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# Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America

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*Retribution stands at the forefront of America's criminal justice system. Yet, as Justice Anthony Kennedy cautioned, retribution is also the motive for punishment that "most often can contradict the law's own ends." This Article proposes, and then tests empirically, the existence of a novel contradiction of retribution — the idea that race and retribution have become automatically and inextricably intertwined in the minds of Americans.*

*The study we present in this Article demonstrates that the core support for retribution's use has been shaken by implicit racial bias. Our national empirical study, conducted with over 500 jury-eligible citizens, shows that race cannot be separated from the concept of retribution itself. The study finds, for example, that Americans automatically associate the concepts of payback and retribution with Black and the concepts of mercy and leniency with White. Furthermore, the study showed that the level of a person's retribution-race implicit bias predicted how much they supported retribution as a desirable punishment rationale — the stronger the anti-Black implicit racial bias they held, the more likely they were to harbor retributivist views of criminal punishment.*

*Contextualized within the racial history of America's criminal justice system, as well as the continued racial disparities in the criminal justice*

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system, the results of our empirical study have wide-ranging implications for legislative enactments, constitutional challenges to harsh punishment practices, and even for the reduction of excessive force against civilians in the context of policing.

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#### INTRODUCTION

When it comes to justifications for punishment, retribution is first among equals.<sup>1</sup> Its prominence in legal codes and constitutions traces back thousands of years,<sup>2</sup> and it counts among its supporters some of the world’s finest philosophers, legal scholars, and judges.<sup>3</sup> It is not

<sup>1</sup> See Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 437, 437 (2006) (finding that in a study of punishment motivations, retribution information was more relevant to punishment than either deterrence or incapacitation information, people prefer retribution information when punishing others, and that retribution information increases people’s confidence in assigned punishments); see also Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) (“[C]apital punishment is excessive when it . . . does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.”); Robert Bohm, *Retribution and Capital Punishment: Toward a Better Understanding of Death Penalty Opinion*, 20 J. CRIM. JUST. 227, 227 (1992) (noting that “retribution appears to be the primary basis of support for the death penalty in the United States”); Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309, 309 (2014) (“Retributive theory has long held pride of place among theories of criminal punishment in both philosophy and in law.”).

<sup>2</sup> See, e.g., CODE OF HAMMURABI §§ 196, 200 (L. W. King trans., Yale L. Sch. Avalon Project 2008) (c. 1754 B.C.E.), <https://avalon.law.yale.edu/ancient/hamframe.asp> (asserting the principles of “[a]n eye for an eye” and “[a] tooth for a tooth”). Indeed, retribution’s logic is central to the Old Testament. See Exodus 21:23-25 (New American Standard) (“But if there is *any further* injury, then you shall appoint as a penalty life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”).

<sup>3</sup> See, e.g., Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (“The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”); H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 7 (2d ed. 2008) (arguing that “punishment is *justified* as an ‘emphatic denunciation by the community of a crime’”); IMMANUEL KANT, THE METAPHYSICS OF MORALS 253 (Mary Gregor trans., Cambridge

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retribution in theory, however, but rather retribution as it plays out in the real world, that has proven problematic.<sup>4</sup> In this Article, we focus on one particular problem of historical significance that takes on new meaning in the context of modern social science — the seemingly endless connection between race and retributive demand, and its manifestations in America’s modern criminal justice system. In doing so, we build on social cognition literature, and propose that despite the sound reliance on retribution as a legitimate theoretical pillar of punishment theory, retribution in practice no longer exists without implicit racial bias.

To test the hypothesis that Americans now implicitly associate — on an automatic cognitive level — the concepts of race and retribution, we conducted a national empirical study with over 500 jury eligible citizen participants. By implementing study methodologies from the field of implicit social cognition, we were able to test — and our results demonstrate — that race has become inextricably tied to the concept of retribution itself. In other words, retribution itself has become an automatically racialized justification for punishment.

Now is a perfect time to reignite a conversation about the role of retribution in criminal law. America has finally begun to reckon with the aftermath of thirty years of mass incarceration, and scholars continue to work to untangle the complex webs that created its rise in the first place.<sup>5</sup> Through this work, one lesson has become increasingly

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Univ. Press 1991) (1785) (“Every deed that violates a man’s right deserves punishment, the function of which is to *avenge* a crime on the one who committed it (not merely to make good the harm that was done).”). Yet, Justice Anthony Kennedy, writing for the majority in *Kennedy*, cautioned that retribution is also the motive for punishment that “most often can contradict the law’s own ends” by “risk[ing] its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Kennedy*, 554 U.S. at 420. This caution is important to heed.

<sup>4</sup> Our goal in this Article is to address retribution as an expression of punitiveness or payback, and specifically how it plays out in the world of criminal justice. There is important and robust scholarly literature explicating the various strands of retributivism, but it is not our aim in this Article to participate in that dialogue. We hope that others will build upon the study we conducted, and wrestle with its deeper theoretical implications for retributivism. Our choice to operationalize retribution in a way that connects to the public understanding of it, however, allows us to grapple with how most lawmakers, judges, and jurors negotiate the impulse for “paying back” those who are understood to have violated important cultural norms.

<sup>5</sup> See, e.g., RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 3 (2019); EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (1st ed. 2019); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014) (discussing the carceral state in America and custodial citizens).

clear: moral panics, most of them racialized and driven by retributive discourse, contributed mightily to the punishment excesses of the past few decades.<sup>6</sup> These moral panics saw pundits and professors alike warning at one time, for example, of a “new breed” of merciless juvenile “superpredators” and the horrors of “crack babies.”<sup>7</sup> Because of the tight connection between moral panics and criminal sentencing, hundreds of thousands of Americans are spending decades — or even their whole lives — in prison based on baseless legislative assumptions. Retributive demand propelled these policies to fruition in the minds of largely well-meaning American citizens and leaders. But what if American citizens and leaders cannot think about punishment without incorporating automatic racial bias?

Outside of the focus on retribution in sentencing policy in the context of moral panics, modern discussions of race and retributive excess also have seen a connection between racialized policing and excessive use of force.<sup>8</sup> Our study serves as a new vehicle to understand how even pre-arrest policing practices may automatically be bringing racialized retributive excess to communities across America. Thus, the racialized impact of a retribution-race bias begins with lawmaking, continues with policing practices, and crescendos in sentencing policy.

This Article unfolds in four parts. In Part I, we set the stage for our argument by highlighting the entrenched importance of retribution to the criminal justice system.<sup>9</sup> We focus both on death penalty

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<sup>6</sup> See, e.g., SHAY BILCHIK, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 1999 NATIONAL REPORT SERIES: CHALLENGING THE MYTHS (Feb. 2000), <https://www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf> (describing the debunked superpredator theory, which predicted in the 1990s a large wave of remorseless and violent juvenile offenders); see also STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS xvii-xviii* (3d ed. 2002) (1972).

<sup>7</sup> See, e.g., Editorial, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), <http://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html> [<https://perma.cc/LNB4-GGN7>] [hereinafter *Echoes of the Superpredator*] (describing the superpredator panic); see also Stacey Burling, *The Littlest Victims of Cocaine*, PHILA. INQUIRER (Aug. 24, 1989), [http://articles.philly.com/1989-08-24/news/26150896\\_1\\_babies-foster-care-supervisor-cocaine](http://articles.philly.com/1989-08-24/news/26150896_1_babies-foster-care-supervisor-cocaine); Charles Krauthammer, *Worse than 'Brave New World': Newborns Permanently Damaged By Cocaine*, PHILA. INQUIRER (Aug. 1, 1989), [http://articles.philly.com/1989-08-01/news/26148256\\_1\\_cocaine-babies-crack-babies-damage](http://articles.philly.com/1989-08-01/news/26148256_1_cocaine-babies-crack-babies-damage) [<https://perma.cc/MSV7-FK8L>].

<sup>8</sup> See, e.g., Linda Sheryl Greene, *Before and After Michael Brown — Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 37-38 (2015) (“[W]here police killings occur in circumstances where there is no possible harm to the officer or imminent threat to the public, the implicit question is always whether the prevention of imminent threat rationale is sound or is in effect one sounding in ‘just desserts’ or retribution in exchange for ‘being’ a suspect.”).

<sup>9</sup> See *infra* Part I.

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jurisprudence, where the United States Supreme Court largely has rested the constitutionality of the death penalty itself on retribution's shoulders, as well as on commentary and cultural positioning that underscores retribution's importance more generally within the criminal justice system. In a realist context that explores the practical effects of retribution in America, we further examine how retributive urges have led to moral panics, which in turn have led Congress and state legislatures to enact regressive laws.

In Part II, we present a social science theory behind our proposal that race and retribution have become cognitively inseparable.<sup>10</sup> Specifically, we argue that race and retribution have become cognitively intertwined for two reasons: first, because of the deep and troubling historical connection between the two concepts, and second, because citizens' psychological understanding of retributive punishment already rests upon the racialized psychological building blocks of fear, anger, and of empathy. In this context, we explain how the cultural context of retribution has created a new type of implicit bias: a race-retribution bias.

In Part III, we turn from the theoretical basis of our proposal to an empirical exploration of our hypothesis, using methods from the field of implicit social cognition on a national sample of over 500 Americans.<sup>11</sup> We presented participants with an Implicit Association Test — a measure that uses reaction times in milliseconds to test people's associations between concepts — and measured the ways in which they associated race (White or Black) with concepts of retribution or mercy. The study found that participants more strongly associated Black faces with the concepts of retribution, payback, and revenge, and White faces with the concepts of rehabilitation, treatment, and redemption. Moreover, the degree to which people associated Black more closely with retribution-inspired words than with mercy-inspired words predicted the degree of overall retributive punishment philosophies that the participants embraced. In other words, our study found that race is now psychologically engrained — at least in Black and White — into the very concept of retribution.

In Part IV, we consider these results' ramifications for criminal law and theory.<sup>12</sup> First, our study exposes grave, and arguably fatal, cracks in the only remaining justification for the constitutionality of the death penalty. In addition to the findings that race and retribution are inextricably intertwined in members of the American public, we found

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<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See *infra* Part IV.

that these racialized retribution effects are even exacerbated by the process of “death qualification,”<sup>13</sup> raising the probability that processes designed to protect the fairness of death penalty administration actually themselves trigger racial bias in its administration.<sup>14</sup> In the lawmaking context, our results have important implications regarding how moral panics such as the mythical superpredator and crack-baby scares fuel race-tinged retributive excess that result in harsher sentencing laws. Finally, in the policing context, though not retribution in a formalistic sense, the racialized “payback” impulse we found could help explain the excessive use of force by police upon civilians — including the shootings of unarmed Black citizens. Our findings thus have

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<sup>13</sup> “[D]eath [Q]ualification” describes the process during voir dire whereby potential jurors are typically questioned about their willingness to impose the death penalty in certain (e.g., “the worst of the worst”) murders. Patrick Radden Keefe, *The Worst of the Worst*, NEW YORKER (Sept. 7, 2015), <https://www.newyorker.com/magazine/2015/09/14/the-worst-of-the-worst> [<https://perma.cc/VK8T-59RV>]. Jurors who would be unwilling to find a defendant guilty (if they knew that death were a possible punishment should they convict), would be unwilling to ever impose the death penalty, or who always would vote for death as a sentence in any murder, are frequently removed from the jury pool. *See id.*

<sup>14</sup> Prior research on death qualification established “conviction proneness” — the idea that death qualified jurors would be more likely to convict than jurors who are excluded under *Witherspoon*. For analysis of these conviction proneness findings, see, for example, Edward J. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON J.L. 11, 32 (1981) (reporting study findings of “conviction proneness” in multiple California locations, and concluding that *Witherspoon* excludables are “consistently and substantially less conviction prone than those retained on the panel”); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 1 (1970) (finding that “[t]he more favorably [a venireman] views capital punishment, the more conviction prone he tends to be”); Claudia L. Cowan et al., *Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 53 (1984) (studying whether death-qualified jurors “are more likely to convict a defendant than are people who are excluded from serving on capital juries”); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46-48 (1984) (noting that “a person’s attitude toward capital punishment is an important factor . . . about crime control and due process”); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 121 (1984) (“Subjects who were exposed to death qualification were significantly more conviction prone.”); George L. Jurow, *New Data on the Effect of a “Death Qualified” Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 567 (1971) (reporting data of a study showing that death qualification “makes for conviction-prone jury”); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 109 (1984) (“These two studies help explain the consistent finding that death-qualified jurors are more likely to convict a criminal defendant than excludables.”).

implications not only for criminal law jurisprudence, but also for sentencing policy and policing reform.

## I. RETRIBUTION AND THE LAW

There may be no more important criminal law theory than retribution. This Part defines retribution, establishes its centrality to criminal law, and explores the massive impact it has in sentencing and even lawmaking.

### A. Retribution and Its Central Role in Criminal Law

Retribution is at the core of America's criminal law theory, legislation and doctrine. This legal significance of retribution dates back in history to at least the Old Testament command — “an eye for an eye, a tooth for a tooth”<sup>15</sup> — a principle that the Hammurabi Code, the earliest surviving code of law, adopted.<sup>16</sup> Retribution holds that punishment should be in proportion to the severity of the offense, the culpability of the offender, or both. As the Supreme Court has explained, retribution “reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused.”<sup>17</sup>

Philosophers, most notably Immanuel Kant, have long recognized retribution as a moral underpinning of punishment.<sup>18</sup> So, too, have renowned legal thinkers such as Herbert Wechsler, who posited that retribution in criminal law, “whatever its exponents may avow as its philosophy and purposes, is actually animated largely by retributive

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<sup>15</sup> See *Exodus*, *supra* note 2, at 21:23-25 (New American Standard) (“But if there is any further injury, then you shall appoint as a penalty life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”) (emphasis added). *But see Romans* 12:19 (New American Standard) (“Never take your own revenge, beloved, but leave room for the wrath of God, for it is written, ‘VENGEANCE IS MINE; I WILL REPAY,’ says the Lord.”).

<sup>16</sup> See *CODE OF HAMMURABI*, *supra* note 2, §§ 196, 200.

<sup>17</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008).

<sup>18</sup> See, e.g., *KANT*, *supra* note 3, at 253 (“Every deed that violates a man's right deserves punishment, the function of which is to *avenge* a crime on the one who committed it (not merely to make good the harm that was done).”); see also *MICHAEL S. MOORE*, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 91 (2010) (“For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved.”); John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 4 (1955) (noting that according to the retributive view, “punishment is justified on the grounds that wrongdoing merits punishment”).



objectives, constituting nothing more than vengeance in disguise.”<sup>19</sup> Herbert Packer summarized the foundational psychological importance of retribution by noting that “[t]he retributive view rests on the idea that it is right for the wicked to be punished.”<sup>20</sup>

Retributivism’s pride of place extends beyond the theoretical and into the center of criminal law practice. The American Law Institute’s Model Penal Code also “adopts desert as the primary distributive principle for criminal liability and punishment.”<sup>21</sup> State legislatures, including in California, Minnesota, Pennsylvania, and Washington have identified retribution as the primary or sole purpose of punishment.<sup>22</sup> Judges, too, often focus on retribution as the cornerstone for justifying the sentences they impose. For instance, in sentencing Bernie Madoff, a 71-year-old man, to 150 years in prison — a de facto death sentence — Judge Denny Chin said, “an offender should be punished in proportion to his blameworthiness,” and, since Madoff’s acts were “extraordinarily evil,” Chin chose the extraordinarily harsh sentence to send a message that Madoff would “get what he deserves.”<sup>23</sup>

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<sup>19</sup> See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1103 (1952) (noting evidence that “penal law, whatever its exponents may avow as its philosophy and purposes, is actually animated largely by retributive objectives, constituting nothing more than vengeance in disguise”); see also HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 37 (1968) (“The retributive view rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts.”).

