capital punishment has been a front in a war against Black people in general. Answering these defenders thus seems to necessitate an argument that fleshes out more explicitly the movement’s claims that these capital punishment practices are a wrong to Black communities, an argument invoking an ethical idiom that defenders of capital punishment cannot so readily dismiss.

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

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

We then propose (in section 2) that the discriminatory patterns in capital punishment that generate this injustice are explained, in part, by implicit racial biases. The biases in question are both general, relating to perceptions of Black criminality, and specific, likely to be triggered in contexts where prosecutors, judges, and jurors make ‘life or death’ choices about capital charges, convictions, and sentences. The effect of such biases is to make murder (at least in the U.S.) a racially coded act, such that its moral gravity is calibrated in part based on the race of those who commit it or those who are its victims. That is, notwithstanding the obvious wrongness and illegality of sentencing on the basis of a victim or defendant’s race, our criminal justice institutions systematically treat certain murders as more brutal and morally heinous partly because they are committed by Blacks or against Whites. Situations involving judgments about capital punishment, we suggest, tend to activate and amplify racial bias in distinctive ways. Pre-existing biases regarding Blacks’ proclivity toward, and insusceptibility to, violence that may otherwise remain dormant are galvanized when individuals are afforded the opportunity to render
judgments regarding who ought to be executed for their crimes. In other words, the possibility of the death penalty (as opposed to life imprisonment serving as the maximum possible penalty) arouses race-based biases that distort judgments regarding the justifiability of imposing death as a punishment. These biases impact not only capital sentences as such but also intuitive judgments of guilt, appraisals of incriminating evidence, charging decisions, assessments of the severity of pain and suffering, and general moral intuitions related to punitiveness and desert. In sum, the capital punishment regime elicits biases that in turn generate race-based injustice. The social meaning of murder thus comes to vary systematically with the races of those involved.4

In section 3, we propose that in light of the role implicit biases play in capital sentencing in the U.S., not to address this discrimination amounts to a form of societal or institutional recklessness. The continuation of the American capital punishment regime means that American society and its judicial and policing bodies engage in unjustified risk taking with respect to the legal status of Black lives, risk taking of which they are knowingly aware and so culpable.5 In our estimation, although the abolition of the death penalty does little to address past injustice of this kind, it nevertheless would be the most justifiable remedy for this recklessness going forward. We show in sections 4 and 5 that abolition is unique among plausible remedies6 in both eliminating the discriminatory effects of this bias-based recklessness and in not being itself unjust. Thus, while imperfect, the abolition of the death penalty is the least morally perilous response consistent with the aim of eliminating this unjust recklessness that places the lives of Black Americans at risk. Section 6 addresses two objections to our proposal for abolition, while our conclusion places our argument in the context of recent theoretical accounts of racial injustice.
1. In its 1972 *Furman* decision, the U.S. Supreme Court vacated the death sentences of three Black defendants on the grounds that the state statutes under which they were sentenced gave judges and juries insufficient guidance regarding when defendants should be sentenced to death.\(^7\) Although the defendants’ legal counsel presented evidence indicating that racial bias influenced capital sentencing, the Court’s reasoning was not primarily grounded in concerns about racial bias. Rather, the Court held that the state’s capital punishment regime violated the Eighth Amendment’s ban on “cruel and unusual punishment” because, thanks to a lack of clear sentencing guidelines, “there is no meaningful basis for distinguishing the few cases in which it [death] is imposed from the many cases in which it is not.” The imposition of the death penalty, it concluded, was “wanton,” “freakish,” and “arbitrary.” In response to *Furman*, states introduced a number of reforms to more explicitly regulate capital sentencing, measures which (courts subsequently ruled) rendered state capital punishment statutes constitutionally sound.\(^8\) These reforms included the establishment of more precise sentencing guidelines, requiring that both aggravating and mitigating factors be taken into account; the bifurcation of capital trials into guilt and penalty phases; automatic appellate review of capital cases; and proportionality review, in which a state appellate court can consider whether a given capital sentence aligns with, or is instead disproportionate to, other sentences issued in the state’s capital cases.

Given that the *Furman* ruling de-emphasized the role of racial bias in capital sentencing, it is unclear whether the Court expected (or hoped) that the sentencing reforms implemented thereafter would mitigate the effects of racial bias.\(^9\) What is clear, however, is that seemingly discriminatory racial patterns in capital sentencing have not abated despite these reforms. Empirical studies conducted since 2000 indicate that, with respect to racial discrimination, the post-*Furman* reforms have had modest success at best. Indeed, they suggest that the historical
patterns in which Black defendants have been statistically more likely to be sentenced to death than are defendants of other races or ethnicities, and non-White defendants are statistically more likely to be sentenced to die for killing Whites than for killing individuals of other races or ethnicities, continue to the present day. Studies conducted since 2000 in Arizona, Colorado, Connecticut, Delaware, Maryland, New Mexico, Ohio, Texas, and Washington have concluded that Black defendants are more likely to face a death penalty prosecution or to be sentenced to death than defendants of other races. Studies conducted since 2000 in Alabama, Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Louisiana, Maryland, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, and the armed forces have shown an even stronger effect on capital sentencing based on victims’ race, concluding that those who kill Whites are more likely to be sentenced to die than those who kill members of other racial and ethnic groups. These two effects also appear to interact, so that “cases involving black defendants and white victims are treated more punitively than cases with all other defendant/victim racial combinations.” Racial discrimination in capital sentencing is therefore not merely a ‘historical’ injustice. Rather, it persists into the present day.

