Death Penalty “Trump Effect”

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DEATH PENALTY “TRUMP EFFECT”
By Chance Meyer

I. INTRODUCTION

Achilles was faster, but the tortoise had a head start. While Achilles ran the distance to where the tortoise began the race, the tortoise crawled another, albeit lesser, distance ahead. While Achilles covered that, the tortoise had time to advance again. In Zeno’s Paradox,\(^1\) the tortoise, though slower, always had another chance, though briefer, to creep out of reach. Achilles drew ever nearer, and, to observers, he seemed ever closer to victory. But it never came.

So goes the race to abolition. Professors Carol Steiker and Jordan Steiker observe, “[h]istory is replete with (over)confident predictions of the death penalty’s impending demise.”\(^2\) Over the years, new revelations have seemed to imperil the death penalty more than ever before, but executions have crept onward. A.M. Stroud III, the capital prosecutor turned abolitionist, calls the death penalty “the great American Paradox.”\(^3\) And, in the impossible way of Zeno’s, the paradox holds.

For instance, when pharmaceutical companies began refusing to

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\(^1\) See JIM AL-KHALILLI, PARADOX: THE NINE GREATEST ENIGMAS IN PHYSICS 26 (2012).

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supply lethal injection drugs in 2013, it was predicted that “Big Pharma May Help End the Death Penalty.” The expectation was reasonable. Disuse is a common precursor to abolition, and disuse seemed inevitable. When one reporter asked doubtfully, “How will states fill their execution syringes?” Oklahoma, for one, had no answer. The state tried but could not obtain the potassium chloride required for its execution protocol. By all appearances, death had no way forward in Oklahoma. But, like the tortoise, Oklahoma’s death penalty defied appearances. Three forces propelled executions ahead.

The first was mistake. Corrections officers accidentally obtained potassium acetate, thinking it was potassium chloride, and unwittingly used it to execute Charles Warner. The second was ignorance. A warden who noticed they had the wrong drug later testified before a grand jury, “When I seen it, I thought it was the same thing” as potassium chloride. He can hardly be blamed; the state did not require him to have medical expertise. The third was corruption. According to reports, when other officers caught the error and halted Richard Glossip’s execution, the governor’s general counsel wanted to proceed anyway so the public would not find out the wrong drug had been used on Warner. The concern did not prevail; Glossip’s execution was called off and he still awaits the next attempt. But political interest revealed itself as a driving force of the

5 See id. (“Historically, state entities do not move directly from having the death penalty to abolition. They begin with a moratorium on killing and then, when the population has grown unused to executions, the death penalty can be abolished.”).
8 See id.
10 Id. The warden, who noticed the error during the attempted execution of Richard Glossip, also testified that he had not noticed the error during the Warner execution, because he was too focused on the drug concentrations. See id. He explained, “I’m not very good at math in my head.” Id.
11 See Mazie, supra note 6 (discussing the influence of the Hippocratic Oath to “FIRST, do no harm” on the involvement of medical professionals in the death penalty).
12 See Ganeva, supra note 7 (also reporting that the governor’s counsel responded to concerns that the drug would work, they should just “Google it”).
13 See Death Row Monthly Roster, ST. OF OKLA. DEPT’ OF CORRECTIONS (Feb. 28, 2018),
death penalty. Along with mistake and ignorance, corruption is among the bewildering ways the death penalty defies reasonable expectations and abolition stays just out of reach.

But it has not always been so. Unlike the race Zeno imagined, the abolition race was run once before. On that occasion, the impossible happened. In 1972, the Supreme Court struck down the nation’s death penalty regimes in Furman v. Georgia. But for once, death’s driving forces failed. But, even then, abolition defied expectation. A lawyer on the defense team said, “there was no way we could have predicted winning in Furman.”

Nevertheless, in years since, experts have found many ways to predict the coming of “Furman II.” Prognostications abound, undiscouraged by a perfect record of failure, and so, abolition has come to defy something else—the patience of its opponents.

Who will soon forget the grumpy salutation of Justice Scalia’s Glossip v. Gross concurrence, “Welcome to Groundhog Day”? Scalia was frustrated by “time and again” confronting the claim that circumstances had finally “changed radically” and “now, at long last, the death penalty must be abolished for good.” He described fellow justices as “waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare.” Had they not yet learned? Abolition defies new research, too.

Despite the long history of abolition wrong-stepping expectations, a wave of predictions that arose in recent years was compelling. Staunch opponents joined in. Justice Scalia, speaking at Rhodes College three

14 See Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (finding state death penalty regimes unconstitutional as practiced, though declining to find unconstitutional the death penalty itself).
18 Id. at 2749.
19 Id. (quoting Breyer, J.).
20 Id. at 2747 (emphasis in original).
21 Id.
22 See, e.g., infra Part I, describing a 1999 study based on Capital Jury Project data demonstrating that death sentencing is often based on unconstitutional considerations.
months after Glossip, said he “wouldn’t be surprised” if the Court found the death penalty unconstitutional. Leading scholars joined in. The Steikers’ 2016 book Courting Death contained, at last, its own prediction—abolition within twenty years. Momentum gathered in the media. Time Magazine’s June 8, 2015 cover read “THE LAST EXECUTION,” and, inside, David Von Drehle described “why the era of capital punishment is ending.”


24 Denno, supra note 16, at 1829.


33 See Rauf v. State, 145 A.3d 430, 433 (Del. 2016) (stating the “majority’s collective view that Delaware’s current death penalty statute violates the Sixth Amendment role of the jury as set forth in Hurst”).

There were reports of botched executions in Ohio, Oklahoma, Arizona, and Georgia. Pharmaceutical companies took a “moral stand” against providing lethal injection drugs, causing shortages that disrupted use of the death penalty in Arkansas, California, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Carolina, Oregon, and Tennessee. Polls conducted by Gallop and the Pew Research Center placed support for the death penalty at the lowest it had been in a half-century, and an ABC News/Washington Post poll found, for the first time, Americans favored life imprisonment to death. Retired Justice Stevens proposed adding five resounding words to the Eighth Amendment, so that it would prohibit cruel and unusual punishments “such as the death penalty.” And, on June 29, 2015, forty-three years to the day after Furman, Justice Breyer, joined by Justice Ginsburg, wrote in dissent in Glossip that the death penalty’s unconstitutionality is “highly likely.”

One must be familiar with the historical unreliability of abolition predictions, the forces that propel death forward in defiance of reasonable expectations, and the great momentum of events it took for the most recent wave of predictions to seem compelling nonetheless, in order to appreciate what came next—the force it took to bring it all to a sudden halt.

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36 On April 29, 2014, the physician supervising Clayton Lockett’s execution in Oklahoma pronounced Lockett unconscious and ready to receive lethal injection, but he was not, and he writhed until official lowered the blinds so that witnesses could no longer watch as Lockett died of a heart attack forty-three minutes after the execution began. Botched Executions, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions#endref67 (last visited Mar. 19, 2018).
37 On July 23, 2014, Joseph Wood gasped for air for one hour and forty minutes during his execution in Arizona. Id.
38 On February 3, 2016, Georgia executioners spent forty-five minutes repeatedly attempting to insert an IV for the execution of seventy-two-year-old Brandon Jones. Id.
39 Algar, supra note 4.
41 Id.
wave peaked on November 7, 2016, with the publication of the Steikers’ *Courting Death*, and, the very next day, at the height of its power, the wave broke against the November 8, 2016 election. An immovable barrier stood in its path, an unanswered question that towered just as high: Would a Donald Trump presidency revive the death penalty?