<sup>20</sup> PACKER, *supra* note 19, at 37 (“[B]ecause man is responsible for his actions, he ought to receive his just deserts.”). Scholars have also used empirical methods rooted in psychology to prove that Americans rely heavily on retribution in their punishment justifications. See, e.g., Carlsmith, *supra* note 1, at 437 (finding that in a study of punishment motivations, retribution information was more relevant to punishment than either deterrence or incapacitation information, people prefer retribution information when punishing others, and that retribution information increases people’s confidence in assigned punishments); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-71 (1997) (reporting findings from a series of studies that show that laypersons prize desert over other purposes of punishment). But see Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 77 (2013) (reporting on a series of studies that illustrate that other considerations, such as incapacitation, matter, too).

<sup>21</sup> Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1940 (2010) [hereinafter *The Disutility of Injustice*].

<sup>22</sup> See Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1831 n.1 (2007).

<sup>23</sup> Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES (June 28, 2011), <http://www.nytimes.com/2011/06/29/nyregion/judge-denny-chin-recounts-his-thoughts-in-bernard-madoff-sentencing.html> [https://perma.cc/4FVE-APSQ]. Many other judges have discussed retributivism and its ties to revenge. See, e.g., *Baze v. Rees*, 553 U.S. 35, 79-80 (2008) (Stevens, J., concurring) (“We are left, then, with

Retribution plays a pivotal role not only in criminal theory and practice, but also in defining the constitutional limits of the ability of legislatures to enact punishment. The Eighth Amendment's bar on excessive punishment demands that criminal sanctions "embrace and express respect for the dignity of the person" by ensuring the severity of the sanction aligns with the culpability of the person who committed it.<sup>24</sup> Therefore, in gauging the constitutionality of a punishment practice, the Supreme Court has asked whether the challenged sanction "measurably contributes" to the retributive purpose of the punishment.<sup>25</sup> For example, the Court has said that executing juveniles or the intellectually disabled is retributively extravagant.<sup>26</sup>

The Supreme Court used the same retribution-based rationale in *Graham v. Florida* to bar life without parole for juveniles who commit non-homicide offenses.<sup>27</sup> In this context, the Court has elevated the idea that retribution in terms of moral culpability is not only a backwards looking idea. The *Graham* Court, underscoring that few, if any, juveniles possess an "irretrievably depraved character,"<sup>28</sup> focused on the idea that children change, often profoundly so. The Court stated that, "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile non-

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retribution as the primary rationale for imposing the death penalty . . . . A natural response to such heinous crimes is a thirst for vengeance."); *Tison v. Arizona*, 481 U.S. 137, 180-81 (1987) (Brennan, J., dissenting) ("Retribution, which has as its core logic the crude proportionality of 'an eye for an eye,' has been regarded as a constitutionally valid basis for punishment only when the punishment is consistent with . . . the defendant's culpability, and when 'the administration of criminal justice' works to 'channel' society's 'instinct for retribution.'"); *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (Brennan, J., concurring) ("But I cannot see that this [punishment] is anything other than forcing retribution from the offender — naked vengeance.").

<sup>24</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

<sup>25</sup> *Atkins v. Virginia*, 536 U.S. 304, 318-20 (2002) (holding that executing people with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishments, but states can define who has an intellectual disability). For further examination of *Atkins*, see Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 463-64 (2003).

<sup>26</sup> See *Roper v. Simmons*, 543 U.S. 551, 571 (2005) ("Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); *Atkins*, 536 U.S. at 318.

<sup>27</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>28</sup> *Id.* at 68.

homicide offender's capacity for change and limited moral culpability."<sup>29</sup> Thus, in addition to crime-specific calculations of desert, the Court's categorical exemption cases focus on both the culpability of the transgressor at the time of the offense and the possibility that she or he experiences redemption over time.

The constitutionality of the death penalty swings, in large part, on the belief that executions meaningfully contribute to a retributive justification for the punishment.<sup>30</sup> In other words, if life without parole satisfied the societal demand for retribution, the capital punishment could not survive constitutional scrutiny. This reliance on retribution as a justification for punishment "is of particular concern" in the death penalty context, wrote Justice Anthony Kennedy, because retribution is the rationale that "most often can contradict the law's own ends" and "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."<sup>31</sup> As Professor Justin Levinson and colleagues have explained, "the relationship between race and retribution is important because retribution has been cast as an indispensable component to the constitutionality of the death penalty, while racial arbitrariness is an impermissible consideration for imposing capital punishment. Yet, it might be that one cannot be contemplated without also considering the corresponding impact of the other."<sup>32</sup>

In the legal context, the age-old importance of retribution to the law may be paralleled loosely by the importance of retribution to human evolution. Some scholars, for example, suggest that retribution is something of a biological imperative, and therefore operates — like implicit bias — on an automatic level. Professor Joshua Greene, a psychologist, writes: "as an evolutionary matter of fact, we have a taste for retribution . . . ."<sup>33</sup> Professor Thane Rosenbaum wrote: "Despite the stigma of vengeance, it's as natural to the human species as love and

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<sup>29</sup> *Id.* at 74.

<sup>30</sup> See *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring) (explaining that "[t]he legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best" and "[w]e are left, then, with retribution as the primary rationale for imposing the death penalty").

<sup>31</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

<sup>32</sup> Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 541 (2014) [hereinafter *Devaluing Death*].

<sup>33</sup> Joshua D. Greene, *The Secret Joke of Kant's Soul*, in 3 MORAL PSYCHOLOGY 35, 71 (Walter Sinnott-Armstrong ed., 2008).

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sex.”<sup>34</sup> In *Furman v. Georgia*, Justice Potter Stewart underscored the instinctual and heightened role of retribution in capital punishment, articulating a similar view: “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”<sup>35</sup> This approach views retribution not as a calculated and rational process, but rather an automatic one that relies on highly emotional cues. Much like implicit bias, then, it functions faster than a deliberate balancing, and serves as a short cut that allows people to save cognitive resources.

Retribution’s role, then, in American criminal law, embraces both its vast importance to legal doctrine — such as the judicial reliance that upholds the death penalty, as well as its central role in understanding how Americans’ retributive urges shape reactionary lawmaking on a federal and state level. If retribution had stayed its moral course, and never racialized, then perhaps a descriptive model of its role in the criminal justice system wouldn’t reveal discrimination on a potentially epic scale. Yet, the reality of retribution’s role in American criminal justice reveals not only racialization, but also a potential corruption of retribution’s very legitimacy.

## II. HOW THE RACE-RETRIBUTION ASSOCIATION HAS BECOME AUTOMATIC IN AMERICANS’ MINDS

The racialization of retribution in American criminal justice has occurred for complementary reasons. This Part explores the “why” behind our hypothesis that race and retribution have become cognitively intertwined and formed a new retributive implicit racial bias. We propose two complementary arguments that converge at the intersection of race and retribution, both leading to the creation of the new implicit bias. First, we propose that American historical

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<sup>34</sup> Thane Rosenbaum, Opinion, *Justice? Vengeance? You Need Both*, N.Y. TIMES (July 27, 2011), [http://www.nytimes.com/2011/07/28/opinion/28rosenbaum.html?\\_r=0](http://www.nytimes.com/2011/07/28/opinion/28rosenbaum.html?_r=0) [https://perma.cc/Z5ZP-JYTM] (concluding that the government has a “moral duty to satisfy the needs of victims to feel avenged”).

<sup>35</sup> *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); see also OLIVER WENDELL HOLMES, COMMON LAW 41-42 (Dover 1991) (1881) (“If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.”); Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS (May 2002), <https://www.firstthings.com/article/2002/05/gods-justice-and-ours> [https://perma.cc/CA3L-9WWG] (noting “the authority of a government to exact vengeance” and the fact that punishment can be “deserved” and “just”).

associations between race and retribution have created a part of American culture whereby the two concepts have become cognitively conflated. And second, we argue that three core psychological elements underlying the retributive calculation — fear, anger, and empathy — have each become intertwined with implicit racial bias. We thus provide historical and structural social science-based support for our claim that retribution, in reality, no longer exists without race.

We begin by describing briefly some highlights of the cognitive science underlying implicit bias.<sup>36</sup> For several decades, psychologists have used a variety of methods to measure and reveal the way the human mind works automatically to influence perceptions, decisions, and even actions.<sup>37</sup> This automatic cognitive influence related to meaningful group membership — called implicit bias — has been studied and documented in a variety of domains across the legal

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<sup>36</sup> We have defined implicit bias as “the automatic attitudes and stereotypes that appear in individuals.” Levinson et al., *Devaluing Death*, *supra* note 32, at 518.

<sup>37</sup> See, e.g., Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, in THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 123 (Henry L. Roediger III et al. eds., 2001) (exploring the theories underlying the measurement of automatic cognitive associations); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006 (2007) (empirically measuring response times in decisions to shoot, focusing on police officers); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1322 (2002) (introducing the “shooter bias” task, which measures response time in simulated shooting decisions); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 9 (1989) (employing “priming” to measure the effects of automatically activated stereotypes on ambiguous behaviors); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (empirically exploring the automatic connection between White and Black faces with various race-based stereotypes); Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509 (1991) (measuring how exposure to a White or Asian research assistant activated stereotypes in word completion tasks); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995) (setting forth theoretical support for the idea that attitudes, self-esteem, and stereotypes all rely on “implicit modes of operation”); Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359 (2007) (finding that implicit associations predicted both self-reported discriminatory actions as well as economic decision-making).

system,<sup>38</sup> especially in criminal law.<sup>39</sup> These studies have shown repeatedly that negatively stereotyped groups, particularly African Americans, may be punished by implicit bias at almost every stage of the criminal justice system, both in a theoretical and practical way.<sup>40</sup>

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<sup>38</sup> See, e.g., Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477 (2007) ("They have pointed to an expanding mass of evidence from experimental psychology that appears to demonstrate the pervasiveness of unconscious bias based on race, gender, and other legally protected characteristics, evidence that raises troubling questions about the effects of such bias on legally relevant behaviors."); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1535-39 (2005) (introducing implicit bias research to legal scholars generally, and applying it to the communications law and policy context); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (introducing the concept of unconscious discrimination to the employment discrimination realm); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1026-27 (2006) ("[A]ntidiscrimination jurisprudence has in many respects proven stubbornly refractory to the conceptual adjustments the science of implicit bias suggests it needs."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (drawing primarily upon Freudian psychology, and providing powerful arguments to set the stage for discussions of implicit social cognition); Justin D. Levinson, *SuperBias: The Collision of Behavioral Economics and Implicit Social Cognition*, 45 AKRON L. REV. 591 (2012) [hereinafter *SuperBias*] (claiming that the behavioral law and economics decision model overlooks the role of implicit biases). See generally IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

<sup>39</sup> See, e.g., Robert J. Smith & G. Ben Cohen, *Choosing Life or Death (Implicitly)*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 229 (Justin D. Levinson & Robert J. Smith, eds., 2012) (noting that "race discrimination plagued the administration of the death penalty in Georgia"); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1539 (2004) ("Defense attorneys commonly suspect that the defendant's race plays a role in prosecutors' decisions to seek the death penalty, especially when the victim of the crime was white."); Cynthia Lee, *The Gay Panic Defense*, 42 UC DAVIS L. REV. 471 (2008) (discussing implicit bias in the context of sexual orientation bias); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 353 (2007) [hereinafter *Forgotten Racial Equality*] (arguing that judges and juries remember and "misremember case facts in racially biased ways"); Justin D. Levinson, *Race, Death and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 599 (2009) ("Considered in the legal context, well-developed social science principles may help reveal how people's automatic and unintentional cognitive processes may either propagate racial disparities in the death penalty or serve as a making agent in covering up those disparities.").

<sup>40</sup> See, e.g., Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309-10 (2010) (noting that simple racial cues may evoke stereotypes affecting how jurors evaluate evidence); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 406-07 (2017) (discussing implicit racial bias against African Americans in the criminal justice system); Jeffrey J. Rachlinski et al., *Does Unconscious*

For example, some of our projects have argued — many of them supported by direct empirical studies — that implicit bias functions in the way judges and jurors remember (and misremember) trial information,<sup>41</sup> the way jurors perceive the presumption of innocence,<sup>42</sup> the way prosecutors proceed with cases, the way jurors evaluate evidence,<sup>43</sup> the way death penalty jurors value human life,<sup>44</sup> and more.<sup>45</sup>

Social scientists have discovered that one of the core sources of implicit bias is culture. That is, if a particular culture does not contain assumptions, attitudes, stereotypes, or meaning about a certain group, relevant implicit biases about that group would not be expected to appear.<sup>46</sup> Cultural influences, when they are present, can be expected to trigger implicit biases in young children and remain there throughout life.<sup>47</sup> Furthermore, once implicit biases have been found to exist, research shows that they are difficult to eradicate.<sup>48</sup> Psychological theorists continue to debate the question of what to do about implicit

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*Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009) (finding that judges have implicit biases that may work against African Americans); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796-97 (2012) (arguing that implicit biases skew prosecutorial decisions).

<sup>41</sup> See Levinson, *Forgotten Racial Equality*, *supra* note 39, at 373, 398-404.

<sup>42</sup> See Danielle M. Young et al., *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, PLOS ONE, March 2014, at 3.

<sup>43</sup> See generally LEVINSON & SMITH, *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 38.

<sup>44</sup> See Levinson et al., *Devaluing Death*, *supra* note 32, at 542.

<sup>45</sup> See Levinson & Young, *supra* note 40, at 309-10; Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010).

<sup>46</sup> Some studies, for example, show that group-based stereotypes that exist in one culture may be entirely absent in another. In their study of stereotype threat in the United States and Canada, Shih, Pittinsky, and Ambady found that the American stereotype of Asians being “good at math” was not a then-current stereotype among Asian women from Vancouver, Can. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 82 (1999). Thus, when measuring stereotype-threat, culturally bounded responses could be expected. See *id.* at 82-83.

<sup>47</sup> See Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 57 (2006); see also Yarrow Dunham et al., *From American City to Japanese Village: A Cross-Cultural Investigation of Implicit Race Attitudes*, 77 CHILD DEV. 1268, 1278 (2006).

<sup>48</sup> See Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 421, 422 (2006) (“The evidence that racial prejudices develop early and eventually become automatic has led most researchers to conclude that they are relatively difficult to change.”).