The vast majority of the academic literature frames this injustice as an individual legal wrong. In other words, this literature assumes that if there is an injustice here, it is a wrong suffered by those particular individuals who engage with the capital punishment regime either as capital defendants or as victims of murder. The debates within this literature thus focus largely on questions of retributive justice. For example, if a person’s punishment is deserved, what moral difference does it make if other persons equally deserving of that punishment receive a lesser (or greater) punishment? Is a person (a Black murder defendant, say) treated unjustly if he ends up being executed for his crimes when others convicted of the same crime would not have
been executed (thanks to their race)? And if so, how ought such comparative injustices be redressed?37

While we do not deny that issues of retributive legal justice are important in this context, we believe that this focus neglects an arguably larger political injustice, one that illuminates the movement’s claim that the American capital punishment regime wrongs Black communities as a whole. First, Cholbi’s arguments underscore how the capital punishment regime wrongs members of the Black community irrespective of their actual engagement with that regime. Consider the status of Blacks as potential murder victims.38 Because would-be murderers are justified in believing that individuals who murder Blacks are likely to face lesser costs (the presumptively less severe punishments of prolonged or lifelong incarceration rather than execution) than they would for murdering individuals of other races, the law thus fails to penalize killings of Blacks in a manner consistent with their having the equal protection of the law. The injustice in question is one that all Blacks face, not only those who actually are murdered (or are victims of murder by dint of being a family member of a Black murder victim, etc.) All Black Americans thus inhabit a normative reality that protects their lives less than White lives. Second, Cholbi argues that, with respect to their status as potential capital defendants, Blacks are justified in believing that the criminal justice system will subject them to a greater “cost” for conviction (execution rather than the presumptively less severe punishments of prolonged or lifelong incarceration, say) because of their race.39 These expectations, in turn, entail that Blacks are not accorded “equal status” under the law because they face an increased likelihood of suffering a greater cost than others would due to factors (i.e., race) unrelated to objective desert. The law thus penalizes Blacks engaging in murder in a manner inconsistent with their having the equal status under the law. Note again that the injustice in question —
Blacks not being accorded equal status under the law — is one that all Blacks face, not only those who actually become capital defendants.

Cholbi’s arguments thus invite us to see the racial wrongs of American capital punishment less in terms of retributive wrongs done to particular defendants due to their race and more in terms of distributive injustices done to Blacks as a class. On this analysis, the wrongs at issue are that two crucial political goods the law (understood here to encompass not just statutory law, legal doctrine, secondary rules, etc., but also the concrete functioning of the courts, law enforcement, etc.) is responsible for ‘distributing’ are unjustly distributed on the basis of race.40 Black murder defendants are not extended the same legal status as other defendants; they are presumed less innocent than defendants of other racial groups. Black victims of murder are not extended the same legal protection as victims of other races; their killers are presumed more innocent than those who kill members of other racial groups. The injustices wrought by racial bias in American capital sentencing are therefore exhausted neither by the wrongs done to Black defendants sentenced to die due (in part) to their race nor by the wrongs done to Black victims of murder whose murderers escape the death penalty (in part) due to the race of the victims. The injustices are also political, extending (as the movement maintains) to the Black community as a whole, because the capital sentencing regime generates normative realities in which Blacks are not treated as equals.

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

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

No doubt the adverse normative realities we reference here are not caused exclusively by capital punishment, and the realities create attitudes and expectations that interact in nuanced ways. But no matter. For we consider it probable that racial discrimination against Blacks in the
administration of the death penalty (both as prospective murder victims and as prospective murderers) contributes to normative realities that motivate violence, increase community tension, and exacerbate mistrust, particularly toward law enforcement.\textsuperscript{44}

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

2. Implicit racial biases likely influence countless decisions made by witnesses, police, attorneys, judges, and juries, such that Blacks can, as a class, reasonably expect to be mistreated, devalued, and less protected by the capital punishment regime, relative to Whites.\textsuperscript{45} Before reviewing key evidence, two caveats are in order. First, recent political events have made it clear that reports of the demise of \textit{explicit} bigotry in liberal democracies have been greatly exaggerated. Accordingly, we make no assumptions about the extent to which the “implicit” biases found in these studies are unconscious, unintentional, or simply \textit{unspoken}. That is, in many of the field- and lab-based studies reviewed here, individuals act in predictably biased ways despite verbally reporting that they are unbiased. As far as we are concerned, these individuals might be concealing their conscious, intentional racism, or they might be sincerely egalitarian. We are neutral regarding such questions, and refer to these biases as “implicit” simply because they go unreported.\textsuperscript{46} Second, we do not argue that these biases constitute the sole cause of racial injustices related to capital punishment. A complex and entangled set of factors, both internal and external to the
criminal justice system, are likely involved. For example, many police departments appear to allocate disproportionate time and resources to levying fines and seizing assets in Black communities (i.e., *over-policing* in order to garner revenue to fund local government operations) and, as a direct consequence, have fewer resources to devote to solving violent crimes in those communities (therefore *under-policing* when it comes to actually protecting Black citizens).\textsuperscript{47} We claim only that such structural factors do not by themselves suffice to account for the injustice in question, and that given the persistence of implicit bias and the persistence of racial injustice even after post-*Furman* reforms, no (feasible) package of reforms short of abolition will suffice to eliminate the injustices of capital punishment.