Against the question, the wave rebounded and reversed course. University of Pennsylvania criminology lecturer Tom Dolgenos predicted, “[T]he election of Trump has ended any chance that the Supreme Court will declare capital punishment unconstitutional in the foreseeable future,” 44 Professor Austin Sarat predicted, “Trump’s election is likely to put on hold any prospect that the Supreme Court will take up Justice Stephen Breyer’s recent invitation to his fellow justices to reconsider the constitutionality of capital punishment.” 45 Professor Kevin Barry predicted, “the death penalty will likely remain with us for some time—a crude tool . . . to make America ‘great.’” 46 referencing Trump’s campaign slogan.

When the wave receded, the question stood as the new horizon of death penalty analysis, beyond which experts could not see. The question seemed to be the termination point of all inquiries. At the end of Professor Deborah W. Denno’s review of *Courting Death* 47 she asked, “Does a Donald Trump presidency . . . threaten the Steikers’ prediction that the Supreme Court will strike down the death penalty within the next decade or two?” 48 At the end of the *L.A. Times* coverage of California’s Proposition 62, the indecisive headline read, *Analysts Caution Against Blaming So-Called ‘Trump Effect’ for Death Penalty Repeal’s Defeat.* 49 At the end of Professor Michael Meltsner’s article *A Road Map for Abolition* 50 he conceded, “the greatest force for resolution of the status of

48 Id.
capital punishment is the 2016 presidential election.” At the end (as well as the beginning, with little headway in between) of The Times Picayune article How will a Trump White House impact the death penalty in Louisiana? the question was asked, and the director of the Louisiana ACLU answered, “I don’t think anybody has any idea what we’re facing.”

Maybe not, but there were suggestions. Foremost among them was that Trump might impact the death penalty by appointing Supreme Court justices who would vote to retain or expand it. Barry suggested that, if Justice Kennedy retires, “the populist and pro-death penalty president, Donald Trump, will almost certainly replace Kennedy with a conservative Justice unlikely to support judicial abolition.” Indeed, Denno noted that Trump’s first appointee, Justice Gorsuch, “has been primarily characterized as pro-death penalty.”

It was also anticipated that Trump might influence prosecutorial discretion. Two days after the election, reporters Chris McDaniel and Chris Geidner warned in their article How Donald Trump Could Revitalize the Death Penalty that Trump might exert influence over appointed U.S. Attorneys and Attorneys General. Sure enough, when a man killed eight people by driving a truck onto a New York City bike path on October 31, 2017, President Trump tweeted “SHOULD GET DEATH PENALTY!” In response, The New York Times’ chief White House correspondent decried “the head of the executive branch that will prosecute the charges advocate[ing] the ultimate punishment before a judge has heard a single shred of evidence at trial.”

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51 Id.
52 Emily Lane, How will a Trump White House impact the death penalty in Louisiana?, THE TIMES-PICAYUNE (Nov. 15, 2016, 10:01 AM), http://www.nola.com/crime/index.ssf/2016/11/how_will_a_trump_white_house_i.html.
53 Id.
55 Denno, supra note 16, at 1876 n.216.
McDaniel and Geidner also predicted that Trump might reanimate the machinery of state executions by appointing a Food and Drug Administration head that would restore the supply line to execution drugs.\textsuperscript{59}

Along with predictions, events reversed course. On election day, Californians voted to retain the death penalty, Nebraskans voted to reinstate the death penalty, and Oklahomans voted to reinforce the death penalty, amending their constitution to affirm that death is not “cruel and unusual.”\textsuperscript{60} In April of 2017, Arkansas undertook a campaign of executions unrivaled in the modern era, setting out to execute eight men in eleven days.\textsuperscript{61} On August 24, 2017, the State of Florida resumed use of its death penalty on defendants sentenced under a statute previously found unconstitutional by the U.S. Supreme Court. The never-before-seen legal doctrine of \textit{partial} retroactivity paved the way, which the Florida Supreme Court invented just for the occasion.\textsuperscript{62}

The turn of events across the country, coinciding with Trump’s rise to power, was suggestive. Perhaps he was influencing the death penalty in ways less apparent than appointments of like-minded jurists and government officials.\textsuperscript{63} Perhaps something subtler was going on, something beneath the surface.

Sarat felt that the “powerful populist and symbolic appeal” of the death penalty was reflected in Trump’s election.\textsuperscript{64} Trump had long been “a vocal and enthusiastic supporter of capital punishment.”\textsuperscript{65} In 1989, Trump infamously paid for a full-page ad in four New York newspapers, demanding the death penalty for five teenagers accused of a violent rape in Central Park.\textsuperscript{66} In the age of social media, Trump’s advocacy for the death penalty has far exceeded constitutional bounds, in tweets demanding the executions of individuals accused but not yet tried or convicted, by means including beheading:

\textsuperscript{59} See McDaniel & Geidner, supra note 56.
\textsuperscript{60} See Dolgenos, \textit{supra} note 44; \textit{but see} Denno, \textit{supra} note 16, at 1876 n.218 (“However, as commentators have argued, particularly regarding California, these outcomes may be more a result of the divided views on the death penalty throughout the country and less a result of broader political trends.”).
\textsuperscript{63} But see Ulloa, \textit{supra} note 49.
\textsuperscript{64} Sarat, \textit{supra} note 45.
\textsuperscript{65} Id.
\textsuperscript{66} See McDaniel & Geidner, \textit{supra} note 56.
August 8, 2012: “Tucson killer Loughner should be given the death penalty, not his plea-bargained life in prison.”67

August 24, 2012: “Terrible tragedy at the Empire State Building today. Must have fast trials and death penalty for the animals.”68

September 7, 2012: “Drew Peterson, a real sleaze, just convicted of killing wife. Change the law so he gets death penalty.”69

April 19, 2013: “Get ALL the info, then quick trial, then death penalty for the Boston killer of innocent children and people! Do not be kind.”70

September 26, 2014: “The animal who beheaded the woman in Oklahoma should be given a very fast trial and then the death penalty. The same fate -

67 Donald J. Trump (@realDonaldTrump), Twitter (Aug. 8, 2012, 8:45 AM).
69 Donald J. Trump (@realDonaldTrump), Twitter (Sept. 7, 2012, 8:24 AM).
70 Donald J. Trump (@realDonaldTrump), Twitter (Apr. 19, 2013, 4:56 PM).
beheading?”

May 11, 2015: “How come there are no protests in favor of the two young police officers gunned down in Mississippi by two deranged animals. DEATH PENALTY!”

After the election, suspicion grew that Trump’s advocacy for the death penalty was having a cultural impact. The impact was hard to measure, but easy to name. “[A]bolitionists argued that campaigns in favor of capital punishment benefited from the so-called ‘Trump effect.’”

Generally, Trump Effect is considered to be a phenomenon “of mostly white, male voters from rural areas energized by the Republican presidential campaign of Donald Trump.” For Southern Poverty Law Center (“SPLC”), the most concerning result of Trump Effect is “an uptick in harassment and violence against racial and religious minorities after Trump’s election victory.” But Trump Effect has been studied in many other contexts, with articles on subjects ranging from professional sports (“Trump effect hits the NFL”) to Canadian high schools (“The ‘Trump Effect’ on Canada’s Classrooms”), from healthcare (“Healthcare and the Trump effect”) to journalism (“The Trump effect turns every paper into a tabloid”), from school bullying (“The Trump Effect: How Hateful

71 Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 26, 2014 7:10 PM).
74 Id.
76 John R. Lott, Trump effect hits the NFL--Teams with more protesters were more likely to lose, FOX NEWS (Sept. 26, 2017), https://townhall.com/tipsheet/mattvespa/2017/10/03/trump-effect-cnn-confirms-data-showing-trump-is-right-about-anthem-protests-torpedoing-nfls-ratings-n2389355.
79 Reamer L. Bushardt, Healthcare and the Trump effect,
Rhetoric Is Affecting America’s Children”80 and public education (“How Does the ‘Trump Effect’ Change the Public’s View of Education?”)81 to social media (“Inside Twitter, angst over the Trump effect”),82 from the stock market83 to immigration.84

If Trump Effect touches so many social institutions and issues, perhaps abolitionists were right that it could have affected death penalty votes on election day. If Trump Effect so permeates American life, why not death, too?