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bias, largely due to the difficulty in reducing or eliminating implicit bias.<sup>49</sup>

For present purposes, it is important to clarify the specific mechanisms whereby we propose that an implicitly biased association between race and retribution has developed in America. This Part, in turn, is structured around these mechanisms, which separate our implicit bias claim into two categories: one historical, and the other rooted in psychological studies of the human emotion surrounding retribution. The historical argument is straightforward: racialized punishment has so long defined the American criminal justice system that it has become impossible to conceptualize punishment without a racial element. The emotion-based element focuses on the human psychological forces that power the human desire to increase or decrease retribution: fear, anger, and empathy. When a decision-maker feels fear, anger, or both, the need for retribution automatically becomes heightened. When a decision-maker empathizes with the transgressor, however, the need for retribution becomes lessened. As we describe below, social science has demonstrated that most Americans automatically feel disproportionate fear and anger when racial elements are present.<sup>50</sup> Similarly, Americans' ability to empathize is at its lowest when racial group membership is relevant.<sup>51</sup>

A. *The Racial History of Retribution: Automatizing the Association*

The deep connection between race and retribution in American history underlies this Article's modern-day claim that retribution can no longer be separated cognitively from race. Just as implicit racial bias has emerged from a cultural and historical association between certain groups and negative attitudes toward those groups, we propose that the historical use of punishment in racialized ways has led to the cognitive inseparability of race and retribution.

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<sup>49</sup> See Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 137-39 (2004) (addressing the topic of "[w]hat should we do about implicit biases" and recommending policy creation efforts, such as affirmative action, which would combat the harmful effects of implicit bias). Although much of the scholarship demonstrates that permanently reducing implicit bias is extremely difficult, some recent efforts have made progress in developing new intervention paradigms that seek to create more lasting reduction of implicit biases. See, e.g., Patricia G. Devine et al., *A Gender Bias Habit-Breaking Intervention Led to Increased Hiring of Female Faculty in STEMM Departments*, 73 J. EXPERIMENTAL SOC. PSYCHOL. 211 (2017) (noting that psychological interventions can promote gender equity).

<sup>50</sup> See *infra* notes 69–113 and accompanying text.

<sup>51</sup> See *infra* notes 114–135 and accompanying text.



As we have described, retribution has deep roots in the criminal law.<sup>52</sup> Those roots, though, have long been infected painfully with racial bias. Indeed, positive law used to treat Black Americans as though a transgression merited greater retribution if committed by a Black person than when a White person. “Slaves could receive the death penalty for at least sixty-eight offenses,” Judge Leon Higginbotham and Professor Anne Jacobs said, explaining Virginia law in the 1850s, “whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all.”<sup>53</sup>

Though positive law enshrining disproportionately harsh punishment for Black Americans no longer exists, race has continued to influence the calibration of punishment in such a way that Americans likely can no longer think of retribution as it was meant to be. Racialized retribution continued unhindered beyond the Emancipation of slaves. As Professor Dorothy Roberts explains, “[a]fter Emancipation, racial subjugation was accomplished less explicitly through the definition of crimes. . . . White law makers soon realized that they could return their former chattel to the condition of slaves by imprisoning them for a crime.”<sup>54</sup> For example, many Southern states made petty larceny a serious offense: Georgia law made hog stealing a felony in 1875, and the Missouri law defined grand larceny as the theft of property worth more than ten dollars and provided for punishment of up to five years hard labor.<sup>55</sup>

Retribution is just as racialized now as it was 100 years ago.<sup>56</sup> The modern era of racialized punishment can perhaps best understood in light of “superpredators,” the war on drugs, and capital punishment. In the context of racial politics, Professor Michael Tonry has traced the rhetoric and ensuing panic that led, at least in some significant part, to the punitive policies that allow for retributively extravagant punishments (mostly) for Black people. Tonry refers to the so-called “Southern Strategy,” the use of coded language intended to link Black people to crime and cause fear among moderate White voters, which

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<sup>52</sup> See *supra* notes 15–32 and accompanying text.

<sup>53</sup> Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1955 (1992-1993) (quoting A. Leon Higginbotham & Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969 (1992)).

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 1955-56.

<sup>56</sup> See generally FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (discussing the history of African Americans, lynching, and the death penalty).

was used by some Republican lawmakers, including the Nixon and Reagan campaigns (strong echoes of which continued into the first Bush era).<sup>57</sup> In a very real sense then, the retributive extravagance of the drug laws of the 1980s and '90s were simply continuations of a broader, sadder, historical trend — “The New Jim Crow,” as Professor Michelle Alexander famously dubbed it.<sup>58</sup>

The specific case of capital punishment and its more than a century of continuous historical racialization perhaps best symbolizes the continuing racialized retribution of the American criminal justice system.<sup>59</sup> Historical reflection shows a clear link between race and government sanctioned death, a link that persists in modern statistical analyses of capital punishment. When death penalty abolition gained traction in 1920s Louisiana, for example, editorial boards argued that the elimination of capital punishment would “increase the number of lynchings” and “the vengeance of an outraged citizenship.”<sup>60</sup> The U.S. Supreme Court in *Furman* echoed this theme: “When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’” Justice Stewart wrote, “then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.”<sup>61</sup> Professors Berman and Bibas made a similar argument three decades later in response to a U.S. Supreme Court decision barring the death penalty for the rape of a child (which incidentally is the case where Justice Kennedy warned of retributive excess). There, they argued that the law “channels retributive anger, limiting it to proportional payback and tempering it with neutral

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<sup>57</sup> See MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 2-4, 82 (2011) (describing the “Southern Strategy”); MICHAEL TONRY, *MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA* 82 (1995).

<sup>58</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

<sup>59</sup> See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 3 (2002) (tracing the changes in the death penalty, from the category of crimes considered capital offenses, arguments for and against capital punishment, and the varied methods of execution); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA, *supra* note 56, at 1 (“[T]here is a long and deep connection between this country’s racial politics and its uses of the killings of African-Americans through lynchings and the death penalty . . .”). See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1st ed. 1991) (discussing the intersection of race relations and America’s criminal justice system).

<sup>60</sup> G. Ben Cohen, *McCleskey’s Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 94 (2012) (citing ALEX MIKULICH & SOPHIE CULL, JESUIT SOC’Y RESEARCH INST., *DIMINISHING ALL OF US: THE DEATH PENALTY IN LOUISIANA* (2012), [http://catholicismobilizing.org/wpcontent/uploads/2012/03/Death-Penalty-inLouisiana\\_Full.pdf](http://catholicismobilizing.org/wpcontent/uploads/2012/03/Death-Penalty-inLouisiana_Full.pdf)).

<sup>61</sup> *Furman v. Georgia*, 408 U.S. 238, 308 (1972).

adjudicators and punishers.” Berman and Bibas wrote that “[i]f one squelches the impulse rather than channeling it, people may take the law into their own hands.”<sup>62</sup> Taken together, this popular, judicial, and scholarly reliance on capital punishment as a means to curb extralegal lynchings, is vulnerable to attack on the grounds that the nation has sanitized and given the force of law to what essentially is racist vigilante justice.

In the modern era, study after study confirms the continuing role of race in capital punishment. Professor Craig Haney frames the problem broadly, explaining that “between 1930 and 1982, African Americans constituted between 10% and 12% of the United States population, but 53% of those executed.”<sup>63</sup> When detailed statistical analyses are employed by researchers who seek to compare capital sentencing outcomes in similarly heinous killings, a striking and often confirmed finding (across many jurisdictions) is that Americans who murder White victims are significantly more likely to receive a death sentence than Americans who murder Black victims.<sup>64</sup>

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<sup>62</sup> Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 360 (2008).

<sup>63</sup> Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1559 (2004) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT 1982-9 (1984)).

<sup>64</sup> See, e.g., DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 2 (1990) (“[A]lthough the levels of arbitrariness and racial discrimination in capital sentencing have declined in the post-*Furman* [v. *Georgia*] period, none of these promises have been fulfilled; moreover, given the Supreme Court’s decision in *McCleskey v. Kemp*, little improvement in this regard appears likely.”); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING xiii (1989) (“The Supreme Court has more or less acknowledged that race continues to play a major role in capital sentencing in America . . . . But the Court has decided to do nothing about this form of discrimination and to refuse to hear future claims based on it.”). See generally U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), <https://www.gao.gov/assets/220/212180.pdf> (finding a greater likelihood that a defendant would be charged with capital murder or receive the death penalty if the victim was White, rather than Black, as opposed to an outcome influenced by the race of defendant); Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 40 n.21 (2007) (“Most of the studies find that the race of the victim is the principal determiner of sentence: killers of white victims are far more likely to be sentenced to death than killers of African-American victims.”); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004) (finding empirical evidence that the pre-*Furman* pattern of race-of-victim discrimination continues to characterize many death penalty systems post-*Furman*); David C. Baldus & George Woodworth, *Race Discrimination in the*

These powerful studies underscore the point that the most retributive punishment of all has been nearly continuously racialized. To give meaning to these overwhelming statistics, consider a story from Caddo Parish, La. Caddo Parish, La., is tied for the third most lynchings per capita of any county in the United States,<sup>65</sup> and it is a place where the confederate flag flew proudly outside the county courthouse until 2011.<sup>66</sup> Though there is a sizable Black population in Caddo Parish today, a study found that capital juries are mostly White because prosecutors strike prospective Black jurors three times as often as White jurors.<sup>67</sup> When a reporter asked Dale Cox, then Caddo Parish's head prosecutor, about the wisdom of the death penalty in light of a death row exoneration, Cox effortlessly reflected the ties that bind race and retribution, telling a reporter: "I think we need to kill more people," "I think revenge is a legitimate motive," and that "[w]e're not considered a society anymore — we're a jungle."<sup>68</sup>

These examples, in historical context, demonstrate that the connection between race and retribution persists in today's criminal

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*Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 213-14 (2003) (documenting evidence revealing that while the defendant's race alone is not significant in capital sentencing, race-of-victim factors, particularly Black defendant-White victim cases, offer the greatest disparate treatment and impact in sentencing); John H. Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167 (2004) (examining the composition of the death rows in eight states and finding that "[t]he different death sentence rates for black defendant-black victim cases and black defendant-white victim cases confirm the well-known race-of-victim effect"); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM. J. CRIM. JUST. 17, 30 (1995) (controlling for relevant factors, "Blacks who killed Whites were more likely to be charged with a capital offense and to receive a death sentence").

<sup>65</sup> See EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017).

<sup>66</sup> See Jeff Ferrell, *Confederate Flag Comes Down Friday*, KSLA NEWS 12 (Nov. 3, 2011, 8:50 PM), <http://www.ksla.com/story/15955226/caddo-parish-commission-votes-to-remove-confederate-flag/> [<https://perma.cc/4DU4-8GQ5>].

<sup>67</sup> See Alexandria Burris, *Black Jurors More Likely To Be Struck from Caddo Juries*, SHREVEPORT TIMES (Aug. 17, 2015, 11:15 AM), <https://www.shreveporttimes.com/story/news/local/2015/08/17/black-jurors-likely-struck-caddo-juries/31852745/> [<https://perma.cc/7LL9-PXHM>].

<sup>68</sup> Radley Balko, *How a Fired Prosecutor Became the Most Powerful Law Enforcement Official in Louisiana*, WASH. POST (Nov. 2, 2017, 6:00 AM), <https://www.washingtonpost.com/news/the-watch/wp/2017/11/02/how-a-fired-prosecutor-became-the-most-powerful-law-enforcement-official-in-louisiana/> [<https://perma.cc/76H9-QQE8>]; Andrew Cohen, *Sorry Seems to be the Hardest Word*, BRENNAN CTR. FOR JUSTICE, (March 31, 2015), <http://www.brennancenter.org/analysis/sorry-seems-be-hardest-word> [<https://perma.cc/WDE2-3NPS>].

justice system. Yet, we do not believe that all examples of race and retribution today remain so easy to spot. In psychological terms, the shifting of bias from the “explicit” (or outspoken) to the “implicit” (or hidden) may track retribution’s shifting racialized role, from outright racial discrimination to embedded and structural racism. In light of the tight and continuing historical connection between race and retribution, and considering the fundamental importance of retribution’s supposed fairness to the American legal system, we now turn to investigate what the role of modern social science teaches us about how the human mind can turn culture into hidden automatic cognitive reality.

B. *Fear, Anger & Lack of Empathy: Racialized Corruption of the Psychological Levers of Retribution*

We have proposed that the association between race and retribution has become so historically infused in American culture that it has essentially become part of Americans’ automatic minds. Yet, this is only one reason why we suggest that an implicit race-retribution bias has emerged. The other reason is that the psychological fulcrums of retribution have also been corrupted by racial stereotypes. Thus, the race-retribution bias that we propose — and test in Part III — comes both from a history of racialized retribution as well as the racialized and psychological corruption of retribution’s drivers: fear, anger, and empathy. Each of these concepts (which in the context of retribution are meant to be pure and unpolluted measurements of punishment deservingness) pivot in intensity in direct response to racial cues.

1. Race and Fear

When societal fear spikes, in relation to real or perceived increases in crime, a retributive impulse kicks in and the punishment dial is often turned way up.<sup>69</sup> As Professor Paul Robinson writes, “People’s opinions

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<sup>69</sup> See, e.g., Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 CRIME L. & SOC. CHANGE 147, 147, 152-53 (1999) (discussing how school shootings around the nation have prompted several severe and punitive responses, including the suspension of bail for students charged with bringing guns to school, even though empirical data suggest that despite the shootings, schools remain safe places for children and school violence is lower today than it was several years ago); Dawn Rothe & Stephen Muzzatti, *Enemies Everywhere: Terrorism, Moral Panic, and US Civil Society*, 12 CRITICAL CRIMINOLOGY 327, 339-42 (2004) (noting that the presentation of terrorism and terrorists by the media after the attacks of September 11, 2001 contributed to unnecessary levels of panic and fear and disproportionate reactions).

about the sentences required for proper criminal punishment fluctuate as a function of their current perceptions of the threat of crimes and, more generally, their state of fear.<sup>70</sup> Indeed, Professor Peter Enns, a political scientist at Cornell University, documented that across nearly 400 national surveys over sixty years, “the public’s increasing punitiveness has been a primary determinant of the incarceration rate . . . .”<sup>71</sup> Enns found that those results held constant even after controlling for “the crime rate, illegal drug use, inequality, and the party in power.”<sup>72</sup> Fear thus drives the retributive impulse, and prosecutors and lawmakers respond with harsher punishment.

This relationship between fear and the retributive impulse exists not only in the lawmaking or policy function, but also at the retail level — for example, in the context of police use of excessive force. Attention to excessive use of force skyrocketed in recent years in the wake of the shootings of Michael Brown in Ferguson, Miss., and Tamir Rice in Cleveland, Ohio, among other victims.<sup>73</sup> In his book, *Violence: A Micro-sociological Theory*, Professor Randall Collins describes the concept of “forward panic” — the process whereby fear escalates during heated interpersonal interactions, and when the momentum shifts in the conflict, a surge of adrenaline results in an overkill response that would not have happened under ordinary conditions.<sup>74</sup> The kind of actions that derive from forward panic are simple vengeance, payback, revenge — even if not consciously so. It is the video footage of that retributive

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<sup>70</sup> PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* 136 (2013); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 10 (2001) (noting that “[s]ince the 1970s fear of crime has come to have new salience,” resulting in the development of policies designed to reduce fear levels, not crime, and that according to public opinion research, a large public majority believes that crime rates are rising and “there is little public confidence in the ability of the criminal justice system to do anything about this”).

<sup>71</sup> Peter K. Enns, *The Public’s Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 857-58 (2014).

<sup>72</sup> *Id.* at 858.