Research suggests that most White Americans, and even many Black Americans, harbor anti-Black implicit biases, many of which are obviously relevant to criminal justice.\textsuperscript{48} These biases lead individuals to judge that darker-skinned individuals look angrier and more threatening than lighter-skinned individuals with identical facial expressions.\textsuperscript{49} Whites tend to be less sensitive to the pain experienced by Blacks.\textsuperscript{50} Whites are more likely to see Blacks in some contexts as physically "superhuman,"\textsuperscript{51} and in other contexts as subhuman and ape-like.\textsuperscript{52} Even images of 5-year-old Black boys automatically call to mind problematic racial stereotypes.\textsuperscript{53} It is not hard to imagine how these biases could lead to the systematic mistreatment of Blacks relative to Whites in capital contexts, and a significant body of research specifically suggests that prosecutors, judges, and juries are just as susceptible to these biases as everyone else.

Bias is especially likely to affect individuals when they lack clear-cut guidelines or structural constraints to hold them accountable for their decisions. Among the many subjective, institutionally unconstrained decisions regularly made by prosecutors, some of the most relevant, for our purposes, are whether to charge and what sentence to seek, but also whether to disclose
mitigating or potentially exonerating evidence to the defense, how to describe defendants and their actions in cross-examinations and closing arguments, and so on.\textsuperscript{54} Such biases may even lead detectives and prosecutors to devote fewer resources to obtaining evidence when there are minority victims, thereby making cases with White victims \textit{seem} more serious on average than those with minority victims. Thus, a Louisiana study found that prosecutor case files were significantly thicker when victims were White women, and thinnest when victims were Black, which in turn correlated with severer sentences for those convicted of killing Whites and women.\textsuperscript{55}

One study found that professional lawyers’ decisions in a simulated \textit{voir dire} reflected the implicit (but not self-reported) biases of jurors.\textsuperscript{56} Attorneys randomly assigned to be prosecutors tended to exclude jurors with comparatively weak implicit racial biases.\textsuperscript{57} In other words, professional attorneys are somehow, consciously or unconsciously, tracking the implicit biases of potential jurors and striking them partly on this basis. Attorneys will, of course, inevitably be able to cite ostensibly non-racial reasons to justify such decisions\textsuperscript{58}—making the influence of implicit bias in this sphere particularly difficult to combat, short of removing the option to strike jurors altogether.

Once selected, jurors’ implicit biases likely lead them to find the testimony of Black defendants, victims, and their families less credible and sympathetic than their White counterparts.\textsuperscript{59} Mock jurors are more likely to remember “aggressive” details of a crime, and even to falsely remember such details, when defendants are Black.\textsuperscript{60} They are more likely to think that the conviction of a Black defendant remains appropriate despite the use of inadmissible evidence.\textsuperscript{61} One field study even found that jurors were more likely to report that the love, grief, and loss experienced by a murder victims’ family were important factors in their
decision-making when the victim was White. Several experimental studies tie these discriminatory patterns directly to measures of implicit racial bias, such as mock jurors’ automatic associations of Black faces with the word “guilty.”

Although juror bias likely affects conviction and sentencing trends throughout the criminal justice system, it seems especially pernicious in capital contexts. For example, the jurors most likely to be selected in capital cases also seem more likely to implicitly devalue Black lives. One study found that individuals tended to associate Whites with words like “value” and “merit” and Blacks with words like “expendable” and “worthless,” and that this tendency was especially strong among those who reported being willing to convict someone even if that meant a potential death sentence. In fact, this implicit devaluation of Blacks relative to Whites predicted mock jurors’ decisions to sentence a Black convict to death instead of life in prison. This bias may help to explain why, when victims are White, defendants who look more stereotypically Black are also more likely to receive a death sentence.

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

Remarkably, one study found that White respondents became more supportive of capital punishment when informed about racial bias in capital sentencing. Another study, by Glaser et
al., found that, when the maximum possible sentence was life without parole, mock jurors were equally likely to recommend convicting Black and White defendants (67.7% and 66.7% respectively); however, when the maximum possible sentence was death, participants became simultaneously less likely to convict Whites (55.1%) and more likely to convict Blacks (80%).