In this article, I examine Trump Effect on the American death penalty. In Part I, I review evidence that juror decision-making in death sentencing is influenced by folk belief and that Trump Effect is amplifying the influence. President Trump has brought on a cultural shift towards belief in the reliability of gut intuition (“I’m a very instinctual person, but my instinct turns out to be right”)85, a populist distrust of courts and judges (“Our legal system is broken!”86), and the repudiation of legal processes and constitutional limits on death sentencing (“Change the law so he gets death penalty.”87).

In Part II, I examine Trumpian folk beliefs relevant to capital sentencing, which find their way into legal outcomes through the increasingly intuitive juror decision-making described in Part I. I compare


86 In His Own Words: The President’s Attacks on the Courts, Brennan Ctr. for Just. at N.Y.U. Sch. of L. (Jun. 5, 2017), https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts.

those beliefs to constitutional principles of capital sentencing, and find them diametrically opposed to one another.

Trump encourages the dehumanization of criminal defendants (“death penalty for the animals”88), while the central precept of American death sentencing is “the fundamental respect for humanity underlying the Eighth Amendment.”89 Trump encourages distrust of scientific experts (“I am being proven right about massive vaccinations—the doctors lied”90), while testimony of mental health experts “ranks among the most powerful types of mitigation evidence available.”91 The Trump administration wages what has been dubbed “ontological warfare”92 by encouraging belief in “alternative facts”93 over evidence, while sentencing jurors are constitutionally required to “consider, as a matter of law, any relevant mitigating evidence.”94

In Part III, I consider results, including the likelihood that Trump Effect is increasing use of the death penalty and the incidence of death sentencing based on unconstitutional, folkloric considerations. Trump’s rise to power coincides with an uptick in death sentencing on the heels of an historic decline, an uptick in executions on the heels of an historic decline, and an uptick in murder on the heels of an historic decline, inviting still more death sentencing and executions.95 Many forces affect the death penalty. The abrupt spikes, while curiously synchronous, are not necessarily “Trump bump[s].”96 But it is known that “folk knowledge about crime and punishment influences the exercise of juror discretion in capital sentencing,”97 and Trumpian folk knowledge about crime and

91 See Littlejohn v. Trammell, 704 F.3d 817, 864 (10th Cir. 2013).
95 See infra Part III, reviewing FBI Uniform Crime Reporting, Bureau of Justice Statistics, and data from the Death Penalty Information Center.
97 See Benjamin D. Steiner et al., Folk Knowledge As Legal Action: Death Penalty
punishment heavily favors use of the death penalty. If the decision between life imprisonment or death is ordinarily influenced by folk belief but has somehow escaped the pervasive and sea-changing Trumpian variety, then the death penalty is a greater paradox than even Zeno could have imagined.

II. AMONG CAPITAL JURORS, INCREASED RELIANCE ON FOLK BELIEF OVER LEGAL RULES

Law has boundaries, and one is the human mind. Jurors are given legal standards on which to make factual determinations, but the law cannot penetrate their inner thoughts to ensure they comply. For instance, jurors are instructed to find aggravating factors necessary for imposition of a death sentence beyond a reasonable doubt, but a juror “might vote for her strong intuitive preference without engaging in much explicit thought,” reasonably doubtful or otherwise. Jurors who have a conflict in their minds between going with knee-jerk intuition or reasoning out a question more laboriously “might try to resolve the conflict not by overriding their dominant intuitions but instead by crafting arguments that help to put their doubts to rest.” That is, jurors might dream up ways to dismiss reasonable doubts, rather than seriously grapple with them.

Jury instructions “are keys to effectuation of the proper distribution of decisional responsibilities among judge and jury.” But the responsibility is not merely to make decisions; it is how to make decisions. Reasons matter. And, regrettably, reasons are unobservable. As Judge Walter Smith Cox put it during the 1882 sentencing of Charles Guiteau for assassinating President Garfield, the “subtle essence which we call ‘mind’ defies, of course, ocular inspection.”

Even more troubling, it may defy introspection. Many cognitive psychologists believe that people tend to “reason with the help of a small number of heuristics, or rules of thumb, rather than by a comprehensively

98 *See infra* Part II.
99 *See* Frederick Schauer, *Law’s Boundaries*, 130 Harv. L. Rev. 2434 (2017) (“[H]istory of law is in no small part the history of its boundaries”).
100 *See* Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017).
102 *Id.* at 192.
103 Roberts v. Sears, Roebuck & Co., 723 F.2d 1324, 1340 (7th Cir. 1983).
104 *See* United States v. Guiteau, 10 F. 161, 167 (S.D.N.Y. 1882).
analyzing the problems at hand . . . producing systematic . . . biases.”

Given their biases, perhaps not even jurors can know whether their decisions comply with legal standards. Professor Philip N. Meyer calls it “the stories that we tell ourselves.” Perhaps jurors tell themselves they are following the law, even as they defy it. And so, their metacognitive limits are another of law’s boundaries.

Intentionally or not, jurors have the power to disregard law. Lawrence Friedman recognizes, “[t]he jury’s power to bend and sway, to chip away at the official rules, is built into the system.” Legal rules embodied in jury instructions are just words on a page until applied. Whether the rules translate into legal outcomes—or are merely theoretical exercises among courts and legislatures—turns entirely on unknowable moments of juror choice.

Seeming to compound the problem, the juror’s power is an unfamiliar one. Jurors are not experienced, as should be lawyers, in striving to appreciate the subtle meanings of legal standards and battling their own biases in honor of life-long commitment to upholding legal principles. Blame the Sixth Amendment. By extending to defendants a right to be tried by impartial peers, the law trusts many of its inquiries to laypeople. Rights come with risks.

Some question whether the risks are worth it. Professor Paul H. Robinson asks, “Why Does the Criminal Law Care What the Layperson Thinks Is Just?” On the one hand, “normative crime control requires a criminal law that has moral credibility within the community it governs”—a credibility served by a showing of trust in community members. On the other, lay intuitions are unwieldy. They are not good at creating “a distribution of criminal liability that maximizes the traditional crime control mechanisms of deterrence, incapacitation, and rehabilitation.”

Of course, judges cannot escape their intuitions, either. After all, even Justice Stewart had to resort to the intuitive approach of “I know it

107 Steiner et al., supra note 97, at 498 (quoting Friedman).
108 See U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury”).
110 Id. at 1841.
111 See id. at 1839.
when I see it” to identify “hard-core pornography,” conceding in *Jacobellis v. Ohio*, “I shall not today attempt further to define [the term] . . . and perhaps I could never succeed in intelligibly doing so.”  

And it was Justice Holmes who admitted,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.  

Like jurors’ intuitions, judges’ intuitions lead to arbitrary results. A study was once conducted in which German judges were asked to roll dice secretly weighted to turn up three or nine, and the judges were then asked whether a certain defendant’s sentence should be higher or lower in months. The judges who rolled nine averaged eight months; those who rolled three averaged five. Their cognitive adjustment in relation to a priming number is known as “anchoring,” and it is why you might hear a lawyer repeating a certain number over and over at a sentencing hearing.

Perhaps relying on a lay application of cherished legal standards is not as reckless as it seems at first blush. We might be reassured that from judges, unlike juries, at least we get written legal opinions to review. But Professor R. George Wright asks, “What value can really inhere in an articulated judicial opinion, . . . if the real decisionmaking process must be largely inarticulable and opaque even to the actual decisionmaker?” It is a fair question. On the other hand, surely there is value in having documented reasoning for appellate scrutiny, even if, unbeknownst to the decision-maker, it is not the true basis of the decision.