<sup>73</sup> See, e.g., Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/video-shows-cleveland-officer-shot-tamir-rice-2-seconds-after-pulling-up-next-to-him.html> (discussing a White officer’s shooting of a twelve-year-old black child holding a toy gun); see also Jonathan Cohn, *Darren Wilson Walks: No Indictment for Michael Brown’s Killer*, NEW REPUBLIC (Nov. 24, 2014), <http://www.newrepublic.com/article/120395/ferguson-grand-jury-makes-issues-no-charges-officer-wilson> (discussing a grand jury’s decision not to indict a White police officer who shot and killed an unarmed Black teenager).

<sup>74</sup> See RANDALL COLLINS, *VIOLENCE: A MICRO-SOCIOLOGICAL THEORY* 98-104 (2008) (describing the phenomenon of forward panic, and providing examples).

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surge — the continued force after the threat has ceded — often against unarmed Black men, that so infuriated millions of Americans.

The fear that drives retributive demand is itself shaped by race. “There is nothing more painful to me at this stage in my life,” wrote renowned reverend and civil rights icon Jesse Jackson, “than to walk down the street and hear footsteps . . . then look around and see somebody white and feel relieved.”<sup>75</sup> How can it be that one of the most respected Black leaders in America experiences fear at the sound of people walking behind him when he believes those people to be Black? Does Blackness itself trigger or amplify a sense of danger; a fear of crime victimization? Indeed, social scientists have confirmed that race often serves to trigger fear, one of the core elements that predict retributive urges.

Cognitive psychology has shown that fear becomes disproportionately activated when Americans experience and interact with African Americans.<sup>76</sup> For example, Professor Matthew Lieberman and his colleagues found that people given a brain scan while being exposed to a Black face — as opposed to a White face — show significantly more activity in the area of the brain thought to be involved in the processing of emotional responses to perceived threats.<sup>77</sup> Moreover, when Professor Frank Gilliam inserted either a Black mugshot or a White mugshot into a fifteen-minute news program, participants who saw the Black mugshot registered greater concern for violent crime and also were more likely to blame Black Americans for rising crime rates.<sup>78</sup> This racially-driven perceived dangerousness enhances the fear response, which, in turn, heats up the already flammable relationship between fear and retributive excess.

Political scientists have also explored the relationship between race and fear. Professor Wesley Skogan, for example, found that the closer in proximity one lives to Black Americans, or the more racial bias one

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<sup>75</sup> Bob Herbert, Opinion, *In America; A Sea Change on Crime*, N.Y. TIMES (Dec. 12, 1993), <http://www.nytimes.com/1993/12/12/opinion/in-america-a-sea-change-on-crime.html> [https://perma.cc/44LW-XJYT].

<sup>76</sup> See Matthew D. Lieberman et al., *An fMRI Investigation of Race-related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720, 720 (2005). See generally Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 435-36 (1999) (“[T]he perception that an outgroup constitutes a threat to ingroup interests or survival creates a circumstance in which identification and interdependence with the ingroup is directly associated with fear and hostility toward the threatening outgroup and vice versa.”).

<sup>77</sup> See Lieberman et al., *supra* note 76, at 720.

<sup>78</sup> See Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563-64 (2000).

exhibits, the more she or he tends to be fearful of crime.<sup>79</sup> The findings also accord with a 2012 study by Justin Pickett and colleagues showing that fear of victimization increased when study participants were informed that the Black population is increasing.<sup>80</sup>

In the 1990s, juvenile crime became racialized, and the widespread fear around the rise in juvenile homicides drove harsher punishment. “[F]atherless, Godless, and jobless,” is how Professors John DiIulio and John Fox described the “breed” of juvenile “superpredators” who would “kill, rape, maim, without giving it a second thought.”<sup>81</sup> As Professor Michelle Alexander has pointed out, even Hillary Clinton, campaigning in support of the 1994 Crime Control Bill, partook in the fear-driven racial panic: “They are not just gangs of kids anymore . . . . They are often the kinds of kids that are called ‘super-predators.’ No conscience, no empathy. We can talk about why they ended up that way, but first we have to bring them to heel.”<sup>82</sup> This racialized hysteria sounds laughable today<sup>83</sup>, but in the 1990s this racialized dehumanizing rhetoric relied on a fear-based retributive urge to stir the nation and spurred tough-on-crime legislation.<sup>84</sup>

The retributive impulse, infused with racial undertones, also propelled an unprecedented punitiveness toward drug crimes beginning in the late 1980s and this uneven application of retribution has

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<sup>79</sup> Wesley G. Skogan, *Crime and the Racial Fears of White Americans*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 59 (1995).

<sup>80</sup> See Justin T. Pickett et al., *Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites’ Perceptions of Victimization Risk: Do Racial Stereotypes Matter?*, 50 CRIMINOLOGY 145, 169-70 (2012).

<sup>81</sup> Editorial, *Echoes of the Superpredator*, *supra* note 7; John J. DiIulio, Jr., *The Coming of the Super-Predators*, WASH. EXAMINER (Nov. 27, 1995, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [https://perma.cc/3FWD-DQMS].

<sup>82</sup> Michelle Alexander, *Why Hillary Clinton Doesn’t Deserve the Black Vote*, NATION (Feb. 10, 2016), <http://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/> [https://perma.cc/FMM2-99XE].

<sup>83</sup> Indeed, Professor DiIulio acknowledges his error and Clinton — as the Democratic nominee for President in the 2016 election — went to great lengths to distance herself from her husband’s pro-carceral agenda. See Editorial, *Echoes of the Superpredator*, *supra* note 7 (quoting Professor DiIulio’s admission that “[t]hank god we were wrong” about the existence of superpredators). See also Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on ‘Super-predators’ After Encounter with Activist*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/> [https://perma.cc/3HH6-BZX9].

<sup>84</sup> See Alexander, *supra* note 82; see also Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 613-14 (2000).



continued.<sup>85</sup> Physicians opined on the “crack babies” that the “crack epidemic” in America’s poorest, Blackest neighborhoods would produce.<sup>86</sup> Others warned of drug-related murders spilling out of the inner city and into the Whiter, wealthier neighborhoods that circle around the city like a doughnut.<sup>87</sup> The most obvious example is the fear-fueled moral panic that emerged over crack cocaine, a drug disproportionately used by Black Americans and for decades was disproportionately punished at the federal level relative to powdered cocaine by a measure of 100 to 1.<sup>88</sup> At the state level, the American Civil Liberties Union has documented the imposition of life without parole sentences for non-violent offenders for “simple possession” crimes including possession of “a crack pipe,” “a trace amount of cocaine in clothes pockets that was so minute it was invisible to the naked eye and detected only in lab tests,” “a single, small crack rock at home,” and “two rocks of crack cocaine.”<sup>89</sup>

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<sup>85</sup> See ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 13 (1st ed. 1998) (“Nationally, there are twice as many black men in state and federal prison today as there were men of all races twenty years ago. More than anything else, it is the war on drugs that has caused this dramatic increase: between 1985 and 1995, the number of black state prison inmates sentenced for drug offenses rose by more than 700 percent.”); HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* (May 2000), <https://www.hrw.org/reports/2000/usa/> (reporting various statistics on racial disparities in arrests, prosecutions, convictions, and sentencing between White, Black and Latino Americans); JUSTICE POLICY INST., *FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS* 23, 26 (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/finding\\_direction\\_full\\_report.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction_full_report.pdf) (“The growth in the U.S. prison population has been fueled, in part, by the increase in incarceration for drug offenses. Between 1980 and 2006, the number of people incarcerated for drug offenses in state and federal prisons increased 1,412 percent from 23,900 to 361,276. In 2006, 24 percent of the people in state and federal prisons were there because their most serious offense was a drug offense . . . . Drug policies in the United States . . . are shaped around the belief that drugs fuel crime and reducing drug use is accomplished by penalizing drug-related behaviors.”). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (characterizing the war on drugs and mass incarceration as a system of racial control).

<sup>86</sup> Interview by Michael Martin with Hallam Hurt, Professor, Univ. of Pa. Med. Sch. (July 31, 2013, 12:00 PM) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=207292639> [<https://perma.cc/ZC5L-NP6U>]).

<sup>87</sup> See Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 853-57, 853 n.60 (discussing “crack-related murders”).

<sup>88</sup> See Dvorak, *supra* note 84, at 615.

<sup>89</sup> AM. CIVIL LIBERTIES UNION, *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NON-VIOLENT OFFENSES* 21 (2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf>.

One of the most interesting contexts for a psychological discussion of the intersection of race and fear is policing, and in particular the ways in which police officers choose to use violence in certain encounters. Writing for *The Atlantic*, Seth Stoughton, a police officer turned law professor, suggested that racialized fear (“every encounter, every individual is a potential threat”), which is institutionalized through training (“[o]fficers ... are shown painfully vivid, heart-wrenching dash-cam footage of officers being beaten, disarmed, or gunned down after a moment of inattention or hesitation”), is a prime reason why police shootings happen.<sup>90</sup> Against this baseline level of fear, associations between Black faces and dangerousness, as Dr. Jennifer Eberhardt has found,<sup>91</sup> only elevate fear levels. And, as Professor Stoughton put the point, “[b]ecause officers use more force when they perceive a greater threat, unconscious bias can lead officers to react more aggressively when confronting black men than they would when confronting others in otherwise identical situations.”<sup>92</sup>

The connection between fear and racialized retribution also exists in the context of capital punishment. Consider the case of Duane Buck, a Black man with an IQ score of seventy-four,<sup>93</sup> who was scheduled for execution in 2016 until his appeal was eventually heard by the Supreme Court that year.<sup>94</sup> In Texas, before jurors can recommend a death sentence, the jury must find that the defendant would present a future danger to society if he received a life sentence instead of the death penalty. At the penalty phase of Buck’s capital murder trial, an expert witness testified that though Buck posed a low overall threat, “race” is a factor in future dangerousness calculations: “It’s a sad commentary that minorities, Hispanics and black people, are overrepresented in the criminal justice system.”<sup>95</sup> The expert, Walter Quijano, later agreed

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<sup>90</sup> Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> [<https://perma.cc/8QAZ-BKP4>].

<sup>91</sup> Eberhardt et al., *supra* note 37, at 889.

<sup>92</sup> Stoughton, *supra* note 90.

<sup>93</sup> *Ex parte Duane Edward Buck*, 418 S.W.3d 98, 101 (2013) (noting that Buck had “an I.Q. of 74, at the ‘low end of the borderline range’”).

<sup>94</sup> *Duane Buck Resentenced to Life After Supreme Court Reversed Racially-Biased Death Sentence*, EQUAL JUSTICE INITIATIVE (Oct. 11, 2017), <https://ej.org/news/duane-buck-resentenced-to-life> [<https://perma.cc/M8R7-8334>]. Buck was later re-sentenced to life in prison. *Id.*

<sup>95</sup> Adam Liptak, *Citing Racist Testimony, Justices Call for New Sentencing in Texas Death Penalty Case*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/duane-buck-texas-death-penalty-case-supreme-court.html> [<https://perma.cc/92UC-D6PU>].

with the prosecutor that “the race factor, black, increases the future dangerousness for various complicated reasons.”<sup>96</sup> During closing argument, as part of her argument that Buck deserved to die, the prosecutor reminded the jury that Quijano “told you that there was a probability that the man would commit future acts of violence.”<sup>97</sup>

## 2. Race and Anger

Fear is not the only emotion that fuels the retributive appetite. “People punish in proportion to the extent that transgressions make them angry,” writes Joshua Greene, a Harvard experimental psychologist who studies retribution.<sup>98</sup> Professor Martha Nussbaum provides insight into why anger finds an outlet in retribution: “emotions contain within themselves a directedness toward an object” such that “anger is not simply an impulse, a boiling of the blood,” but rather anger is “directed at someone, namely, a person who is seen as having wronged me.”<sup>99</sup> Anger, then, reflects an emotional desire for retribution

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<sup>96</sup> Erwin Chemerinsky, *Chemerinsky: Why the Supreme Court’s Ruling on Race-Based Evidence Matters*, ABA J. (Mar. 2, 2017, 8:30 AM), [http://www.abajournal.com/news/article/why\\_buck\\_v\\_davis\\_matters](http://www.abajournal.com/news/article/why_buck_v_davis_matters) [<https://perma.cc/TG8A-AZJX>].

<sup>97</sup> R. J. MARATEA, *KILLING WITH PREJUDICE: INSTITUTIONALIZED RACISM IN AMERICAN CAPITAL PUNISHMENT* 147 (2019). Meanwhile, according to a letter that twenty-seven Evangelical Christian leaders sent to the Governor of Texas, in the fifteen years that he has lived on death row, “Buck has not received a single disciplinary write-up,” has “ministered to other prisoners and served as a role model to them,” and has “taken responsibility” and “expressed deep remorse” for his crimes. Marc Hyden, *27 Evangelical Leaders Call for a New Fair Sentencing Hearing for Death Row Prisoner Duane Buck*, CONSERVATIVES CONCERNED ABOUT DEATH PENALTY (Nov. 22, 2013), <https://conservativesconcerned.org/27-evangelical-leaders-call-for-a-new-fair-sentencing-hearing-for-death-row-prisoner-duane-buck/> [<https://perma.cc/N2UF-A4TD>].

<sup>98</sup> Greene, *supra* note 33, at 51. Anger may influence punishment at many different points during a trial. For example, “[a] crime scene photo or testimony from a murder victim’s parent might evoke anger or outrage toward the defendant, and thus function as an appraisal of the defendant’s conduct.” Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 62 ARIZ. ST. L.J. 1003, 1007 (2014). “Angry jurors may be less likely to carefully and thoroughly evaluate a photo or a statement or the credibility of a witness, instead relying solely on their anger,” and “[j]urors who are angry with the defendant . . . may be motivated to seek out other evidence that validates their anger and to minimize or dismiss evidence that does not,” both of which could impact jurors’ punishment of the defendant. *Id.* at 1008.

<sup>99</sup> MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION IN PUBLIC LIFE* 60 (1995).

— a desire for “payback to condemn the crime, vindicate the victim, and denounce the wrongdoer.”<sup>100</sup>

Professor Devon Johnson, a criminologist, found evidence for this anger-retribution link in public opinion data.<sup>101</sup> Specifically, even after “controlling for other factors such as racial prejudice, fear of crime, causal attributions for criminal behavior, and political ideology,” national public opinion data demonstrates that “anger about crime is a significant predictor of punitive attitudes.”<sup>102</sup>

As with fear, race has been shown repeatedly to be related to the way anger functions in the human mind.<sup>103</sup> Consider, for example, the research that Professor John Bargh and colleagues performed on participants who were asked to complete repetitive, boring computer tasks.<sup>104</sup> After a participant completed 130 trials, she or he would hear a beep and see an error message (“F11 error: failure saving data”).<sup>105</sup> The experimenter then told the participant that she would need to redo

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<sup>100</sup> Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. 355, 360 (2008); see also Bandes & Salerno, *supra* note 98, at 1005 (noting that “anger toward the defendant elicited by victim impact statements may result in an inability to remain open to evidence favoring the defense, to greater certainty about the verdict, and to a desire to punish”); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 443-44 (2003) (footnotes omitted) (“[T]he experience of anger is accompanied by a desire to attack, an instinct that is easily translated into a desire for punishment.”).