Note that these results are inconsistent with the intuitive and widely held view (articulated, for example, in the Supreme Court’s ruling in *McCleskey v. Kemp*) that racial bias is insensitive to the context or the stakes. Glaser and colleagues’ findings, together with the body of evidence reviewed in this section, suggest that the interplay between racial bias, capital punishment, and other patterns of unfairness in the criminal justice system is more complex. In this case, otherwise equal rates of conviction for Whites and Blacks (when the maximum sentence is life imprisonment) become stunningly unequal simply by introducing the death penalty as a possibility. Such results suggest that capital punishment is not just another arena infected with bias, but instead represents a distinctive channel for racial discrimination, in at least two respects. First, the possibility of a capital sentence may function as a powerful contextual cue that both activates and amplifies the effects of specific anti-Black biases, and second, the bias-amplifying power of capital contexts is not restricted to capital-sentencing contexts, but here distorts mock jurors’ judgments of guilt, assessments of evidence, and willingness to convict. The cognitive salience of execution as an ultimate outcome may, then, cast a broad shadow over the perception and treatment of Black defendants (and killers of White victims) throughout the criminal justice system, influencing rates of conviction, charging decisions, public support for punitive policies, police uses of force, mistrust of criminal justice within the Black community, and so on. (We will circle back to these hypotheses when we respond to objections in section 6.)
At this point, we can only speculate about the mechanisms rendering capital contexts
distinctively discriminatory. We suspect that many of the aforementioned biases play a role: the
reflexive devaluation of Black lives; the implicit denial that Black defendants, victims, and
families feel pain, love, and loss; and the broader tendencies to perceive Blacks as threatening,
guilty, and variously super- or sub-human. Glaser and colleagues speculate that the sheer
salience of the death penalty as a live option might interact with implicit racial prejudices and
stereotypes to make crimes committed by Black defendants (or crimes committed against White
victims) seem especially brutal. In other words, for many, Black Americans do not deserve to die
because of the gravity of their crimes. Rather, at least in part, their crimes are particularly grave
because Black Americans commit them. Likewise, those who kill Black Americans are found not
to be worthy of death not because of the lesser gravity of their crimes. Rather, at least in part,
their crimes become less grave by virtue of having killed Black Americans.

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

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

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

A person acts recklessly when she knows (or should have known) that her act will likely cause harm but proceeds to perform that act anyway without due concern for the justifiability of risking harm to others. When recklessness results in harm, the actor can be justifiably held culpable for that harm because the harm is the direct product of her having knowingly engaged in risky behavior. An intoxicated driver, for example, knows (or should know) that her driving increases the risk of injury or death to others but proceeds to drive anyway. When her driving results in injury or death to others, she is thereby culpable for that harm. This is the case even though (a) the act of driving while intoxicated did not increase the likelihood of harming others to certainty (or near certainty) — it merely increased the likelihood of such harm, and (b) she did not intend to harm inasmuch as she did not drive while intoxicated so that she could harm
someone else nor was harming someone else an essential component of her achieving her ends through her acts. The reckless actor is culpable because and to the extent that the harms resulting from her acts are reasonably foreseeable.

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

4. We turn now to the question of what shape the remedy for this injustice should have. The best remedy will meet two desiderata. First, it will diminish the injustice in question, either by eliminating the bias that generates it or by nullifying the effects of that bias. Second, the remedy will not be itself unjust.
One proposal, which we reject, is that discrimination in capital punishment can be rooted out through sentencing reform alone. As noted earlier, after the *Furman* decision, states implemented a number of reforms to make capital sentencing fairer, reforms which (courts ruled) rendered state capital punishment statutes fair enough to pass constitutional scrutiny. But these reforms were not race-conscious. Rather they were aimed at diminishing the latitude that judges or juries have in applying the death penalty so as to make its application less ‘wanton’ or arbitrary. Might additional procedural reforms, perhaps including reforms explicitly designed to address racial bias, eliminate the racially discriminatory patterns in American capital punishment practices?