When the law rolls the dice on lay, juror decision-making, it looks away long before the final turn. There is a “cardinal principle that jury

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114 See Meyer, supra note 106, at 27.
115 Id.
116 Id.
deliberations shall remain private and secret.” 118 Thus, the jury room door is one of law’s boundaries, well before reaching the juror’s mind.

Sometimes, the law surrenders to intuition and calls it a day. “It is not uncommon for a code to incorporate explicitly within its liability assessment a call for the jury to look to their own intuitive notions of justice.”119 After all, there is what Professor Wright calls an “inescapable and crucial dependence of each allegedly distinct alternative to intuition upon intuition itself.”120 Maybe there is no other option. Along the same lines, Dr. Bernard G. Suran believes that even a more informed intuition, in which “the guesswork is ‘educated,’” 121 may just be “a more elaborate way of disguising ignorance.”122 He muses wryly, “Intuition tells me that intuition works best when guided by previous information . . . ,”123 but still, intuition works in secret.

Given the multiple layers of secrecy that cloak juror decision-making, Friedman continues, “[j]uries are not supposed to be lawless; but the system is set up in such a way that lawlessness . . . cannot be prevented.”124

Even worse, lawlessness cannot be denied. An underprized study from 1999, based on data from the Capital Jury Project125 and reported in the Law and Society Review, managed to provide evidentiary proof that “folk knowledge about crime and punishment influences the exercise of juror discretion in capital sentencing.”126 Specifically, the study utilized “3-4-hour interviews with 916 jurors in 11 states,”127 during which jurors reported relying on folk belief that life-sentenced defendants would soon be granted early release (and put back on the streets, perhaps to kill again) in states that, by law, did not allow early release, or allowed it far later than the jurors thought.128 For example, “despite being told by trial judges in California that a life sentence means life without parole, only 18.4% of the 152 capital jurors in [the] California sample indicated that they believed capital murderers given a life sentence would usually spend the

119 Robinson, supra note 109, at 1852.
120 See Wright, supra note 117, at 1420.
122 Id.
123 Id.
124 See Steiner, supra note 97, at 498.
126 See Steiner, supra note 97, at 464.
127 Id. at 461.
128 See id. at 461-64.
rest of their lives in prison.” The jurors ignored instructions from the court that life imprisonment really would be for life, ignored “admonitions that such considerations [as folk knowledge were] not to play a role,” and voted for death in order to prevent a fictitious scenario that they felt might occur.

More recent psychological research confirms that jurors “draw upon personal memories, experiences and associations, supplemented by vast repositories of unconscious material,” to make decisions “intuitively rather than analytically.” In his 2011 book *Thinking, Fast and Slow*, behavioral economist Daniel Kahneman described two discrete mental systems of human decision-making, which have been summarized as follows:

System 1 . . . represents our fast, intuitive and typically story-based decision-making and judgmental processes. System 1 calls upon causal and associational thinking, a palette of memories, associations and quickly retrieved information. We employ metaphor, categorization, intuition and emotion—creatively shaping and then showing preference to coherent explanatory stories, and building our judgments and decisions upon this narrative framing. . . . Effortful and laborious, System 2 is the weak-willed and subordinate analytical sidekick of System 1. For System 2, think algorithms, mathematics, scientific methodology and statistics rather than representative character, causality, intentionality and verisimilitude (lifelikeness and representation).

System 1 is brimming with bias. But “the more powerful, fast and intuitive System 1 typically dominates and prevails when the two are at odds,” due to “cognitive ease.” System 2 type critical analysis takes

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129 Id. at 499.
130 Id. at 461.
132 Id. at 26–27.
133 Id.
134 Id.
grueling effort, while gut intuition comes naturally. So, jurors, being only human, “quickly and intuitively rely upon psychological shortcuts—heuristics and biases—that affect individual judgment and decision-making,” because the alternative—critical thinking—feels an awful lot like work.

The fact that jurors go with their guts when making life-or-death decisions left researchers in the early release study to wonder, “how can state law tolerate death as a punishment when folk understandings compromise the constitutional protections required of state law?” Indeed, early release rules are not the only ones undermined by jurors’ folk beliefs. All juror-applied law is vulnerable.

Juror folk belief about criminal law is far-reaching. According to Friedman, jurors generally “think they know far more about the basic contours of criminal justice than about other aspects of the legal system.” Similarly, it was found in the early release study that murder and the death penalty “have particular visibility and salience . . . in the popular legal imagination.” In film, television series, literary fiction, “themes in the news coverage of murder cases,” media “play a key role in reinforcing and reproducing folk knowledge about crime and punishment.” There has been extensive debate over the exact nature of the media’s influence on juror decision-making, but not over its existence. “Lawyer intuition, post-trial juror interviews, mock trials, real-time observation by judges, and social science research” all confirm that “juror beliefs and perceptions are influenced by popular culture.”

Media shapes folk belief, and, in turn, folk belief shapes legal outcomes. Jurors rely on their intuitions about crime and punishment when they vote for life or death. They do so knowingly, and they do so unknowingly. And the law cannot reach past its boundaries to stop them.

A. The Primacy of Gut Intuition in the Trump Era

Folk belief runs deeper than law. Folk belief is what Justice Holmes called “felt necessities.” Henri Lefebvre called it “the truth in a
body and a soul.” Kant called it “transcendental reason.” Hemingway called it “what is seen out of the corner of an eye.” Justice Clinton of the Court of Criminal Appeals of Texas called it consulting the viscera. The early release study called it “the everyday, taken-for-granted understandings that shape people’s perceptions, thinking, actions, and reactions to events and situations.”

Whatever you call folk belief, it is “[e]mbodied in contemporary cultural common sense.” “It is inseparable from the interests, goals, and understandings that deeply shape or make up social life.” It is “a primary vehicle for the communication and continuation of attitudes and values.” It “provides unique raw material for those eager to better understand themselves and others.” Folk belief is the deviously seductive stuff of intuition.

Whether capital jurors give themselves over to folk belief unreservedly or make a concerted effort towards System 2 type critical analysis “[d]epend[s] on their motivations.” Do they feel the work is worth it? In the Trump Era, the motivation to embrace gut intuition is heavily reinforced, while the motivation to undertake critical thought is aggressively marginalized.

In Intuition, Trust, and Analytics, a collection of case studies on decision-making, researchers explain, it was “gut instinct . . . that swept Donald Trump . . . to victory.” The same force responsible for capital jury decision-making was responsible for Trump’s victory. On an extraordinary scale, American voters embraced their intuitions.

Trump was able to subvert trust in critical thinking through what Princeton professor Joan Wallach Scott calls a “pattern . . . [of] attack on the university as a place where critical thinking occurs.” Professor Scott

144 See Steiner, supra note 97, at 462 n.3.
145 Suran, supra note 121.
146 Meyer, supra note 106, at 27.
147 See, e.g., Watson v. State, 900 S.W.2d 60, 63 (Tex. Crim. App. 1995) (en banc) (Clinton, J., concurring) (“I suspect that the plurality has once again consulted its viscera”).
148 Id. supra note 97, at 461.
149 Id. at 496.
150 Id. at 461.
151 ALAN A. DUNDES, INTERPRETING FOLKLORE 174 (1980).
152 Id. at viii.
153 See Spottswood, supra note 101, at 188.
believes Trump “made it possible for a number of different groups whose aim is to stop the teaching of critical thinking to launch direct attacks.” For example, a right-wing organization known as Turning Point USA has created a “professor watch list,” intended to identify those that “advance a radical agenda in lecture halls.” Along the same lines as Scott, Dr. David Tollerton of the University of Exeter believes, “If the rhetoric of Trump’s campaign is translated into some kind of reality,” it is a threat to “the practice of logical, reasoned argument itself.”

Trump drew a battle line between himself and the academy. When Bill Moyers asked Professor Scott to “sum up the state of academic freedom in late 2017 as we approach the end of Trump’s first full year in power,” she said, “It’s under grave threat. . . . And it’s up to those of us in the academy . . . to somehow keep open that space of critical thinking . . . .” For his part, University of Chicago linguistics professor Chris Kennedy decided to teach a course called Truth in the Spring of 2017; “President Donald Trump was his inspiration.”