<sup>101</sup> See Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 PUN. & SOC. 51, 51-62 (2009); see also Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 570 (1998) (finding that inducing anger in people who were later asked to award tort damages in a seemingly unrelated study awarded more damages to a tort plaintiff and judged a defendant to be more deserving of punishment). *But see* Nadler & Rose, *supra* note 100, at 436 (finding that “[t]here were no significant differences in participants’ reported experience of feelings of disgust or anger based on the severity of victim impact statements” following a reading of a burglary vignette).

<sup>102</sup> Johnson, *supra* note 101, at 51. Research from the field of behavioral economics also illustrates that an “angry individual will probably try to hurt the agent as a punitive revenge.” Francine Espinoza et al., *Anger in Ultimatum Bargaining: Emotional Outcomes Lead to Irrational Decisions*, 33 N. AM. ASSOC. IN CONSUMER RES. 264 (2006). This may be so even when that retributive response is “costly,” because “people often have tremendous difficulty restraining their costly aggressive impulses.” Cynthia Wang et al., *Time Delay, Retribution, and Emotional Regulation*, 116 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 46, 49 (2011).

<sup>103</sup> See *infra* notes 110–123 and accompanying text.

<sup>104</sup> John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238 (1996).

<sup>105</sup> *Id.*

the entire task from the beginning.<sup>106</sup> A hidden camera captured the responses of participants. Participants primed with a consciously imperceptible image of a Black face immediately before the computer crash exhibited significantly more hostile reactions — including anger — than participants who did not see the image of the Black face.<sup>107</sup> In other words, among a group of participants provoked with a frustrating task, exposure to a Black face prime amplified hostility.

Social psychologist Nilanjana Dasgupta and colleagues posit that anger produces “a psychological readiness to evaluate outgroups negatively vis-à-vis ingroups, thus creating an automatic prejudice against the outgroup from thin air.”<sup>108</sup> For example, though not specifically in the context of Black-White bias, Dasgupta and colleagues found that participants who experienced more anger showed more anti-Arab bias on an implicit association test than participants who experienced less anger.<sup>109</sup> Nonetheless, the principle is the same: anger enhances out-group bias.

So far, this discussion of racialized anger and retribution has assumed a progression — race amplifies anger which in turn amplifies retributive impulse. But there is another pathway through which race and anger operate together. Not only do people feel more anger themselves in a racialized context, they additionally perceive out-group others to be angrier. For example, researchers have shown that people perceive “anger” or “hostility” in Black faces faster and with more intensity than when the emotive faces are White.<sup>110</sup> Moreover, in the context of a school fight, study participants perceive shoves as more aggressive when the person who does the shoving is Black.<sup>111</sup> Thus, in perceiving both actions and emotions in the faces of others, people tend to see Black Americans as more hostile.<sup>112</sup>

Finally, as an additional amplification of the role of anger in the retributive urge, researchers have shown that anger is highly

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<sup>106</sup> *Id.*

<sup>107</sup> *See id.* at 239.

<sup>108</sup> David DeSteno et al., *Prejudice from Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 *PSYCHOL. SCI.* 319, 323 (2004).

<sup>109</sup> Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 *EMOTION* 585, 589 (2009).

<sup>110</sup> *See* Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 *PSYCHOL. SCI.* 640, 643 (2003).

<sup>111</sup> *See* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 590, 596 (1976).

<sup>112</sup> *See, e.g., id.*; Hugenberg & Bodenhausen, *supra* note 110, at 643.

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contagious.<sup>113</sup> Thus, again in the context of policing, if a police officer detects anger in the face of a Black suspect or prisoner (and because anger is a contagious emotion), the officer becomes angry and that anger amplifies the demand for retribution. Consider a prison guard who threatened to kill an old man who would not comply with his orders, or a police officer who believed that a Black driver was “resisting” arrest, or the Louisiana man whose friends back home in the “jungle” needed to be sent a message. Would a White prisoner look a little less hostile, a White driver a little less aggressive, a White defendant a little less angry?

### 3. Race and Lack of Empathy

Unlike anger and fear, which intensify retributive demand, empathy serves to lessen the impact of it. Yet, here too, racial cues likely automatically interfere with Americans ability to counterbalance their own desires to punish harshly. Thus, not only are fear and anger themselves automatically intensified by racial stereotypes, but the primary safeguard to protect over-punishment — empathy — will be similarly skewed.<sup>114</sup>

People often view those who commit crimes, especially violent crimes, as “lacking core human capacities,” “subhuman and beastly,” “less sensitive to pain,” and more deserving of “severe and coercive forms of punishment.”<sup>115</sup> Cesare Lombroso, the so-called “father of criminology,” “proposed that criminality was biological and that criminals were atavistic savages — sub-humans that resembled apes in both their physical and behavior characteristics.”<sup>116</sup> Seeing criminals as a “species of bloodthirsty beasts,” Lombroso rejected empathy for offenders because he believed they did not deserve our “compassion.”<sup>117</sup> In more modern times, neuroimaging studies reveal that people react to extremely marginalized social groups, such as homeless people, drug addicts and prisoners with a complete “absence of the typical neural

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<sup>113</sup> See Shirley Wang, *Contagious Behavior*, ASS'N PSYCHOL. SCI. OBSERVER (Feb. 1, 2006), <https://www.psychologicalscience.org/observer/contagious-behavior> [https://perma.cc/CU8M-L8HG].

<sup>114</sup> See Sophie Trawalter et al., *Racial Bias in Perception of Others' Pain*, PLOS ONE 1, 7 (2012) (finding race effects on observers' ratings of pain).

<sup>115</sup> Brock Bastian et al., *The Roles of Dehumanization and Moral Outrage in Retributive Justice*, PLOS ONE, April 2013, at 1.

<sup>116</sup> Rebecca C. Hetey & Jennifer L. Eberhardt, *Cops and Criminals: The Interplay of Mechanistic and Animalistic Dehumanization in the Criminal Justice System*, in HUMANNESS AND DEHUMANIZATION 147, 149 (Paul G. Bain et al. eds., 2013).

<sup>117</sup> *Id.*

signature for social cognition.”<sup>118</sup> As psychologists Rebecca Hetey and Jennifer Eberhardt put the point, dehumanization is an important prerequisite to retributive excess because “people are more likely to commit violence against a group they do not view as fully human, and are more likely to view such violence as acceptable because its target, as not fully human, is not deserving of the moral concern that humans owe each other.”<sup>119</sup> As a matter of history, social fact and even neuroscience, then, people tend to react to criminals by dehumanizing them.

Race can further block empathy when a target of the retributive impulse is made out to be less than fully human.<sup>120</sup> Psychologist and professor Phillip Goff and colleagues, for example, connect racialized dehumanization by demonstrating the still-present connection between race and animal stereotypes.<sup>121</sup> In their studies, the researchers found, among other things, that study participants who were primed with a consciously imperceptible image of a Black face were faster to recognize

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<sup>118</sup> Lasana Harris & Susan Fiske, *Dehumanizing the Lowest of the Low*, 18 *PSYCHOL. SCI.* 846, 852 (2006).

<sup>119</sup> Hetey & Eberhardt, *supra* note 116, at 148 (citations omitted); see also Phillip Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 292, 292-94 (2008) (discussing pervasive Black-ape stereotypes and their role in increased dehumanization of and violence against Black Americans).

<sup>120</sup> Professors Mona Lynch and Craig Haney traced the cause of some of these disparities to differing evaluation of the strength of mitigation evidence depending on the race of the defendant. See Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 *MICH. ST. L. REV.* 573, 577 (2011) (noting “[s]everal recent studies have documented racial bias against Black defendants, apart from the interactive effect that the race of defendant has with the race of victim” and indicating that race of defendant bias is “especially likely to operate in the juries’ penalty phase decision making”); *id.* at 603 (“[R]acial bias is often manifested through a lack of empathy for the defendant and disregard for mitigating evidence — especially mitigation that stems from the defendant’s life experiences that jurors may perceive are not directly connected to the crime itself.”). Dubbing these disparities the “empathic divide,” Lynch and Haney concluded that they “were likely the result of the jurors’ inability or unwillingness to empathize with a defendant of a different race.” *Id.* at 584. This evidence of an empathy gap aligns with the results of interviews with over one thousand jurors who served on real-life capital juries that confirm this dynamic: “White and Black men typically came to very different conclusions about what they perceived to be the Black defendant’s remorsefulness, dangerousness, and his ‘cold-bloodedness,’” and “Black men reported being more empathic toward the defendants in these cases than any other category or group of juror.” *Id.* at 580. Since capital jurors are predominately White, the empathic divide is about the inability of White jurors “to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence.” *Id.* at 584.

<sup>121</sup> See Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 292, 292 (2008).

a blurry image as an ape than were participants primed with a White face.<sup>122</sup> Moreover, when primed with an image of an ape, and then shown a screen with both a White face and a Black face, participants identified a visible “dot probe” positioned over a Black face more quickly than when not primed.<sup>123</sup> In other words, there is an ease of association between Black faces and apes.<sup>124</sup> This dehumanizing linkage has disturbing consequences. Professor Goff and colleagues showed a video of police officers severely and repeatedly striking a Black suspect at the conclusion of a car chase.<sup>125</sup> When participants were primed with the word “ape,” they were more likely to report that the use of force was appropriate.<sup>126</sup>

Professors Aneeta Rattan and her colleagues investigated the effects of racialized empathy in a study where participants read about a fourteen-year-old boy who sexually assaulted an elderly woman.<sup>127</sup> Participants who read about a Black juvenile, as opposed to those who read about a White juvenile, exhibited increased support for the idea that juveniles and adults are similarly culpable for their actions.<sup>128</sup> In other words, race appears to block youthfulness as a mitigating factor.

Professor Levinson, Robert Smith, and Dr. Danielle Young found, in a 2014 study of jury-eligible citizens in six leading death penalty states, that citizens implicitly devalued the lives of Black Americans compared to White Americans on an IAT test designed to measure possible bias in the implicit relative value of White and Black lives.<sup>129</sup> The researchers asked jury-eligible participants to group together photos of White and Black Americans with words that represent either value or lack of value. The results of the study found that participants associated Black Americans with worthlessness and White Americans with worth, a

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<sup>122</sup> *Id.* at 295-96.

<sup>123</sup> *Id.* at 298.

<sup>124</sup> *Id.* at 292.

<sup>125</sup> *Id.* at 302.

<sup>126</sup> *Id.*

<sup>127</sup> Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLoS ONE, May 2012, at 2.

<sup>128</sup> *See id.*

<sup>129</sup> Levinson et al., *Devaluing Death*, *supra* note 32, at 553, 556, 559. Interestingly, statistical analysis also revealed that the bias gap between death-qualified and excludable jurors was driven by the exclusion of non-White jurors from the jury pool through the process of death-qualification. *Id.* at 559-60. In other words, death qualification, supposedly a race-neutral process integral to capital trials, might itself lead to juries disproportionately likely to dehumanize Black defendants. *See id.*



finding that connects directly to the implicit harms of racialized value and empathy.<sup>130</sup>

There is an interesting twist when it comes to dehumanization, and especially the link between race and pain: the dehumanization of Black victims can further lead to an undervaluing of harm.<sup>131</sup> When a person witnesses another person in pain, she or he empathizes with that person's suffering.<sup>132</sup> However, when the bearer of pain is Black, and especially if the observer is White, implicit racial bias can mute the empathic response.<sup>133</sup> A 2012 study by Dr. Sophie Trawalter and colleagues found that White people, including medical professionals, rate pain inducing situations — a stubbed toe, getting a door slammed shut on one's hand, a paper-cut — as less painful when the bearer of the pain was Black than when she or he was White.<sup>134</sup> These results accord with other studies showing that study participants show less activity in the “pain matrix” of the brain when seeing a needle penetrate the face of an out-group member (“them”) than when the same needle penetrates the face of an in-group member (“us”).<sup>135</sup>

The psychological levers of retribution — fear, anger, and lack of empathy — are thus all part of the implicit racial bias matrix. These racialized levels amplify the close connection between race and retribution, and support our contention that race and retribution have become inextricably intertwined. Having set forth the theory behind our claim, we sought to test it empirically. The empirical study we present in the next Part investigated our thesis in a national study of jury-eligible Americans.

### III. THE EMPIRICAL STUDY: A NATIONAL TEST OF THE RACIAL ARCHITECTURE OF RETRIBUTION

Building upon the historical connection between race and retribution, as well as social science theory demonstrating that the core pillars for retribution are each tainted by implicit bias, we set out to design an empirical study that could test whether retribution has indeed become automatically associated with race in ways that are deeply and

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<sup>130</sup> *Id.* at 559.

<sup>131</sup> See Matteo Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, FRONTIERS PSYCHOL., May 2011, at 5-6.

<sup>132</sup> See *id.* at 1.

<sup>133</sup> See *id.* at 4-6.

<sup>134</sup> Trawalter et al., *supra* note 114, at 3-4.

<sup>135</sup> See, e.g., Xiaojing Xu et al., *Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses*, 29 J. NEUROSCIENCE 8525, 8525, 8528 (2009).

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automatically engrained in Americans' cognitions. We thus designed a novel Implicit Association Test ("IAT") and deployed it, along with a range of punishment-related measures, across a national sample of over 520 jury-eligible citizens. The study provided us the opportunity to analyze the potentially long-hidden interaction of retribution and race in the criminal justice system. This Part reports in detail the empirical study, beginning with the methods we employed and concluding with the study results.

### A. *Methods*

#### 1. Jury-Eligible Participants

We recruited a national sample in order to determine whether retribution has become inexorably associated with race, and in particular whether the racial architecture of retribution has led American citizens to think about Black Americans in a manner infused with an implicit desire to punish. The study included a diverse group of 522 jury-eligible citizens.<sup>136</sup> Participants ranged in age, 38.4% of participants falling within the ages of 31 to 40.<sup>137</sup> Of the participants in the study, 44.8% identified as female and 55.2% identified as male. In terms of racial diversity, 77.5% of participants identified themselves as White, 7.8% identified themselves as Black or African American, 5.5% as Asian American, 3.6% as Hispanic or Latino, and 4.8% as more than one race.<sup>138</sup> As with most jury pools, the participant pool demonstrated substantial educational diversity — 35.1% of participants reported holding a bachelor's degree, 28.4% indicated that they had completed some college, 11.1% reported holding an associate degrees, 12.4% identified as high school graduates, and 6.9% reported holding master's degrees.<sup>139</sup> Politically, participants were asked how strongly they typically agreed with liberals and conservatives on a range of issues: 37.4% reported affiliating very strong or strongly with liberal positions; 15.1% reported affiliating strongly or very strongly with conservative

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<sup>136</sup> Participants were recruited using a national online recruitment service. Participants who were non-citizens or convicted felons were excluded from the dataset, because they would likely be excluded from jury service.

<sup>137</sup> The second most common age range was twenty-one to thirty, with 33.6% falling within this age range. The third most common age range was forty-one to fifty, with 14.9% falling in this range.

<sup>138</sup> Two participants identified themselves as Native American, although several others identified as Native American combined with another group.

<sup>139</sup> Three percent of participants held one of various advanced degrees, including PhD, MD, JD, MBA, and others.

positions, and the remainder reported agreeing slightly more often with liberal positions (17.7%), or slightly more often with conservative positions (15.8%). The remainder of participants identified as being ideologically neutral (13.9%).