We are skeptical. As the evidence adduced in section 1 suggests, previous procedural reforms have done little to eliminate the discriminatory patterns in question. Some studies, for example, find that efforts to encourage jurors to more seriously consider mitigating evidence have had no effect on their sentencing decisions. This makes a *prima facie* case against additional procedural reforms satisfying our first desideratum. Still, one might think that reforms reducing discretion in capital sentencing could prove effective. In a recent defense of capital punishment, Matthew Kramer proposes that the death penalty be reserved only for crimes of “extreme gravity” that are “defilingly evil.” When a person has “perpetrated grotesque inequities that besmirch the moral standing of the community” of which she is a member, a “community is under a moral obligation to resort to capital punishment” as a way of ‘purging’ itself of this evil, according to Kramer. By limiting capital punishment only to those whose crimes ‘defile’ the community, Kramer’s ‘purgative’ rationale for the death penalty might suitably limit those subject to it so as to eliminate racially discriminatory patterns in its administration.
In our estimation, Kramer’s proposal runs afoul of both desiderata. As a general matter, Kramer is right to note that racial bias is more likely to sway decision-making in ambiguous cases. For example, mock jurors’ implicit biases lead them to interpret ambiguous evidence as more damning when the defendant is dark-skinned than when light-skinned. Suppose, then, that judges and juries abide by a Kramer-inspired principle and impose the death penalty only on “defilingly evil” crimes. This will not affect decisions made by police, prosecutors, etc., that occur prior to judge or jury sentencing, decisions that (as we noted in section 2) are likely to be swayed by implicit racial bias. That is, Kramer fails to appreciate the role that bias can play in disambiguating cases, as when detectives and prosecutors devote more (versus less) time and effort to turning up evidence when victims are White (versus Black), thereby exerting systematic effects on how egregious a defendant’s crimes come to seem. Thus, this reform may have minimal impact on racial discrimination in capital sentencing overall. Moreover, we doubt that judges and juries would abide by the Kramer-inspired principle in a racially neutral matter. Whether a crime is “defilingly evil” is itself a likely product of implicit bias. Mock jurors become simultaneously more likely to convict Blacks and less likely to convict Whites precisely when capital punishment is a possibility. Recall also that the grief and pain expressed by victims’ families—factors which presumably affect how “evil” a crime seems—are more likely to influence juror decision-making when victims are White. Such considerations illustrate that mere procedural reform would be both ineffective and unjust. (Of course, the criminal justice system is replete with injustices, some of which could be ameliorated through sentencing reforms, such as the elimination of harsh mandatory minimums. Our point is that procedural reforms are, in the context of capital punishment, radically insufficient.)
A second alternative remedy would be to impose the death penalty (a) only on (some) non-Black capital defendants but on no Black defendants, (b) only on (some of) those who kill Blacks but on none of those who kill non-Blacks, or (c) both (a) and (b). This remedy has the obvious defect that it then fails to accord non-Blacks equal status under, or the equal protection of, the law.

A final possible remedy is entertained by Kasper Lippert-Rasmussen: Defendants would receive a “death penalty lottery ticket where the risk of losing varies between the two groups that are being discriminated between such that this differential risk eliminates the overrepresentation of one of these groups within the relevant penal category.” For example, to counteract racial discrimination throughout the capital punishment regime, Blacks and Whites convicted of capital crimes might receive lottery tickets with, respectively, 5% and 20% chances of receiving the death penalty instead of life imprisonment. This proposal might seem especially well-suited to combat the distributive comparative injustices upon which we have focused. However, Lippert-Rasmussen does not defend this lottery as a legitimate option, and for good reason. To trade a regime in which implicit racial bias results in race-based injustice for one in which racial bias is explicitly encoded into sentencing hardly seems like an improvement. Any scheme that explicitly took the race of particular defendants or victims into account with the aim of achieving proportional distribution of capital punishment across racial groups would be odious on its face. We assume, for example, that such a race-conscious proposal would strike defenders of the death penalty as especially intolerable (indeed, less tolerable than abolition). Whatever gains this proposal would make in terms of comparative justice would be outweighed by losses in noncomparative (retributive) justice, such that final determinations regarding whom receives the death penalty versus life imprisonment would become almost entirely disconnected from the
facts about what particular individuals deserve. Certainly White defendants could be forgiven for objecting that such a lottery scheme would fail to accord them equal legal status, and Whites and Blacks alike might reasonably raise a more generic comparative complaint, namely, that there is no rational basis for their being subjected to death while others are not. After all, a lottery embodies the very ‘arbitrariness’ in the allocation of the death penalty that the Furman-era Court condemned.

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

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

If and when discrimination occurs it should be corrected. Not, however, by letting the guilty blacks escape the death penalty because guilty whites do, but by making sure that the guilty white offenders suffer it as the guilty blacks do. Discrimination must be abolished by abolishing discrimination - not by abolishing penalties. However, even if...this cannot be done, I do not see any good reason to let any guilty murderer escape his penalty. It does happen in the administration of criminal justice that one person gets away with murder and another is executed. Yet the fact that one gets away with it is no reason to let another one escape.\textsuperscript{85}
Though van den Haag refers here only to discrimination based on defendant’s race, he would presumably argue in the same manner regarding discrimination based on victim’s race, to wit, that when such discrimination occurs, it should be corrected. We ought not abolish capital punishment because those who murder Blacks more often escape the death penalty than do those who murder non-Blacks, for doing so merely enables both classes to evade their just desserts. Abolition, on van den Haag’s view, bars non-comparative retributive justice from being done, i.e., it prevents those who deserve to suffer death for their crimes from suffering what they ought. One would thereby anticipate that adherents of van den Haag’s position would be no more enthusiastic about our rationale for abolition than they were for prior efforts to justify abolition on the basis of racial discrimination. Prior efforts argued that considerations of comparative retributive justice were sufficient to outweigh considerations of non-comparative retributive justice: that the fact that Blacks were subject to greater punishments than Whites or that the murderers of Blacks were subject to lesser punishments than those who murdered members of other races generated a comparative retributive injustice sufficient to outweigh whatever losses in non-comparative justice the abolition of the death penalty would effect.86 In keeping with the Black Lives Matter movement’s understanding of the American capital punishment regime as wronging Black communities, we have focused not on the particular retributive injustices suffered either by Black capital defendants or by Black murder victims. Rather, we rest our case for abolition on distributive injustices done to the Black community, namely, that thanks to that regime’s discriminatory practices, Blacks do not enjoy equal status under, or the equal protection of, the law. But if adherents of a van den Haag-like position are correct, then considerations of non-comparative (retributive) justice trump any considerations of comparative justice, whether
retributive or distributive. Hence, they would likely reject our rationale for abolition on grounds similar to those used to reject prior race-based rationales.