Scott went on to remind Moyers, education is “supposed to teach citizens how to think better, how to think critically, how to tell truth from falsehood, how to make a judgment about when they’re being lied to and duped and when they’re not, how to evaluate scientific teaching.” Education combats Kahneman’s cognitive ease. Jurors who reject the value of practicing critical thought have less or no motivation to resist knee-jerk intuition. On the contrary, they make a positive effort to reach decisions based on what they feel to be true.

Trump did not invent distrust of critical thought. The problem has gone by many names. Historian Richard Hofstadter called it anti-intellectualism. Isaac Asimov called it a cult of ignorance. Professor

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156 Id.
157 Bill Moyers, In The Age Of Trump, A Chilling Atmosphere, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/entry/in-the-age-of-trump-a-chilling-atmosphere_us_5a283ad9e4b0cd6fb5ee8c1a.
159 Id., supra note 155.
161 Id.
Tom Nichols calls it the death of expertise.\textsuperscript{164} Author and attorney David Niose calls it the abandonment of reason.\textsuperscript{165} Stanford Law lecturer Mugambi Jouet calls it anti-rationalism.\textsuperscript{166} But, whatever you call the war against critical thought, Trump is its modern champion, and he knows how to win.

Trump reports, “I’m a very instinctual person,” and assures Americans, “my instinct turns out to be right.”\textsuperscript{167} In other words, when a critical analysis of empirical evidence goes against his instincts, Trump counsels trust that his instincts will ultimately be vindicated. In support of his policy positions, “Trump appeals more often to emotions than to facts.”\textsuperscript{168} He asks of Americans essentially what Groucho Marx asked in \textit{Duck Soup}, “Well, who you gonna believe, me or your own eyes?”\textsuperscript{169} In doing so, he implicitly teaches Americans that emotion, not fact, is the proper venue of truth-seeking. The more comfortable Americans become relying on their emotions, or Trump’s instincts, as bellwethers of truth, the less motivated they are as jurors to undertake a painstaking, System 2 type analysis of legal questions.

That is, of course, if they are interested in truth-seeking at all. “Of 353 statements double-checked by the nonpartisan, Pulitzer Prize-winning PolitiFact website . . . , a mere 4 percent of Trump’s claims have been judged to be ‘true.’”\textsuperscript{170} In this respect, too, Trump undermines the motivation to pursue critical thought in truth seeking. Given that Trump’s statements and empirical evidence hardly ever agree, Americans no longer expect them to, and no longer feel the need to reconcile them. Trump’s claims have become more important than \textit{being} true.

\begin{footnotesize}
\textsuperscript{164} Id.
\textsuperscript{169} Chico Marx Biography, IMDB, http://www.imdb.com/name/nm0555597/bio (while Chico Marx became famous playing the character Groucho Marx, he was actually playing the character Chicolini when he spoke the line).
\textsuperscript{170} Noel, \textit{supra} note 160.
\end{footnotesize}
Trump’s promotion of intuition is consequential. A 2016 study led by U.S. Santa Barbra professor Dr. Brenda Major found that “[r]eminding White Americans high in ethnic identification that non-White racial groups will outnumber Whites in the United States by 2042 caused them to . . . report increased support for Trump.” The reminder did not change a critical analysis of Trump’s candidacy; it sparked intuitive fears. A study by University of Kansas psychologist Chris Crandall in which Americans were asked before and after the election “how normal it is to disparage” Muslims and Mexican immigrants (among other groups), Americans were “more likely to report it was acceptable to discriminate against these groups after the election.” The respondents were not provided recent empirical evidence reflecting an increased incidence of discrimination so that they could perform a critical analysis of the facts; they were called upon to consult their intuitions. They felt as if the truth had changed.

It is beyond doubt that the consequences of Trump’s promotion of intuitive decision-making and attacks on critical thought extend to death sentencing. Trump relies especially on the intuitive fear of murder to influence the views of Americans. He promotes a border wall by threatening, “Democrats who stand in our way will be complicit in every murder committed by illegal immigrants.” When a plane flew over a campaign rally, Trump warned, “could be a Mexican plane up there, they’re getting ready to attack.” In effect, Trump was ushered into power by a “dramatic rise of a new kind of white populism” based on “fear of terrorist attacks and other physical threats,” such as murder and mass murder. Intuitive fear of murder is central to Trump’s influence over American voters.

American jurors are the same people as American voters. Voters who elected Trump practiced making judgments about complex matters of law and policy based on their intuitive fear of murder. That was good

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174 Potock, supra note 75.
training for bad death sentencing. As science reporter Brian Resnick puts it, “We fear unthinkingly.” When Americans enter the capital jury room, their unthinking fears come with them. They are more inclined to vote for the execution of a defendant who evokes their intuitive fear of murder.

Trump encourages reliance on intuitive fears, and discourages reliance on the critical thinking that would elevate reason above fear. Cognitive ease has never been so easy as it is in Trump Era death sentencing.

**B. Populist Distrust of Courts and Judges**

Folk belief about murder is “embedded in mistrust of the criminal justice process and advocacy of punitiveness.” Thus, gut intuitions about crime and punishment are strengthened by a lack of trust in courts and judges. One juror interviewed during the Capital Jury Project reported, “the judge explained to me that if [the defendant] gets a life sentence there was absolutely no chance that he would get out. I thought he might get out. I don't trust anybody about it.” The comment is telling. Jurors who do not trust courts and judges are less likely to make decisions according to law.

Trump encourages Americans to distrust courts and judges. Senator Ben Sasse has accused Trump of “trying to weaponize distrust,” and the court system has been a primary target. Trump often makes claims such as, “We need quick justice and we need strong justice — much quicker and much stronger than we have right now.”

The Brennan Center for Justice at New York University School of Law warns that Trump “threatens our entire system of government” through “a troubling pattern of attacking judges and the courts for rulings he disagrees with.” In calling for harsh punishment for the perpetrator of the October 31, 2017 terrorist attack in Manhattan, Trump called courts

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176 Resnick, supra note 172.
177 Steiner, supra note 97, at 487.
178 Id. at 499.
180 In His Own Words: The President’s Attacks on the Courts, BRENNA N CENTER FOR JUSTICE (Jun. 5, 2017), https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts.
181 Id.
a “joke” and a “laughingstock.” In response to federal courts across the nation staying Trump’s January 27, 2017 executive order banning immigration from certain Muslim countries, Trump tweeted, “Our legal system is broken!” He elaborated in a televised statement:

The courts are not helping us I have to be honest. It’s ridiculous. Somebody said I should not criticize judges, Okay, I’ll criticize judges. . . . And I have to be nice, otherwise I’ll be criticized for speaking poorly about our courts. I’ll be criticized by these people, among the most dishonest people in the world. . . . for speaking harshly about our courts. I could never want to do that. I know you aren’t skeptical people. You don’t think this was done by a judge for political reasons do you? . . . . People are screaming break-up the Ninth Circuit . . . that Ninth Circuit, you have to see, take a look at how many times they have been overturned with their terrible decisions. Take a look. And this is what we have to live with.