## 2. Empirical Study Methods

Testing whether jury-eligible citizens harbor automatically raced associations underlying retribution requires implementing a study method that does not simply rely on jury eligible citizens' self-reports, but instead measures implicit associations. Fortunately, social scientists began using various implicit measures in the 1980s and '90s that can test how people's automatic cognitions work. For example, one such method, known as "priming," exposes participants to either a known or unknown stimuli and then measures responses, comparing an experimental condition to a control condition.<sup>140</sup> For example, researchers have found that research participants who hear rap music songs, as opposed to pop songs, make much harsher judgments of an ambiguous actor's behavior, a finding they attributed to the music's automatic activation of negative Black stereotypes.<sup>141</sup> In relation to criminal punishment, for example, researchers have found that priming citizens with prison photos depicting a greater percentage of Black inmates (as opposed to prison photos depicting a lesser percentage of Black inmates) negatively affects those citizens' willingness to take social action to address harsh punishment laws.<sup>142</sup>

Perhaps the most popular method of measuring implicit associations is the Implicit Association Test. The IAT is a game-like measure that pairs an "attitude object" (such as a particular group, e.g., women or Muslim Americans) with an "evaluative dimension" (positive or negative) and tests how the speed (measured in milliseconds) and accuracy of participants' responses indicate automatic associations

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<sup>140</sup> For examples of priming and a detailed summary of psychological research on priming, see Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW*, *supra* note 38, at 10-15 [hereinafter *Implicit Racial Bias*] (summarizing psychological research on priming and providing examples).

<sup>141</sup> See Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 *GROUP PROCESSES & INTERGROUP REL.* 133, 138-39 (2002).

<sup>142</sup> See Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 *PSYCHOL. SCI.* 1949, 1949-51 (2014) (finding that when California prisons were visually "represented as 'more Black,' people were more concerned about crime and expressed greater acceptance of punitive policies than when the penal institution was represented as 'less Black'").

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between concepts.<sup>143</sup> Study participants sit at a keyboard (frequently at their own computer) and are instructed to match an attitude object (for example, Muslim or Christian, woman or man; gay or straight) with either an evaluative dimension (for example, positive or negative) or an attribute dimension (for example, moral or immoral, valuable or worthless) by pressing a designated response key as quickly as possible. For example, in one task, participants are instructed to rapidly pair together pictures of Muslim American names with positive words. In a second task, participants are instructed to pair Muslim American names with negative words. The variance in the speed at which people can respond to the two tasks is understood as the strength of the attitude. For example, if participants pair the words in the first task faster than those in the second task, they are demonstrating implicitly positive attitudes toward Muslim Americans. If they, however, are faster to respond to tasks that require categorizing old people with slow than tasks that require categorizing old people with fast, they are demonstrating implicit age stereotyping.

Social scientists Nilanjana Dasgupta and Anthony Greenwald have accurately summarized the logic underlying the IAT: “When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty.”<sup>144</sup> Social psychologists Laurie Rudman and Richard Ashmore concur: “The ingeniously simple concept underlying the IAT is that tasks are performed well when they rely on well-practiced associations between objects and attributes.”<sup>145</sup>

Building on our overall theory regarding the racial architecture of retribution, we created what we call the “Retribution IAT.” We developed this IAT to specifically test the hypothesis that retribution and race have become cognitively inseparable. If indeed retribution and race have become cognitively associated even at the automatic level, we predicted that this IAT should likely be able to detect it. Participants in our study were therefore asked to categorize photos of Black and White

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<sup>143</sup> This description of the IAT in this paragraph and the next is derived heavily, sometimes verbatim, from our prior description of it. Levinson et al., *Implicit Racial Bias*, *supra* note 140, at 16-17.

<sup>144</sup> Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

<sup>145</sup> Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 359 (2007).

men and women<sup>146</sup> with words associated with “Payback” (the stimuli words being *Retaliate*, *Revenge*, *Payback*, *Avenge*, *Punish*, *Get Even*, *Retribution*), as well as words associated with “Mercy” (the stimuli words being *Leniency*, *Redemption*, *Forgive*, *Mercy*, *Pardon*, *Compassion*, and *Sympathy*). Thus, in the first task,<sup>147</sup> participants were instructed to group together Black faces with Payback words, as well as White faces with Mercy words, and in the second task, participants were instructed to group together Black faces with Mercy words, as well as White faces with Payback words. If participants more quickly associated Black faces with Payback words, and White faces with Mercy words, as compared to Black faces with Mercy words, and White faces with Payback words, we could thus conclude that a Race-Retribution implicit bias exists.

Because we were interested not only in implicit associations between race and retribution, but also how these associations may manifest in decisions regarding criminal punishment, we asked participants a range of questions, including self-report measures designed to measure their support of retributive and mercy punishment philosophies. The punishment philosophy questions, in particular, consisted of four items, two formulated to measure support for retributive punishment (“A person who commits the harshest crime deserves the harshest punishment” and “Those who hurt others deserve to be hurt in return”), and two formulated to measure mercy or rehabilitation-based punishment (“People who commit serious crimes often should receive treatment instead of punishment” and “People who commit serious crimes sometimes deserve leniency”).<sup>148</sup> Participants were asked how much they agreed or disagreed with those statements on a 1-7 scale. Responses to the two retributive punishment questions were then totaled into an average Retribution support score, and responses to the two mercy punishment questions were totaled into an average Mercy support score.

In addition to participants’ retributive and mercy-based punishment philosophies, we measured their recommended punishments for

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<sup>146</sup> The photographs we used for the study have previously been used in many studies. See, e.g., Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 52 (2007).

<sup>147</sup> This task order is presented in order to give a clear example of the study. The order of the two tasks was counterbalanced, in order to minimize the effects of task order. Thus, approximately half of the participants were first asked to pair together Black with Mercy, and White with Payback.

<sup>148</sup> These questions were also used in a study of American judges’ punishment philosophies as well as implicit biases. See Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 970 (2017).

specific crimes. To do this, participants were presented with six hypothetical crimes (in randomized order) and were asked to indicate how severe the punishment should be for each crime (on a 1-7 scale). Two of the six crimes, which were largely based upon real crimes, were as follows:

*The defendant robbed a gas station. He carried a gun during the robbery, but had told his friends beforehand that he did not plan to fire it. In the middle of the robbery, the store clerk was shot and killed. The prosecution argues that the killing was cold-blooded and intentional. The defense claims that the gun went off accidentally as he was pointing it at the clerk; and*

*The defendant broke into his neighbor's home, expecting that the home was empty. However, the neighbor was home, and when he threatened to call the police, the defendant picked up a baseball bat that was lying on the floor and struck the homeowner in the head. The homeowner died. The defendant, who was 14 years old at the time, was charged in adult court.*

Prior to reading about the individual crimes, participants read a one-page document that was labeled as a press release from a District Attorney's office.<sup>149</sup> The design of the press release was to prime

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<sup>149</sup> The press release was titled, "Task Force Tackles Surge in Drug Dealing and Violent Crime," and contained the following text describing a task force created by the District Attorney:

*Houston District Attorney Devon Anderson Harris announced today the formal commencement of a task force focused on reducing the dangerous increase in drug dealing and other violent crime in the city. While the rates of some major crimes held steady, other crimes, such as drug dealing, robbery, and rape increased 23%. In response to this concerning increase, the District Attorney formed a task force last month comprised of four veteran prosecutors, seven senior detectives from the police department, and two probation officers.*

*According to the District Attorney's Office, the task force already has secured convictions against a number of criminals who were each responsible for multiple drug dealing and weapon possession offenses. In fact, the District Attorney announced that four criminals were convicted of drug dealing with a weapon on January 5, 2016: Brett Walsh, age 21, Greg Baker, age 21, Nestor Garcia, age 25, and Todd Sullivan, age 19.*

*District Attorney Harris said that the DA's office has instructed the task force to seek the maximum punishment in every drug dealing or violent crime case. If you see any suspicious activities or people in your neighborhood, please call 911 immediately.*

Participants who were randomly assigned to the African American press release condition read the same press release, except three of the four participants' names were

participants either for Black crime, White crime, or simply just crime (no racial categorization). The primary purpose for the inclusion of the press release was to measure whether activating participants' racial stereotypes would ultimately affect participants' punishment judgments for the specific crimes we presented.<sup>150</sup>

Participants were also "death qualified" to determine if they would be eligible to sit on a death-penalty jury or if they would be excluded due to their unwillingness to follow jury instructions on imposing death penalty in certain circumstances. They were asked first whether they would be able to "find the defendant guilty in light of the fact that he may receive the death penalty," and second if the defendant were convicted, whether they would be able to consider "both a life sentence without the possibility of parole and a sentence of death."

If participants responded that they would be unwilling to convict the defendant if death were a possible punishment, if participants responded that they would be unwilling to sentence any defendant to death, even if found guilty, or if participants responded that they would always vote to impose the death penalty after a conviction for murder, these "non-death qualified" participants' data was able to be separated so that it could be compared with the data of jurors who would be eligible to sit on a death penalty jury. Because these groups would be excluded from sitting on capital juries for different reasons, we coded these responses separately into the following four categories:

- (1) Death Qualified Jurors. These are participants who answered yes to both questions, and would therefore be qualified to sit on capital juries (n=368);
- (2) Death Always Jurors. These are participants who answered, "I would always vote for the death penalty," and

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different. Participants in this condition thus read about Darnell Jackson, Jamal Harris, Nestor Garcia, and Rasheed Washington. Participants in both the White American press release condition and the African American press release condition read about Nestor Garcia, who was always listed as third in the list of four. We included this name in order to minimize the chances that participants would become suspicious of the purpose of the press release task. Thus, participants read about three of four White-sounding names, three of four Black-sounding names, or did not read any names at all (control condition).

<sup>150</sup> Justin D. Levinson and Danielle Young have previously found that priming matters in punishment judgments and evidence evaluations. See Levinson & Young, *supra* note 40, at 331-39 (finding that participants evaluated evidence differently based upon the skin tone of the perpetrator).

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would therefore be excluded from sitting on capital juries (n=31);<sup>151</sup>

(3) Nullifiers. These are participants who responded that they would not be able to find the defendant guilty in light of the fact that he may receive the death penalty (n=90); and

(4) *Witherspoon* Excludables. These are participants who reported that they would be able to find the defendant guilty, but could never vote for a sentence of death (n=33).<sup>152</sup>

### 3. Hypotheses

Based on our theory of the racial architecture of retribution, we made the following hypotheses prior to conducting the test:

*Hypothesis 1:* Jury eligible citizens will automatically (implicitly) associate Black with retribution and White with leniency. Thus, on the IAT we conducted, jury eligible citizens will specifically associate Black with Payback and White with Mercy.

*Hypothesis 2:* Death Qualified Jurors will possess stronger implicit race-retribution biases (Black-Payback and White-Mercy) than Nullifiers or “Witherspoon” Excludables.

*Hypothesis 3:* Death Qualified Jurors will be more retributive (on retribution philosophy questions) and less supportive of mercy (on mercy philosophy questions) than jurors who would be excludable, except that Death Always Jurors will be the most retributive.

*Hypothesis 4:* Participants in the Black-sounding name press release condition will report harsher punishment scores on individual crimes, and will self-report stronger retributive philosophy support, as compared to the White-sounding name condition and the control group condition.

*Hypothesis 5:* Jury eligible citizens’ implicit bias levels will predict their how severely they seek to punish, as well as their overall sentencing philosophy. Specifically, stronger race-

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<sup>151</sup> See generally *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that a juror who would always vote for the death penalty, regardless of instruction, must be removed for cause).

<sup>152</sup> See generally *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968) (examining whether excluding jurors opposed to capital punishment violated a prisoner’s right to an impartial jury).



retribution biases as found on the IAT will predict harsher punishment for specific crimes and greater support for retributive theories of punishment.

### B. Results: Retribution and Race Implicitly Intertwined

To test our hypotheses, we conducted several statistical analyses. For Hypothesis 1, we conducted a t-test that compared the IAT “D” score to 0 in order to test for significance. For Hypotheses 2-4, we conducted ANOVAs,<sup>153</sup> and for Hypothesis 5, we conducted regression analyses to test the predictive validity of the IAT. The study results were as follows:

#### 1. Jury-Eligible Citizens Displayed an Implicit Race-Retribution Bias

Jury eligible citizens demonstrated a significant implicit association between Black and retribution, whereby they associated Black with Payback and White with Mercy on the IAT. Participants were faster to categorize Black faces with retributive words and White faces with mercy words.<sup>154</sup>

#### 2. Death Qualified Jurors Held Stronger Implicit Racial Biases Than Nullifiers and *Witherspoon* Excludables

Death Qualified participants showed higher levels of an implicit Black-retribution bias than Nullifiers and *Witherspoon* Excludables. Indeed, as we found in another context with implicit associations between Black and the value of human life, here we confirmed our hypothesis that the death qualification process actually excludes the least biased citizens.<sup>155</sup>

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<sup>153</sup> Generally speaking, Analysis of Variance (“ANOVA”) represents several statistical techniques that separate the variance in a dataset into specific sources of variance, which allows statisticians to compare means between multiple groups. See generally BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 322-23 (Rebecca Pascal ed., 4th ed. 2001) (describing ANOVA and related statistical techniques).

<sup>154</sup> The t-test showed that as we hypothesized IAT d score significantly higher than 0 ( $M=0.34$ ,  $SD=0.33$ ,  $t(521)=23.51$ ,  $p<.001$ ). For this particular test, a higher score represents stronger implicit associations between Black and Retributive attitudes, and White and Mercy attitudes.

<sup>155</sup> Jurors  $F(3,518)=2.82$ ,  $p<.05$ ,  $\eta_p^2=.02$ ,  $M_{\text{Death Qualified}} = 0.36$  ( $SD=0.33$ ),  $M_{\text{Death Always}} = 0.42$  ( $SD=0.34$ ),  $M_{\text{Excludables}} = 0.33$  ( $SD=0.32$ ),  $M_{\text{Nullifiers}} = 0.26$  ( $SD=0.34$ ).

### 3. Death Qualified Jurors Were More Punitive, More Retributive, and Less Merciful Than Excludables

Death Qualified Jurors were more punitive, more retributive, and less merciful as compared to jurors who would be excluded because either they would never convict a defendant if the death penalty was an option, or would never, post-conviction, vote for the death penalty. Statistically, there were three interrelated findings, each statistically significant, that differentiated the results of jury eligible citizens and those who would be excluded from serving on capital juries because of their opposition to the death penalty. First, Death Qualified Jurors were harsher in their judgments as to how severely individual crimes should be punished.<sup>156</sup> Second, Death Qualified Jurors were more likely to self-report agreement with retributive punishment theories,<sup>157</sup> and third, death qualified jurors were less likely to self-report agreement with mercy punishment theories.<sup>158</sup> In addition, Death Always Jurors, who would be excluded because they would always vote for death, were significantly more retributive and less merciful, both on the individual crimes and in theory, than even Death Qualified Jurors.