We find the thesis that comparative considerations of justice, whether retributive or distributive, must always take a backseat to non-comparative considerations implausible. Van den Haag himself acknowledges that comparative considerations are at least morally relevant; upon discovering that members of some races tend to escape the death penalty where others suffer it for the same crime, we ought (he says) to seek to abolish such discrimination. Comparative considerations count as moral reasons, on his view. What van den Haag’s position denies is that such considerations ever count as weighty enough reasons to forego any opportunity whatsoever to give individuals what they ostensibly deserve from a non-comparative perspective. We reject the homogeneity of comparative considerations that this position appears to entail. On this position, comparative considerations have a roughly equal weight in overall determinations of justice, i.e., a uniformly minute weight. But comparative considerations vary widely in their force. On one end of the scale, some disproportions in the allocation of punishments do not seem to call for any remedy. Hurka observes that in most every society, some murders will not be solved and some murderers will receive no punishment, but this fact is not sufficient to merit rethinking how we punish murders. Conversely though, the racial disproportions in the allocation of capital punishment in the U.S. fall toward the weightier end of the scale of comparative wrongs. Hurka notes that evils caused by the state are more objectionable than evils the state merely permits, and as we argued in section 3, the U.S. is engaging in a kind of knowing recklessness that causally effects the racial disproportions in the allocation of capital punishment. In addition, the fact that these disproportions burden a group (American Blacks) that has been historically disadvantaged due to discrimination and prejudice
adds to the weightiness of these comparative considerations. Our judgments regarding what individuals legally deserve should be guided by what they morally deserve, where what they morally deserve must take into account how legal sanctions shape their lives overall. To ignore the racial disproportionality in capital sentencing is to allow this disproportionality to compound the comparative wrongs American Blacks suffer due to other forms of discrimination and prejudice. Thus, if any comparative consideration is ever weighty enough such that its redress justifies reductions in non-comparative justice, then racial disproportionality in capital sentencing is such a comparative consideration.

We therefore do not hold that non-comparative justice trumps comparative justice, whether retributive or distributive. Note however that, even if one accepts this implausible thesis about comparative justice, van den Haag’s position still rests on the controversial stance that the abolition of the death penalty involves a loss in retributive justice. But this stance is open to objection. First, that stance assumes that the death penalty is not an unjust punishment, i.e., is one that polities are morally entitled to exact. We have largely assumed this for the sake of argument but recognize its contentiousness. Second, that position assumes that the death penalty is a uniquely just punishment for crimes such as murder — that no other punishment is sufficient to render unto those who commit (say) murder what they deserve. But there is no special reason to believe that for each and every crime or class thereof, there is but one punishment that those who commit that crime deserve or that those who do not receive that specific punishment are not thereby given their just deserts. We need not be “nihilists” about moral desert, denying that there are any facts of the matter regarding what an offender deserves as a result of his wrongdoing, to recognize that commensurability between criminal acts and sanctions is almost certainly not a matter of one-to-one correspondence. Third, epistemic doubts can be raised about the reliability
of judgments concerning the commensurability of punishment and desert. For instance, we suspect that moral intuitions about which specific crimes merit which punishments are themselves likely compromised by racial (and other) biases. The research reviewed here indicates the dim prospects of identifying some unbiased source of intuitions about the precise requirements of noncomparative justice, or the relative geometric weights of comparative vs. noncomparative considerations. ⁹⁰

We assume that were the death penalty abolished, then the most serious crimes would result in lifetime imprisonment with no possibility of parole. Is it plausible that such imprisonment, given the wholesale deprivations of liberty and opportunity it involves, is insufficiently severe to count as a just punishment for the most serious crimes — that any punishment short of death is not harsh enough to count as a just punishment for such crimes? We doubt that the geometry of desert is so precise or that our judgments about that geometry should be uncritically relied upon. The fact that the suicide rate among prison inmates is three to four times greater than the general U.S. population ⁹¹ suggests that the belief that death is always a worse fate than long-term imprisonment may well be wrong. At the very least, such facts indicate that if the worst crimes demand ‘hard treatment,’ imprisonment looks like hard treatment indeed and is likely not unjust as a sanction for the most serious criminal acts.

Thus, we conclude that either comparative justice (and in particular, comparative distributive justice related to the status and protection the law accords to individuals based on their race) is relevant to justice overall, in which case abolition of the death penalty in response to distributive injustice is defensible; or comparative justice is irrelevant to justice overall, but the case against abolition rests on controversial views concerning the severity of different punishments and the geometry of wrongdoing and desert.
On balance, then, we maintain that abolition fares better than alternative remedies in satisfying the two desiderata we identified. It eliminates the effects of implicit racial bias that generate the racial injustices at issue, and while its being a just remedy is more debatable, our remedy clearly fares better in this respect than the most attractive alternatives.