Encouraging a lack of appreciation for the constitutional restrictions on executive power, Trump complained in a Tweet that, while he “instructed Homeland Security to check people coming into our country VERY CAREFULLY,” the “courts are making the job very difficult!” Exploiting Americans’ fear of “murder committed by illegal immigrants,” Trump suggested terror attacks were imminent and called on Americans to blame the court system: “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”

Trump also targets individual jurists. When U.S. District Court

\[182 \text{Id.} \]
\[183 \text{Id.} \]
\[184 \text{Id.} \]
\[185 \text{Id.} \]
\[186 \text{Phelps & Ebbs, supra note 173.} \]
Judge James Robart stayed the travel ban, Trump referred to him as a “so-called judge.” When U.S. District Judge William Orrick, III of the Northern District of California enjoined Trump’s executive order denying federal funds to sanctuary cities, Trump issued statements referring to Judge Orrick as “[t]his San Francisco judge” and “an unelected judge.” Again appealing to fear, Trump warned that Judge Orrick’s ruling was “a gift to the criminal gang and cartel element in our country.” In response to U.S. District Court Judge Gonzalo O. Curiel’s rulings against Trump in the Trump University case, Trump accused Judge Gonzalo of bias, stating, “this judge is of Mexican heritage, I’m building a wall!”), “[t]otally biased,” and “hates Trump.”

When Justice Ginsburg commented that she could not imagine what the country would be like if Trump were elected, Trump responded, “Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot – resign!” and “Big mistake by an incompetent judge!”

Senator Patrick Leahy has commented that Trump’s attacks on courts make it seem as if he is intent on precipitating a constitutional crisis. Capital sentencing is an unrecognized dimension of that crisis. Trump’s pattern of encouraging distrust and loathing of courts and judges, coupled with his pattern of encouraging trust in gut intuition, paves the way for folk beliefs to supplant legal rules of death sentencing at the critical moment of juror decision-making.

On the surface, it may seem that Trump has made little headway in undermining the court system. Sixty percent of Americans still report having “some degree of trust in the courts.” Twenty-five percent “say they don’t have much trust in the court system, with 12 percent saying they don’t have any trust at all.” But even one juror is too many and it is not the nature of folk belief to be self-reported, or consciously recognized by decision-makers. A juror who reports some trust in courts, when weighing gut intuition against legal instructions in the moment of decision-making,

188 Id.
189 Id.
190 Id.
191 Id.
192 Id.
193 Dustin Volz, Trump steps up attack on judge, court system over travel ban, REUTERS (Feb. 5, 2017), https://www.reuters.com/article/us-usa-trump-immigration/trump-steps-up-attack-on-judge-court-system-over-travel-ban-idUSKBN15K0AF.
might not notice when bone-deep folk belief puts an invisible finger on the scale.

**C. Repudiation of Constitutional Limits on Death Sentencing**

Trump targets death penalty law in particular. He regularly challenges the judicial process of death sentencing, constitutional rules relating to death sentencing, and specific outcomes in capital cases.

Trump teaches a disregard for the process of death sentencing by demanding the executions of individuals not yet tried or convicted. He tweets, “Must have fast trials and death penalty for the animals”;

“Get ALL the info, then quick trial, then death penalty for the Boston killer of innocent children and people!”

“The animal who beheaded the woman in Oklahoma should be given a very fast trial and then the death penalty.”

In each of these statements, Trump demands fast trials, fostering the folk belief that capital process is too extensive and lengthy. In each of these statements, Trump calls for the death penalty without regard for legal processes, fostering the folk belief that moral outrage—a knee-jerk impulse towards vengeance—rightly overrides the law in death sentencing. In each of these statements, Trump reduces capital trials to formality, where forgone conclusions should be quickly rubberstamped.

In a 2016 campaign speech, Trump argued that the Eighth Amendment’s prohibition on cruel and unusual methods of execution coddles capital defendants:

> It’s like these guys that commit murder, right? They commit murder. They kill someone. . . . They go to jail. ‘We don’t want the death penalty. It’s cruel and unusual punishment,’ . . . And then you have another case when they get the death penalty, want to give them drugs to put them to sleep quietly and this. Look, we’re in a fight for our lives.

Evident in Trump’s words is an appeal to fear (“we’re in a fight for our

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197 Donald Trump (@realDonaldTrump), TWITTER (Sept. 26, 2014 7:10 PM).
to create or reinforce a folk belief (murderers are pampered by lethal injection) that Trump urges should be trusted over a constitutional rule (the prohibition of cruel and unusual punishments).

Trump has also challenged the Eighth Amendment implicitly, by calling for a punishment far beyond that which would be constitutionally permissible. Trump suggested that “The animal who beheaded the woman in Oklahoma should be given . . . [t]he same fate - beheading?” Americans who form the impression from Trump that state departments of correction might very well consider cutting off the heads of capital defendants will be heavily predisposed to embrace the death penalty’s “climate of brutal violence” over its constitutional restrictions when they sit as capital jurors.

Trump also challenges the propriety of legal outcomes in capital cases. He has tweeted, “Tucson killer Loughner should be given the death penalty, not his plea bargained life in prison” and “Drew Peterson, a real sleaze, just convicted of killing wife. Change the law so he gets death penalty.” By challenging legal outcomes without familiarity with the proceedings and evidence, Trump teaches that legal proceedings and evidence do not matter, courts are not worthy of confidence, and what feels just and right from a position of ignorance should control.

Repudiation of constitutional rules of capital sentencing, combined with increased reliance on intuitive decision-making and distrust of courts, paves the way for folk beliefs about crime and punishment that supplant legal rules in the intuitive decision-making of jurors.

III. TRUMPIAN FOLK BELIEFS AND THEIR CONSTITUTIONAL ANTIPODES

Trump has the power to sway Americans’ folk beliefs. In 2016, Forbes named Donald Trump the second most powerful person in the world (behind Vladimir Putin), because he was to be “the first billionaire president of the United States.” Trump uses his power to shape folk beliefs, and the election demonstrated that he does so effectively. “For Trump to say the . . . things he said during the campaign, and then be

199 Id.
200 Donald Trump (@realDonaldTrump), TWITTER (Sept. 26, 2014 7:10 PM).
202 Donald Trump (@realDonaldTrump), TWITTER (Aug. 8, 2012, 8:45 AM).
rewarded for them, sent a powerful sign."\textsuperscript{205} In part, the sign was of changing attitudes and ways of decision-making.

Trump became the most powerful person in the nation with help from his cunning use of social media like Twitter. He once admitted, “I doubt I would be here if it weren’t for social media, to be honest with you.”\textsuperscript{206} It has been said of Trump, “Tweeting for him is like whispering in someone’s ear — a few million at a time.”\textsuperscript{207} In his whispers are folk beliefs.

Because media “play a key role in reinforcing and reproducing folk knowledge about crime and punishment”\textsuperscript{208} and “folk knowledge about crime and punishment influences the exercise of juror discretion in capital sentencing,”\textsuperscript{209} the death penalty is certainly subject to influence from a billionaire-president’s demonstrably effectual exploitation of social media specifically designed craft folk beliefs.

Troublingly, Trumpian folk beliefs influential of capital sentencing are antipodal to constitutional principles. Trump encourages the dehumanization of criminal defendants, while the central precept of American death sentencing is “the fundamental respect for humanity underlying the Eighth Amendment.”\textsuperscript{210} Trump encourages distrust of scientific experts, while testimony of mental health experts “ranks among the most powerful types of mitigation evidence available.”\textsuperscript{211} Trump encourages a distrust of factual evidence, while sentencing jurors are constitutionally required to “consider, as a matter of law, any relevant mitigating evidence.”\textsuperscript{212}

As Trump-Era jurors “draw upon . . . vast repositories of unconscious material”\textsuperscript{213} in search of ways to make the difficult decision of whether a capital defendant deserves to be executed, they tap a groundswell of folkloric ideology that aligns in perfect opposition to the Eighth Amendment principles jurors are sworn to uphold.