### 4. Implicit Bias Score Predicted Death Qualification Status

Based on the results that Death Qualified Jurors possessed stronger associations between Black and retribution, and our previous finding of similar results on other IATs (whereby death qualified jurors harbored stronger anti-Black implicit biases than jurors who would be excluded), we wanted to understand what determined participants' death qualification status. In other words, we were interested in

<sup>156</sup> Crime1:  $F(3,518)=19.27$ ,  $p<.001$ ,  $\eta^2=.10$ ,  $M_{\text{Death Qualified}} = 5.93(\text{SD}=0.99)$ ,  $M_{\text{Death Always}} = 6.52(\text{SD}=0.77)$ ,  $M_{\text{Excludables}} = 5.33(\text{SD}=1.11)$ ,  $M_{\text{Nullifiers}} = 5.20(\text{SD}=1.26)$ , Crime2:  $F(3,518)=11.87$ ,  $p<.001$ ,  $\eta^2=.06$ ,  $M_{\text{Death Qualified}} = 5.56(\text{SD}=1.24)$ ,  $M_{\text{Death Always}} = 6.10(\text{SD}=1.04)$ ,  $M_{\text{Excludables}} = 4.79(\text{SD}=1.45)$ ,  $M_{\text{Nullifiers}} = 4.89(\text{SD}=1.52)$ , Crime3:  $F(3,518)=9.52$ ,  $p<.001$ ,  $\eta^2=.05$ ,  $M_{\text{Death Qualified}} = 3.90(\text{SD}=1.47)$ ,  $M_{\text{Death Always}} = 4.71(\text{SD}=1.62)$ ,  $M_{\text{Excludables}} = 3.27(\text{SD}=1.61)$ ,  $M_{\text{Nullifiers}} = 3.26(\text{SD}=1.59)$ , Crime4:  $F(3,518)=21.69$ ,  $p<.001$ ,  $\eta^2=.11$ ,  $M_{\text{Death Qualified}} = 5.80(\text{SD}=1.19)$ ,  $M_{\text{Death Always}} = 6.07(\text{SD}=1.39)$ ,  $M_{\text{Excludables}} = 4.97(\text{SD}=1.36)$ ,  $M_{\text{Nullifiers}} = 4.70(\text{SD}=1.55)$ , Crime5:  $F(3,518)=11.22$ ,  $p<.001$ ,  $\eta^2=.06$ ,  $M_{\text{Death Qualified}} = 5.28(\text{SD}=1.43)$ ,  $M_{\text{Death Always}} = 5.77(\text{SD}=1.41)$ ,  $M_{\text{Excludables}} = 4.73(\text{SD}=1.72)$ ,  $M_{\text{Nullifiers}} = 4.40(\text{SD}=1.67)$ , Crime6:  $F(3,518)=11.88$ ,  $p<.001$ ,  $\eta^2=.06$ ,  $M_{\text{Death Qualified}} = 4.80(\text{SD}=1.28)$ ,  $M_{\text{Death Always}} = 5.61(\text{SD}=1.05)$ ,  $M_{\text{Excludables}} = 4.49(\text{SD}=1.2)$ ,  $M_{\text{Nullifiers}} = 4.17(\text{SD}=1.27)$ .

<sup>157</sup>  $F(3,518)=56.81$ ,  $p<.001$ ,  $\eta^2=.25$ ,  $M_{\text{Death Qualified}} = 5.38(\text{SD}=1.05)$ ,  $M_{\text{Death Always}} = 6.24(\text{SD}=0.73)$ ,  $M_{\text{Excludables}} = 4.09(\text{SD}=1.53)$ ,  $M_{\text{Nullifiers}} = 3.96(\text{SD}=1.39)$ .

<sup>158</sup>  $F(3,518)=37.09$ ,  $p<.001$ ,  $\eta^2=.18$ ,  $M_{\text{Death Qualified}} = 3.5(\text{SD}=1.41)$ ,  $M_{\text{Death Always}} = 2.58(\text{SD}=1.03)$ ,  $M_{\text{Excludables}} = 4.8(\text{SD}=1.36)$ ,  $M_{\text{Nullifiers}} = 4.84(\text{SD}=1.29)$ .

understanding what predicts their decision to answer “yes” or “no” to the death qualification questions, and how multiple variables interact to influence these decisions. To do this, we conducted a mediation analysis<sup>159</sup> whereby we tested whether implicit bias, retributive philosophy, and mercy philosophy predicted participants’ death qualification status.<sup>160</sup> Although it would seem logical that participants’ death qualification status would be predicted by their core self-reported retributive philosophy and mercy philosophy,<sup>161</sup> we also found that implicit bias scores associating Black-payback predicted retributive philosophy ( $B = 0.44$ ,  $p=.01$ ), which in turn predicted death qualification status.<sup>162</sup> That is, participants’ implicit racial biases actually led to their death qualification status — the higher the bias, the more likely they were to be retributive generally, and the more likely they were to be death qualified.

#### 5. The Press Release Priming Task Did Not Affect Punishment Decisions

Although we hypothesized that including Black-sounding names as compared to White-sounding names in the press release would activate racial stereotypes, there did not appear to be a priming effect whereby the names in the press release affected later judgments. For example, there were no significant differences created by the press release conditions in responses to the six individual crime questions. This result may have been due to several reasons, including the possibility that the prime was not strong enough or was just not noticed by study participants (just 54.8% accurately recalled two of the names from the press release, with no errors, when asked at the end of the study) and therefore did not influence participants’ judgments when they were later asked to make punishment judgments about crimes unrelated to the press release.<sup>163</sup>

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<sup>159</sup> See Dawn Iacobucci, *Mediation Analysis and Categorical Variables: The Final Frontier*, 22 J. CONSUMER PSYCHOL. 582, 589-93 (2012).

<sup>160</sup> For purposes of this test, we excluded Death Always Jurors and compared Death Qualified Jurors to jurors who would be excluded because they would not vote guilty, or would not vote for death. However, the results would not have changed even if we included Death Always Jurors ( $z$ Mediation = 5.35,  $p<.001$ ).

<sup>161</sup> And, indeed, these philosophies were confirmed as predictors. For Retribution philosophy,  $B = 0.72$ ,  $p<.001$ ; for Mercy philosophy,  $B = -0.45$ ,  $p<.001$ .

<sup>162</sup>  $z$ Mediation = 4.90,  $p<.001$ .

<sup>163</sup> It is also possible that the prime did work, but did not last in such a way that it racialized the individual crime judgments that were presented.

## 6. Implicit Race-Retribution Bias Predicted Retribution Theory Support

Results of our regression analyses showed that citizens' implicit Black-retribution biases predicted greater support for retributive theories of punishment. In order to investigate the effects of implicit bias on jury-eligible citizens' agreement with retributive and mercy theories, we tested two regression models, one focused on what predicted participants' support for retributive theories of justice, and one focused on what predicted participants' support for mercy-based theories of justice. In the first model (which we call Model A), we ran the following regression:  $\text{Retributive theory} = \beta_{1a} \times \text{IAT d} + \beta_{2a} \times \text{Mercy theory} + C$ . The results of this regression revealed that both implicit bias (Black-payback and White-mercy associations) and participants' self-reported agreement with regard to mercy punishment theories (the lower the mercy score, the higher the retribution score) predicted retributive theory.<sup>164</sup> Our second regression analysis, which we call Model B, tested the predictors for participants' self-reported agreement with mercy theories:  $\text{Mercy theory} = \beta_{1b} \times \text{IAT d} + \beta_{2b} \times \text{Retributive theory} + C$ . This regression found that support for mercy theories of punishment were predicted by retributive theory score (the lower the retribution score, the higher the mercy score) but not IAT score.<sup>165</sup> Thus, we found that implicit race-retribution bias indeed predicted participants' support for overall retribution, but not their support for mercy.

Finally, we tested a third regression model to determine the predictors of the participants' average punishment judgments on the six crime scenarios. We ran the following regression:  $\text{Averaged crime score} = \beta_1 \times \text{Retributive theory} + \beta_2 \times \text{Mercy theory} + C$ . The results of this regression showed that both the retributive theory (the higher the retribution theory score, the harsher the punishment) and the mercy theory (the lower the mercy score, the more lenient the punishment) predicted crime score.<sup>166</sup> Implicit race-retribution bias indirectly influenced crime punishments due to its influence on punishment theory scores.

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<sup>164</sup> Adjusted  $R^2 = .27$ ,  $F(2,519)=96.45$ ,  $p<.001$ ,  $\beta_{1a} = .09$ ,  $t=2.39$ ,  $p<.05$ ,  $\beta_{2a} = -.51$ ,  $t=13.57$ ,  $p<.001$ .

<sup>165</sup> Adjusted  $R^2 = .26$ ,  $F(2,519)=92.68$ ,  $p<.001$ ,  $\beta_{1b} = .01$ ,  $t=0.38$ , ns.,  $\beta_{2b} = -.51$ ,  $t=13.57$ ,  $p<.001$ .

<sup>166</sup> Adjusted  $R^2 = .39$ ,  $F(2,519)=164.12$ ,  $p<.001$ ,  $\beta_1 = .31$ ,  $t=7.77$ ,  $p<.001$ ,  $\beta_2 = -.40$ ,  $t=10.08$ ,  $p<.001$ .

### 7. Conservative Americans Held Larger Implicit Race-Retribution Biases than Liberal and Neutral Americans

Political value self-identification was also related to implicit bias scores. Those participants who characterized themselves as affiliating more with conservative positions held stronger race-retribution implicit biases associating Black faces with Payback words and White faces with Mercy words, as compared to those participants who characterized themselves as neutral or liberal.<sup>167</sup>

### 8. Conservative Citizens Were More Retributive, Punished Criminals More Harshly, and Were Less Merciful Than Neutral and Liberal Citizens

Political value self-identification was also related to the other key measures in the study. Specifically, we found that conservative citizens held stronger retributive punishment philosophies,<sup>168</sup> punished criminals more harshly,<sup>169</sup> and were less likely to support mercy-based punishment philosophies,<sup>170</sup> as compared to citizens who self-identified as either neutral or liberal.

## IV. THE IMPLICATIONS OF AUTOMATIC RACIALIZED RETRIBUTION FOR THE CRIMINAL JUSTICE SYSTEM

The results of the empirical study confirm our hypothesized existence of a deep and inextricable connection between race and retribution.

<sup>167</sup>  $F(2,519)=2.88$ ,  $p=.06$ ,  $\eta_p^2=.01$ ,  $M_{Conservative} = 0.39$  (SD=0.34),  $M_{Liberal} = 0.33$ (SD=0.32),  $M_{Neutral}=0.28$ (SD=0.33).

<sup>168</sup>  $F(2,519)=23.68$ ,  $p<.001$ ,  $\eta_p^2=.08$ ,  $M_{Liberal} = 4.79$ (SD=1.32),  $M_{Conservative} = 5.64$ (SD=1.10),  $M_{Neutral} = 5.15$ (SD=1.30).

<sup>169</sup> Crime1:  $F(2,519)=18.50$ ,  $p<.001$ ,  $\eta_p^2=.07$ ,  $M_{Liberal} = 5.56$ (SD=1.12),  $M_{Conservative} = 6.19$ (SD=0.93),  $M_{Neutral} = 5.90$ (SD=1.05),

Crime2:  $F(2,519)=14.31$ ,  $p<.001$ ,  $\eta_p^2=.05$ ,  $M_{Liberal} = 5.15$ (SD=1.35),  $M_{Conservative} = 5.79$ (SD=1.23),  $M_{Neutral} = 5.71$ (SD=1.28),

Crime3:  $F(2,519)=18.47$ ,  $p<.001$ ,  $\eta_p^2=.06$ ,  $M_{Liberal} = 3.44$ (SD=1.5),  $M_{Conservative} = 4.27$ (SD=1.45),  $M_{Neutral} = 4.17$ (SD=1.57),

Crime4:  $F(2,519)=16.61$ ,  $p<.001$ ,  $\eta_p^2=.06$ ,  $M_{Liberal} = 5.30$ (SD=1.41),  $M_{Conservative} = 6.04$ (SD=1.12),  $M_{Neutral} = 5.61$ (SD=1.35),

Crime5:  $F(2,519)=12.57$ ,  $p<.001$ ,  $\eta_p^2=.05$ ,  $M_{Liberal} = 4.85$ (SD=1.54),  $M_{Conservative} = 5.59$ (SD=1.43),  $M_{Neutral} = 5.15$ (SD=1.5),

Crime6:  $F(2,519)=11.51$ ,  $p<.001$ ,  $\eta_p^2=.04$ ,  $M_{Liberal} = 4.49$ (SD=1.29),  $M_{Conservative} = 5.07$ (SD=1.19),  $M_{Neutral} = 4.89$ (SD=1.41).

<sup>170</sup>  $F(2,519)=24.72$ ,  $p<.001$ ,  $\eta_p^2=.09$ ,  $M_{Liberal} = 4.13$ (SD=1.41),  $M_{Conservative} = 3.14$ (SD=1.43),  $M_{Neutral} = 3.67$ (SD=1.59).

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This racial architecture of retribution has broad consequences, including: in lawmaking, where it helps explain how moral panics function; in policing, including the use of excessive force against unarmed Black citizens; and in sentencing, where it exposes grave, and arguably fatal, cracks in the only remaining justification for the constitutionality of the death penalty.

A. *The Sole Remaining Justification for the Death Penalty's Constitutionality*

In 2008, Justice John Paul Stevens concluded that “current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law . . . rest in part on a faulty assumption about the retributive force of the death penalty.”<sup>171</sup> Though retribution is both “the primary rationale for imposing the death penalty” and the rationale that “animates much of the remaining enthusiasm for the death penalty,” Justice Stevens reiterated that because lesser punishments could adequately sate the retributive thirst, “the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’”<sup>172</sup> The Court, in an opinion authored by Justice Kennedy, did not go as far as Justice Stevens, but it did explain that this core justification for the death penalty is the rationale “that most often can contradict the law’s own ends” and that its use “risks [the law’s] own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”<sup>173</sup>

Meanwhile, moving from the core theory of capital punishment to the outcomes of actual cases, the presence of racial disparities in death sentences and executions continues to define the American experience with the death penalty. In *McCleskey v. Kemp*, decided over thirty years ago, the Court, over the dissent of four Justices, affirmed the constitutionality of the death penalty. It did so by disparaging the results of a sophisticated statistical study showing racial disparities as “clearly insufficient to support an inference that any of the decisionmakers in McCleskey’s case acted with discriminatory purpose,” showing “at most” a “discrepancy that appears to correlate

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<sup>171</sup> *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

<sup>172</sup> *Id.* at 79-80, 86 (Stevens, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

<sup>173</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 420, *opinion modified on denial of reh’g*, 554 U.S. 945 (2008).

with race,” and presenting no “constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.”<sup>174</sup> In the intervening decades, a plethora of studies conducted at the state and county levels in jurisdictions that span the vast territory of the nation have reproduced the finding that racial disparities plague the death penalty.<sup>175</sup> At the same time, scholars have begun to show that procedures central to death penalty trials from jury selection to the consideration of aggravating and mitigating circumstances to the death determination itself are all perfectly suited as sites for implicit racial bias to enter into the sentencing determination. In a separate article, *Devaluing Death*, we, along with Dr. Danielle Young, took this understanding of the link between race and retribution a step farther by showing that Americans tend to associate White faces with concepts that connote worth and value and Black faces with words that connote expendability and a lack of value.<sup>176</sup> Those findings helped to illustrate an underlying social reality — the implicit cheapening of Black lives is a fact that exists before the emotional responses that drive the increased retributive appetite.<sup>177</sup> We said there that the implicit devaluing of Black lives challenges “the idea that retribution is race-neutral,”<sup>178</sup> and posed the question of whether “the retributive rationale could be inextricably tied to race.”<sup>179</sup> Perhaps, we queried, “the race-retribution link” remains “culturally programmed.”<sup>180</sup>

The results of the current study confirmed our intuitions that race and retribution are inextricably tied together. First, we found that Americans associate Black faces with retribution and White faces with mercy.<sup>181</sup> We also found that the strength of the Black-payback association on the IAT predicts support for retributive rationales for punishment.<sup>182</sup> Thus, taken together, our findings suggest that Black

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<sup>174</sup> *McCleskey v. Kemp*, 481 U.S. 279, 297, 312-13 (1987).