6. Two final worries about our abolitionist proposal merit attention.

Some may worry that it ‘proves too much’. The abolition of capital punishment, one might hypothesize, will simply result in racial bias manifesting itself in the application of the next most severe sentence, namely, life imprisonment without parole. Black defendants would be more likely to receive life imprisonment without parole for the same crimes, and those who commit crimes against Blacks, where such crimes are eligible for life imprisonment without parole, would be less likely to be sentenced to life imprisonment without parole. But if so, then the very considerations we have adduced in favor of capital punishment would also seem to speak in favor of abolishing life imprisonment: These discriminatory patterns in life sentencing entail that Blacks are neither extended the law’s equal protections nor accorded equal status, etc. Once life imprisonment is abolished, then racial discrimination would recur at the next most severe sentence, in turn calling for the abolition of that sentence. Taken to its logical conclusion, our proposal might seem to entail not merely the abolition of capital punishment but the more radical abolition of punishment altogether.92

We grant that these untoward implications would be problematic for our position. However, we very much doubt that our position has these implications. For recall that the mechanism behind racial discrimination in capital sentencing, on our view, is implicit bias. And as we observed in section 2, there are good reasons to think that the forms of implicit bias
responsible for racial discrimination in capital sentencing are very closely associated with the application of death as a criminal sentence. Recall that these biases include the belief that Blacks are less sensitive to pain, that the family members of Black murder victims are accorded lesser sympathy, that Blacks are either ‘subhuman’ or ‘superhuman,’ etc. These specific biases suggest that anti-Black biases are closely linked psychologically with the infliction of bodily violence, i.e., that Blacks are perceived to both suffer less harm from it and are more prone to inflict it. Although such biases are apt to exert some influence across a variety of contexts, e.g., in police officers’ split-second decisions to use force as well as clinicians’ deliberations about prescribing pain medication to Black patients, they are likely to be more salient in capital cases than in cases that do not involve murder or capital punishment. Indeed, the aforementioned study conducted by Glaser et al., wherein the availability of capital punishment (as opposed to life imprisonment) appears to lead mock jurors to convict Black defendants at a noticeably higher rate than Whites, strongly suggests that death and life imprisonment stand on opposite sides of a salience boundary within implicit racial bias. Such findings introduce the possibility that capital punishment is not simply another manifestation of racial discrimination but a context that activates biases that make such discrimination more likely, with cascading effects downward into other aspects of the criminal justice system, such as conviction rates, police use of force, mistrust of criminal justice in Black communities, etc. In other words, abolishing the death penalty may itself be one among many necessary reforms for reducing broader racial disparities in criminal imprisonment. Of course, these are empirical hypotheses, but so too is the speculation that racial bias will manifest no matter the most severe punishment available. Proponents of capital punishment have, however, consistently treated this speculation as a truth deduced a priori. We
would certainly welcome a more empirically oriented approach, such as a nationwide experiment to assess the multifarious effects of a death penalty moratorium.

A second worry is that our proposal leaves an unaccounted for loss in noncomparative justice. The abolition of the death penalty would place Blacks on equal terms with others with respect to legal status and to the law’s protections, we have argued, and thus eliminate a large scale comparative injustice. But it would apparently do so by introducing noncomparative injustice, because abolition would (a) reduce the costs that Blacks and non-Blacks alike ought to face for murder below what it ought to be, and (b) fail to give Blacks and non-Blacks the level of legal protection that they ought to enjoy. Equality in legal status or in the law’s protections thus come at the expense of adequate legal status or legal protection for all. These losses in noncomparative justice could well outweigh the gains in comparative justice that we have invoked in defense of abolition.95

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

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

Some theoreticians of injustice will worry that our appeal to the unjust distribution of legal status and protections does not get to the heart of the racial injustice in question. They may assert that the injustices with which we are concerned are instantiations of Black oppression, oppression which is not adequately conceptualized by talking of distributive injustice. For these theorists, just social relations manifest equality insofar as they achieve equality of relations and the absence of domination. We cannot hope to hash out theoretical disputes such as this here, but nor (in our estimation) need this be done in order to vindicate our conclusions concerning capital punishment. For we simply note that some distributions of non-material goods (in this case, political goods such as legal status and the law’s protections) are unjust and that these distributions can be conceptualized in different terms: as violations of basic natural rights, as failures to mitigate the effects of luck, as indications of the marginalization or powerlessness typical of oppressive social relations, etc. Thus, we do not share Young’s belief that “serious conceptual confusion” results from any attempt to capture injustices related to non-material
goods in distributive terms. On the contrary: In the case of race and capital punishment, the social or community wrongs associated with American capital punishment cannot be grasped without reference to distributive facts about non-material goods. But we take no stand on how best to conceptualize these wrongs and anticipate that egalitarians of various stripes can endorse our specific conclusions.