\textsuperscript{205} Resnick, supra note 172.
\textsuperscript{208} Steiner, supra note 97, at 477.
\textsuperscript{209} See id. at 464.
\textsuperscript{210} See Woodson, 428 U.S. at 304.
\textsuperscript{211} See Littlejohn, 704 F.3d at 864.
\textsuperscript{212} See Eddings, 455 U.S. at 113-14.
\textsuperscript{213} See Meyer, supra note 106, at 26.
A. Dehumanization of Defendants v. “the fundamental respect for humanity underlying the Eighth Amendment”

Murderers have long been dehumanized in folklore. In crime fiction, Professor Christiana Gregoriou identifies a primary criminal archetype of “THE MONSTER” or “the ‘Born Evil’ criminal figure.”214 “Though a human, the criminal is correlated to a ‘monster that [i]sn’t human’, as a devilish creature that came straight from hell.”215 The same archetype also appears in non-fiction literature, blurring the line between fantasy and reality in the minds of readers. For instance, former member of the FBI Behavioral Science Unit Robert Ressler wrote the books I Have Lived in the Monster216 and Whoever Fights Monsters,217 based on his involvement and testimony for the prosecution in murder trials.

In news reporting on murders and executions, murderers are often described and portrayed as monsters.218 For instance, in 2015 a Missouri sheriff told reporters the executed murderer David Zink “was just a horrible monster.”219 The archetype appears in politics—and thus media coverage of politics—as well. Philip L. Simpson explains the archetype of a serial killer, “as a dramatic case study of leftist and feminist critique of generalized patriarchal hostility toward marginalized classes during the 1970s, ironically became one of the New Right’s favorite bogeymen to illustrate the pernicious effect of the supposed decay of traditional values in the 1980s.”220 In other words, politicians came to use the myth—think Hannibal Lecter—to leverage fear. According to the early release study, “[t]he public’s apprehension about crime and punishment invites politicians to assume a ‘get tough’ posture in their political campaigns . . . as a way of garnering support from a public ever wary of crime.”221

214 CHRISTIANA GREGORIOU, DEVIANCE IN CONTEMPORARY CRIME FICTION 111 (Palgrave Macmillan 2007).
215 Id. at 113.
221 Id. (footnotes omitted).
Prosecutors do the same. Across the nation, prosecutors deliver closing arguments to juries that leverage folk belief in the monster-murderer as a means of dehumanizing defendants charged with terrible crimes. The Missouri prosecutor refers to the defendant as “that monster who showed no mercy.” The Oklahoma prosecutor calls him “‘evil’ and ‘a monster.’” The Massachusetts prosecutor uses the narrative form of a ghost story to more effectively conflate the defendant with the fictional character: “[A] monster came in the night. A monster came into the life of [the victim], and the monster looked like [the defendant].” The South Dakota prosecutor attempts to place the defendant beyond the fictional character, describing him as “a ‘monster . . . something scarier than anybody dressed up on Halloween.’” The Arizona prosecutor folds in religious belief, characterizing the defendant “as a ‘monster’, as ‘filth’, and the ‘reincarnation of the devil on earth.’” The Illinois prosecutor points to the defendant and says, “Right here over here is the monster, folks.” The Minnesota prosecutor cries “monster.” The Rhode Island prosecutor cries “monster.” And, all over the nation, jurors mete out death to the bogeymen that hid under their childhood beds.

The nationwide chorus of prosecutors invoking the monstrosity of criminal defendants does not arise by chance. Prosecutors adopt a supernatural rhetoric of monstrosity because it appeals to jurors on familiar terms and exploits bone-deep fears. Dehumanization through superstition becomes the way of prosecution, because it is the folklore of murder.

In short, they do it because it works. The tendency among humans to dehumanize others has been called “one of the darkest, most ancient, and most disturbing mental programs encoded into our minds.” At Northwestern University, psychologist Nour Kteily studies “dehumanization, the ability to see fellow men and women as less than human,” and has measured “[m]ean levels of dehumanization” by asking participants to rate how evolved certain groups of people are. Americans are least dehumanized, with a score of 91.5, and Muslims

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223 See Malicoat v. Mullin, 426 F.3d 1241, 1256 (10th Cir. 2005).
228 See Kellogg v. Skon, 176 F.3d 447, 451–52 (8th Cir. 1999).
230 Resnick, supra note 172.
231 Id.
most, at 77.6. Whatever the nationality or race of a certain defendant, capital jurors certainly have a capacity to dehumanize him.

Jurors are more likely to end the life of someone they see as inhuman. Unsurprisingly, the same is true of murderers. Criminologists believe that those who commit murder often view their victims “as worthless and expendable,” due to a “process of dehumanization.” Perhaps, to some extent, the exploitation of folk belief in the monster-murderer is a response to the dehumanization of victims by killers. Sentencing becomes a denial of humanity, because murder is a denial of humanity.

Indeed, there is the sense that turnabout is fair play for murderers. Professor Robert Blecker argues, “A basic retributive measure – like for like or giving a person a taste of his own medicine – satisfies our deepest instincts for justice.” But instincts are the very reason jurors tend to ignore court instructions. Constitutional principles, not instincts, should be the basis for death sentencing.

Constitutional principles, unlike instincts, do not permit killing out of unreasoned vengeance. Constitutional principles demand that the death penalty be more enlightened than murder. The central constitutional precept of the American death penalty is “the fundamental respect for humanity underlying the Eighth Amendment.” Jurors must regard defendants as “uniquely individual human beings” and recognize any “compassionate or mitigating factors stemming from the diverse frailties of humankind.” The Supreme Court has admonished that “before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider . . . that individual in light of his personal history and characteristics . . . .” The allowance is also a mandate: “Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.” In the context of ineffective assistance of counsel claims, where postconviction courts determine whether unpresented mitigating evidence might have changed the outcome of a sentencing proceeding, the Supreme Court directs that courts do in

232 Id.
236 See id.
237 Id.
retrospect what, presumably, jurors must do in the first place: “engage with” the defendant’s unique human experience\textsuperscript{240} and “any aspect of [his] character”\textsuperscript{241} to understand “why he has become the man he is now.”\textsuperscript{242} In short, jurors are not allowed to dehumanize killers in order to justify ending their lives. On the contrary, jurors can only end lives they fully venerate as uniquely human. The price for using the ultimate punishment is—rightfully so—meeting the law’s highest challenge of human decency.

After all, the Eighth Amendment test for whether the death penalty is cruel and unusual is the “evolving standards of decency,”\textsuperscript{243} not the evolving standards of vengeance.

To live up to the Eighth Amendment’s fundamental respect for human decency, jurors must find it in themselves to show killers the empathy those killers did not show their victims. Thus, while Blecker may be right to argue the death penalty “restore[s] a moral balance,”\textsuperscript{244} the Eighth Amendment ensures that balance is restored in favor of cherishing humanity, rather than denying it—no matter how flawed or destructive. The dehumanization of the victim by the defendant is counterbalanced with the humanization of the defendant by society. To avoid conforming society’s life-or-death decision-making to that of its most damaged members, the denial of humanity inherent in murder is met with the preservation of humanity inherent in sentencing. Balance is restored by jurors doing what a murderer could not, embracing the best qualities of humanity—empathy, compassion, and reason—even when tempted to embrace the worst.

Reasoned decision-making is not an act of mercy; it is an act of law. The constitutional toll for ending a life is grace.

By invoking folk belief in the monster-murderer bogeyman, prosecutors cheat the Eighth Amendment’s fundamental respect for humanity. In the Trump Era, they have a great deal of support in doing so.

Dehumanization of capital defendants is a central tenet of Trumpian folk belief. Trump wields his power and media-based influence to regularly dehumanize those he believes deserve the death penalty. After the October 31, 2017 terrorist attack in Manhattan that killed eight people, Trump stated, “We also have to come up with punishment that’s far quicker and far greater than the punishment these animals are getting right

now." When two people were killed and eleven wounded in a police shootout with a gunman in front of the Empire State Building, Trump tweeted, “Must have fast trials and death penalty for the animals.”

When in 2014 a man beheaded a coworker at a food processing plant in Oklahoma, Trump tweeted, “The animal who beheaded the woman in Oklahoma should be given a very fast trial and then the death penalty.” (Years later, the man was indeed sentenced to death.)