<sup>175</sup> See generally BANNER, *supra* note 59, at 139-42; KENNEDY, *supra* note 59, at 311-50 (addressing the ideological gap where race and criminal law intersect, the historical causes for a suspicious perception of the criminal justice system by African Americans who have also fought to suppress racial injustice and implicit racial targeting for particular crimes); OGLETREE & SARAT, *supra* note 56, at 1 (“[T]here is a long and deep connection between this country’s racial politics and its uses of the killings of African-Americans through lynchings and the death penalty . . .”).

<sup>176</sup> Levinson et al., *Devaluing Death*, *supra* note 32, at 557-64.

<sup>177</sup> See *id.* at 573-74.

<sup>178</sup> *Id.* at 567.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *supra* note 154 and accompanying text.

<sup>182</sup> See *supra* note 162 and accompanying text.

Americans are associated with concept of retribution in a more direct, fundamental way than even our initial theory driven proposal of retribution — as we set forth in Part II — would suggest. Emotions such as fear and anger likely amplify this connection, but we found that the relationship may exist even as a precursor to these emotional processes. It is difficult to overstate the importance of these results for the constitutionality of the death penalty because there is now comprehensive and overlapping evidence that shows not just racially disparate outcomes, or the racially unfair aspects of death penalty procedures, but also that the sole hanging theoretical thread justifying the existence of the death penalty is itself inextricably linked to race. In other words, these results fray that remaining thread to a point where it can no longer sustain the weight of the enterprise.

Even if there were some remaining force to the retributive rationale for the death penalty generally, our results showing that the process of death qualification results in jurors with stronger associations between Black faces and the concept of retribution is enough standing alone to undermine the perceived race-neutrality of death penalty regimes. We have previously found that, with regard to implicit biases related to race and the value of human life, Death Qualified Jurors hold these stronger raced associations *because* the process of death qualification excludes racial minorities whose associations between Black and valueless are weaker.<sup>183</sup> Our study results here actually build on this finding by demonstrating that the best predictor of citizens' death qualification status may be the strength of their race-retribution implicit bias. That is, the strength of the association between Black and retribution actually predicts who gets qualified to sit on a capital jury.

In sum, then, our findings pose fundamental challenges to the constitutionality of the death penalty by undermining its retributive rationale and exposing the process of death-qualification as one that increases, not decreases, racial unfairness.

### B. *Explaining Racialized Moral Panics and Harsh Lawmaking*

Remember John DiIulio? He is the professor who, in the 1990s, warned of the “[f]atherless, Godless, and jobless” “breed” of juvenile “super-predators” who would “kill, rape, maim, without giving it a second thought.”<sup>184</sup> DiIulio has since apologized for the fear-

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<sup>183</sup> See Levinson et al., *Devaluing Death*, *supra* note 32, at 559-60.

<sup>184</sup> John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, available at <https://www.city-journal.org/html/my-black-crime-problem-and-ours->



mongering, writing “[t]hank god we were wrong” about the existence of superpredators.<sup>185</sup> Professor DiIulio joined dozens of other scholars in filing an amicus brief that urged the Supreme Court to bar life without parole sentences for juvenile offenders.<sup>186</sup> That brief noted, tellingly: “research that has analyzed the increase in violent crime during the early- to mid-1990s and its subsequent decline demonstrates that the juvenile superpredator was a myth and the predictions of future youth violence were baseless.”<sup>187</sup> “Crack babies” are a myth, too.<sup>188</sup> Studies show no significant difference in “long-term health and life outcomes between full-term babies exposed to cocaine in-utero and those who were not.”<sup>189</sup> As we discussed above, these moral panics propelled the retributive demand that lead to draconian sentencing practices across the country, including a rash of mandatory minimum sentencing laws and a severe uptick in sentencing juvenile homicide offenders to life without the possibility of parole.<sup>190</sup>

Our findings help to explain why these racialized moral panics occurred and, more importantly, suggest a few steps that legislatures and courts can take that might help prevent such panics in the future. Moral panics, like the retributive urge, occur because of fear and anger, and the process of dehumanization creates a frenzy that interrupts our ability to assess the level of punishment necessary.<sup>191</sup> Our findings add an important layer of sophistication to this description by suggesting that moral panics become racialized not in a direct chain of events, but rather in a symbiotic and cyclical way as race shapes the fear, anger, and empathy responses that in turn shape retributive demand.

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11773.html [https://perma.cc/8CZP-92JE]; DiIulio, Jr., *supra* note 81; Editorial, *Echoes of the Superpredator*, *supra* note 7.

<sup>185</sup> Editorial, *Echoes of the Superpredator*, *supra* note 7.

<sup>186</sup> See Brief of Jeffrey Fagan et al. as Amicus Curiae Supporting Petitioners at vii, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9647, 10-9646), 2012 WL 174240, at \*3.

<sup>187</sup> *Id.* at 8.

<sup>188</sup> Ana Teresa Ortiz & Laura Briggs, *The Culture of Poverty, Crack Babies, and Welfare Cheats: The Making of the “Healthy White Baby Crisis,”* 21 SOC. TEXT 39, 44 (2003) (“Crack has very little, if any, effect on pregnancies or fetuses.”).

<sup>189</sup> Katie McDonough, *Long-Term Study Debunks Myth of the “Crack Baby,”* SALON (July 23, 2013, 9:16 PM), [http://www.salon.com/2013/07/23/longterm\\_study\\_debunks\\_myth\\_of\\_the\\_crack\\_baby/](http://www.salon.com/2013/07/23/longterm_study_debunks_myth_of_the_crack_baby/) [https://perma.cc/SPH6-43Z3] (referring to Laura Betancourt et al., *Adolescents with and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 NEUROTOXICOLOGY & TERATOLOGY 36 (2011)).

<sup>190</sup> See AM. CIVIL LIBERTIES UNION, *supra* note 89.

<sup>191</sup> See Michael H. Eversman & Jason D. P. Bird, *Moral Panic and Social Justice: A Guide for Analyzing Social Problems*, 62 SOC. WORK 29, 29-30, 33-34 (2017).

Given that retributive demand can drive moral panics, and our understanding of the direct link between race and retribution, one strategy would be to include sunset provisions in new sentencing legislation, which would mean that after a set period of time (say, 15-20 years), the law is voided and the legislature must decide anew whether to re-up the punishment or not.<sup>192</sup> The benefit of these sunset laws is that they ensure that moral panics are not forever built into the legal architecture of a society. Once emotions calm down, cooler heads adjust the retributive calculus and new legislators simply do not enact the same statute (or punishment). Because non-White people are disproportionately impacted by carceral moral panics (for example, the juvenile super-predator panic), non-White people will also receive the most relief from sunset provisions.

Legislatures could also repeal all harsh mandatory minimum sentences,<sup>193</sup> which mean that regardless of who the defendant is as a person or why the crime occurred, every person convicted of a particular crime receives a mandatory minimum sentence. This sometimes leads to absurd results. In Duval County, Fla., for example, prosecutor Angela Corey sought a mandatory minimum sentence of twenty years for Marissa Alexander, a Black woman with no criminal record, for firing a warning shot at her abusive husband (the shot did not hit anyone).<sup>194</sup> However, if laws are indeed crafted in the midst of moral panics — which we know was the case with many mandatory minimum sentencing laws enacted in the 1980s and '90s — then the legislature's sense of the necessary level of retribution could differ greatly from the community's post-panic prevailing sentiment. Permitting a jury or judge to decide whether the harsh sentence is appropriate in a given case works a stop-gap against retributive excess that lingers due to the ghosts of long-forgotten racialized moral panics. Notably, ending mandatory minimums won't solve for racialized empathy during sentencing hearings, but it at least will mitigate the damage of harsher automatic sentences that result from racialized panics.

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<sup>192</sup> See, e.g., BRENNAN CTR. FOR JUSTICE, 2009 CRIMINAL JUSTICE TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 41 (2008), <https://www.brennancenter.org/sites/default/files/legacy/publications/Smart.on.Crime.Transition.Report%202008.pdf>.

<sup>193</sup> See John S. Martin Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 312 (2004).

<sup>194</sup> See Roland Martin, Opinion, *Shame of Mandatory Minimums Shows in Marissa Alexander Case*, CNN (May 12, 2012, 10:26 AM), <http://www.cnn.com/2012/05/12/opinion/roland-martin-mandatory-minimums/> [<https://perma.cc/7ZJ4-RSG9>].

### C. Making Sense of Excessive Use of Police Force

Our results also illuminate how race influences the use of excessive force. One of the most vivid examples of excessive use of force is the case where a White New York Police Department officer choked Eric Garner, an unarmed Black man, to death during a botched attempt to arrest Garner for selling loose cigarettes.<sup>195</sup> What is striking about watching the video of Garner's death is that Garner is clearly posing no threat to the officers, but the officers continue to restrain him even as he repeats, "I can't breathe."<sup>196</sup> This is the forward panic phenomenon, discussed above, at work. Black and brown men, people like Eric Garner, are disproportionately the recipients of this (often) fear-driven excessive force.<sup>197</sup> Indeed, a recent study found police officers in New York City "more likely to use force against blacks and Hispanics than whites, after controlling for other relevant variables."<sup>198</sup> The Las Vegas Metropolitan Police Department ("LVMPD") suffered from a similar problem — officers too often used force against suspects *after* a foot chase had ended.<sup>199</sup> This primarily was a problem in majority non-White neighborhoods.<sup>200</sup>

"You're an officer, you're pumping adrenaline, you don't have time to evaluate whether your implicit bias is driving your behavior," Professor Phillip Goff, who consulted with the LVMPD, has said.<sup>201</sup> And, yet, this is a prime place where the race-retribution link can thrive. How can police rules and regulations help eliminate the conscious or unconscious felt need for retribution when the suspect is Black?

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<sup>195</sup> See Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/YQ2C-D5XT>].

<sup>196</sup> See Annie Karni et al., *Two Cops Pulled Off Streets, Staten Island DA Looking into Death of Dad of Six After NYPD Cop Put Him in Chokehold During Sidewalk Takedown - Exclusive Video*, N.Y. DAILY NEWS (July 19, 2014), <https://www.nydailynews.com/new-york/nyc-crime/staten-island-da-man-death-nypd-chokehold-article-1.1871946> [<https://perma.cc/WAD8-YK8U>].

<sup>197</sup> See Sarah Zwach, Comment, *Disproportionate Use of Deadly Force on Unarmed Minority Males: How Gender and Racial Perceptions Can Be Remedied*, 30 WIS. J.L., GENDER & SOC'Y 185, 188-92 (2015).

<sup>198</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661 (S.D.N.Y. 2013).

<sup>199</sup> See Marcus Woo, *How Science is Helping America Tackle Police Racism*, WIRED (Jan. 21, 2015, 6:45 AM), <http://www.wired.com/2015/01/implicit-bias-police-racism-science/> [<https://perma.cc/F6KE-DH8P>].

<sup>200</sup> See *id.*

<sup>201</sup> Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014) (internal quotation marks omitted), <http://www.motherjones.com/politics/2014/12/science-of-racism-prejudice> [<https://perma.cc/B49U-7A4>].

One possible way to address the problem of excessive use of force is a proposed rule, as scholars have suggested, whereby an officer who chased the suspect cannot be the person to put handcuffs on the suspect once the suspect is apprehended.<sup>202</sup> The LVMPD implemented such a new rule and use of force claims are down.<sup>203</sup> However, because police use of excessive force often takes place in a matter of seconds, it may be difficult to eliminate racial bias by focusing exclusively on the encounter itself. There are thus two other possibilities. The first is to reduce baseline levels of policing, which would have the effect of limiting the number of police-civilian interactions that could potentially result in the use of excessive force, particularly when non-White neighborhoods are disproportionately policed.<sup>204</sup> The second is for police departments to train officers not to focus on low-level infractions (e.g., minor traffic infraction or marijuana possession) that so often lead to police-civilian encounters where excessive force ultimately occurs.

#### CONCLUSION

Retribution has long been at the core of American criminal justice. Yet, the legal and psychological scholarship on how racial bias continues to operate in the criminal justice system, which has focused extensively on procedural aspects and sentencing outcomes, is devoid of a comprehensive examination of how the driving spirit of punishment itself interacts with racial bias. This Article filled the gap in two ways:

First, the Article deconstructed our hypothesis that race and retribution are inexorably intertwined in the minds of Americans.<sup>205</sup> It demonstrated how history, as well as the emotional responses such as fear, anger and lack of empathy amplify the felt need for retribution, and do so in a predictably racialized way.<sup>206</sup> This reconstruction of the psychological nuts and bolts of the link between race and retribution provides us with a window into how racialized moral panics such as the superpredator scare and the crack-baby phenomenon of the 1990s take hold and translate into harsh sentencing practices. These sentencing

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<sup>202</sup> See Woo, *supra* note 199.

<sup>203</sup> See *id.*

<sup>204</sup> See Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE OF CHILDREN 59 (2008) (discussing theories such as “differential selection and processing hypothesis”).

<sup>205</sup> See *supra* Part II.

<sup>206</sup> See *supra* Part II.

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practices, in turn, contribute to the racial disparities that define the nation's experience with mass incarceration.

Second, we set out to test our hypothesis empirically.<sup>207</sup> To that end, we revealed the results of an experimental study of over 500 jury-eligible citizens. In the study, we found that jury-eligible citizens implicitly associate White Americans with words that connote a need for “mercy” and Black Americans with words that connote a need for “retribution,” that death-qualified jurors hold stronger implicit biases than do jury-eligible citizens generally, and that implicit racial bias predicted overall support for retribution theory.<sup>208</sup> These findings powerfully demonstrate that the core penological theory driving modern criminal justice has itself become a hopelessly raced concept.

The study results we presented have wide-ranging implications for legislative enactments, constitutional challenges to harsh punishment practices, and for the reduction of excessive force against civilians in the context of policing.<sup>209</sup> Future research is warranted on how race and retribution interact during the use emotional primes (e.g., fear, anger) in particular factual scenarios. These results could add an additional layer of sophistication to the current study. Moreover, researchers might consider how these findings around race and retributive excess map onto other marginalized groups in the criminal justice process. Finally, our results in the criminal justice context have implications beyond criminal law theory: for example, the racialized retributive urge we discussed could help explain the relationship between race and punitive damage awards in the context of torts actions.

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<sup>207</sup> See *supra* Parts II.A, II.B.

<sup>208</sup> See *supra* Part III.B.

<sup>209</sup> See *supra* Part IV.