The Black Lives Matter movement asserts that American institutions have waged a war on Black communities. Even if ‘war’ is hyperbole, it seems clear that progress toward greater racial comity and justice will require building greater trust between Black communities and institutions, especially law enforcement and the legal system. The abolition of capital punishment in the U.S. would not only be just. It would also be a powerful step, both symbolically and substantively, toward ending that ‘war’ and establishing peace across divisions of race.
* We gratefully acknowledge the comments and feedback on earlier drafts provided by David Adams, Cory Aragon, Carl Cranor, Katie Gasdaglis, Stephen Munzer, Peter Ross, the editors and anonymous reviewers at Ethics, and Cal Poly Pomona students present at a departmental ‘brown bag’ presentation in February 2017.

1 Movement for Black Lives Platform, “End the War on Black People” (https://policy.m4bl.org/end-war-on-black-people/, accessed 6 March 2017)

2 Ibid.


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

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


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


27 Paternoster et al., “Justice by Geography and Race.”
M. Wilson, “The Application of the Death penalty in New Mexico, July 1979 through December 2007”


Phillips, “Racial Disparities in the Capital of Capital Punishment”


Benjamin S. Yost, “What’s Wrong with Differential Punishment?,” Utilitas 29, no. 3 (September 2017): 257–85, https://doi.org/10.1017/S095382081600039X. Benjamin S. Yost, “What’s wrong with differential punishment?”, Utilitas (2017), provides an excellent overview of these questions and the disputes surrounding them. Yost makes the case that race-based disparities in punishment reinforce structural oppression in ways that are distinctively retributively unjust. We are sympathetic with his proposal but do not take retributive considerations to exhaust the racial injustices in the US criminal justice system.


“Race, Capital Punishment, and the Cost of Murder,” p. 262.

The Movement for Black Lives Platform does not typically employ the idiom of ‘distribution’ to characterize the group-based injustices suffered by African Americans, and refers instead to violations of rights, structural oppression, exploitation, and marginalization. We consider the extent to which our normative analysis of U.S. capital punishment maps onto the Movement’s general conception of racial injustice in Section 7.


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

It has long been disputed whether capital punishment has a deterrent effect on crimes such as murder. For a useful overview of this evidence and the surrounding debate, see John J. Donohue and Justin Wolfers, “Uses and Abuses of
Empirical Evidence in the Death Penalty Debate,” 58 Stanford Law Review (2006) 791. As Donohue and Wolters conclude, “the U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect,” but what evidence exists for a deterrent effect suggests that it is small in comparison to other factors that influence murder rates (“the death penalty does not cause or eliminate large numbers of homicides”). We take the considerations advanced in this paragraph to suggest that racial discrimination could well undermine whatever deterrent effect capital punishment has, and at the very least, complicates our ability to make sound inferences about its deterrent effects. Indeed, it may be a further advantage of the abolition we advocate in this article that it would enable disputes about the deterrent effect to be more decisively settled.


47 See, e.g., Rebecca Goldstein, Michael W. Sances, and Hye Young You, “Over-policing, Under-policing, or Both? An Analysis of Police Resource Allocation,” (manuscript), and the Movement for Black Lives Platform’s “invest-divest” demands. For the criticism that implicit bias discourse is insufficiently attentive to these structural-institutional concerns, see Ralph Richard Banks and Richard Thompson Ford, “(How) Does Unconscious Bias Matter: Law,


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


We know of no experimental evidence directly related to anti-Black biases in assessments of credibility (i.e., testimonial injustice; see Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford, New York: Oxford University Press, 2007)), but several studies point to such biases against other ethnic groups, including Latinx individuals in the US and


They also found that the refusal to sentence someone to death led to the exclusion of non-White jurors, and that the death qualification process therefore exacerbated the impact of racial bias on capital sentencing. Notably, their participant sample was drawn from 6 of the most active death penalty states: Alabama, Arizona, California, Florida, Oklahoma, Texas. Moreover, “those who are more likely to be allowed to serve on death penalty cases are not only more likely to harbor racially prejudiced attitudes, but also are more likely to favor the conviction of innocent defendants over letting guilty ones go free,” Robert L. Young, “Guilty until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment,” *Deviant Behavior* 25, no. 2 (March 1, 2004): 151–67, doi:10.1080/01639620490266916.; cf. Mark Peffley and Jon Hurwitz, “The Racial Components of ‘Race-Neutral’ Crime Policy Attitudes,” *Political Psychology* 23, no. 1 (March 1, 2002): 59–75, doi:10.1111/0162-895X.00270.


*Ethics of Capital Punishment*, p. 245.

*Ethics of Capital Punishment*, pp. 228-29

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

Pierce et al., “Race and the Construction of Evidence in Homicide Cases.”

Karp and Warshaw, “Chapter 15, Their Day in Court: The Role of Murder Victims’ Families in Capital Juror Decision Making”; and on the insensitivity of Whites to Blacks' pain, see Trawalter, Hoffman, and Waytz, “Correction.”

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


Cory Aragon suggests that, given that this patently unjust scheme would successfully eliminate certain race-based distributive injustices, we have reason to conclude that the underlying political injustices are not primarily distributive, but relational (for further discussion, see Section 7). However, this sort of proposal would also seem to counteract race-based relational inequality and oppression.


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

94 Jack Glaser et al., “Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants”.