When in 2015 two police officers were shot and killed during a traffic stop in Hattiesburg, Mississippi, Trump characterized the shooters as “two deranged animals” and demanded “DEATH PENALTY!”

According to the early release study, jurors “make recourse to their store of folk knowledge” when “[p]resented with what they regard as legal nonsense.” Those who Trump encourages to view murderers as animals will find the mandate to empathize with them nonsensical. According to the study, constitutional principles like those found in “the highly structured ideology of due process” will be “regularly resisted” by jurors if the principles “def[y] cultural common sense.” Cultural common sense in the age of Trump holds that murderers are less than human and undeserving of consideration in sentencing. According to the study, when the law vies with “taken-for-granted assumptions about the right way of dealing with criminals and the dangers of deviating from those methods [it] does not penetrate” the minds of jurors. It is a taken-for-granted assumption of Trumpian folk belief that murderers deserve a quick death. Thus, jurors of the Trump Era make the life-or-death sentencing decision, “but not in the way required by the constitution as a condition for using death as punishment.”

Trump encourages Americans to embrace the folk belief that murders are less than human, and, in so doing, defy the respect for humanity fundamental to the Eighth Amendment. Trump validates dehumanization of murderers as an intuitive basis for decision-making in

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245 In His Own Words: The President’s Attacks on the Courts, Brennan Center for Justice, https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts.
247 @realDonaldTrump, Twitter (Sept. 26, 2014 7:10 PM).
249 @realDonaldTrump, Twitter (May 11, 2015, 2:39 AM).
250 Steiner, supra note 97, at 498.
251 Id. at 461.
252 Id. at 499.
253 Id. at 499-500.
death sentencing, and, as a result, the constitutional principle of humanization fails to translate into legal outcomes.

B. Devaluation of Expertise v. Testimony of Mental Health Experts

In addition to critical thought, critical knowledge—expertise—is pitted against intuition in the minds of capital jurors. Jurors ask, shall I listen to the experts or trust my gut? In the Trump Era, folk belief provides a clear answer.

Trump rejects expertise itself. Bernard Avishai writes of Trump, “His lies seem increasingly brazen and transparently designed to create a suspicion of élites.” Often, those élites are leaders in science, earning Trump’s campaign against expertise the moniker “Donald Trump’s War on Science.”

Since Trump became President, he has argued that vaccinations cause autism, stating, “I am being proven right about massive vaccinations—the doctors lied” and pleaded with Americans to “[s]ave our children & their future.” But “[t]he medical community has been consistent and adamant on this point: There is no proven connection between vaccines and autism.” Trump’s folk belief is based on a study by Andrew Wakefield, which has been both debunked and retracted. And, while Trump has been a proponent of the false folk belief for years, “as president, Trump’s position carries outsized weight, and has the power to significantly impact autism research and treatment, as well [as] the number of preventable outbreaks of viral-borne diseases such as measles and mumps.

Trump has insisted, “Global warming is a total, and very expensive, hoax!” But “97 percent of scientific experts agree that human-caused climate change is real,” and Congress has found that

254 Avishai, supra note 92.
256 Donald Trump @realDonaldTrump, TWITTER (Sept. 3, 2014, 6:30 AM).
257 Id.
258 Id.
259 Id.
260 Id.
261 Chelsea Harvey, Research shows — yet again — that there’s no scientific debate about climate change, WASH. POST (Apr. 15, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/04/15/research-
“global warming poses a significant threat to the national security and economy of the United States, public health and welfare, and the global environment . . . .” When challenged on his rejection of scientific expertise, Trump becomes hostile. With growing rage, he tweets, “Is our country still spending money on the GLOBAL WARMING HOAX?” and “same old climate change (global warming) bullshit! I am tired of hearing this nonsense.” Other times he adds explanation that carries the ring of truth: “The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.” Whatever the tactic, Trump’s rejection of scientific expertise is resounding.

Trump’s war on expertise is demonstrably effectual. A Pew Research Center poll reflects that Republicans’ attitudes towards experts is changing dramatically, while Democrats’ attitudes are not. “The poll found that the number of Republicans who believe colleges have a ‘positive impact on the way things are going in the country’ dropped from 54 percent in 2015 to 36 percent in 2017. Meanwhile, Democrats’ approval held constant at 72 percent.” Trump’s constituents are losing faith in the acquisition of specialized knowledge through learning.

In 2015, one group of researchers saw a need to adopt a measure of trust in experts, which they dubbed “epistemic trustworthiness” (demonstrating perfectly the very arcaneness that contributes to laypeople distrusting experts). Call it what you will; trust in experts is on the decline. Trump is winning the war, because he understands that the experts’ only weapon is, well, their expertise.

shows-yet-again-that-theres-no-scientific-debate-about-climate-change/?utm_term=.6b96921aa119.
264 @realDonaldTrump, TWITTER (Jan. 25, 2014, 3:48 PM).
265 @realDonaldTrump, TWITTER (Jan. 28, 2014, 10:44 PM).
266 @realDonaldTrump, TWITTER (Nov. 6, 2012, 11:15 AM).
269 Julia Shaw, The real reason that we don’t trust experts anymore, INDEPENDENT (July 8, 2016), http://www.independent.co.uk/voices/the-real-reason-that-we-don-t-trust-experts-a7126536.html.
Distrust of scientific expertise in favor of gut intuition is especially destructive to capital sentencing proceedings. Scientific experts play a key role there. Because the biopsychosocial determiners and influencers of human behavior are critical in assessing human culpability, testimony of mental health experts “ranks among the most powerful types of mitigation evidence available.”

Defendants have a right to present any mitigating mental-health evidence, and the Supreme Court prohibits postconviction courts from discounting the effects unpresented mental health testimony might have had on sentencing jurors. Distrusting mental health experts undermines the central role of mental illness in assessing human culpability.

Outside the courtroom, on a larger scale, there is widespread expert opinion about the death penalty that might—if not for the distrust of experts—sway the folk understandings of jurors towards a more critical view of the death penalty. For instance, a national poll of 500 police chiefs was undertaken in 2008, in which the officers were asked to select factors “most important for reducing violent crime.” They ranked capital punishment last, behind, among other things, drug abuse treatment, job growth, longer prison sentences, better laboratories, and crime databases. In addition to law enforcement officers, 88 percent of criminologists report that the death penalty does not deter crime. Beyond them, the American Bar Association (“ABA”), representing some 400,000 lawyers, has called for a moratorium on the death penalty since 1997. A 2015 ABA study found “numerous concerns have arisen over states’ ability to fairly and accurately determine who should be sentenced to death.”

Beyond lawyers, the American Psychological Association (“APA”) called for a moratorium on the death penalty in 2001, until further studies could confirm that states had “policies and procedures that can be shown through psychological and other social science research to

270 See Littlejohn v. Trammell, 704 F.3d 817, 864 (10th Cir. 2013).
274 See Id.
275 Id.
276 See About the American Bar Association, AMER. BAR ASSOC., https://www.americanbar.org/about_the_aba.html.
ameliorate [certain] deficiencies.”

Not all expert opinion and research cuts against the death penalty. But there is ample expert opinion and research both in and out of the courtroom that—if susceptible to expert influence—would raise concerns in jurors and inspire more critical analysis of death penalty cases.

C. Trump’s “Ontological Warfare” v. Reliance on Mitigating Facts

In the age of Trump, “beliefs . . . are fueled by emotive opinions and arguments rather than facts.” Put another way, “Truth is pliable in Trumpland.”

Studies, empirical evidence, facts and figures have trouble penetrating folk belief in the Trump Era, because Trump strongly encourages distrust of facts. He has gone so far as to profess on a talk show, “One of the greatest of all terms I’ve come up with is ‘fake.’”

The Trump administration’s back and forth on many factual questions has been well-documented. Infamously, while serving in the role of Counselor to the President, Kellyanne Conway coined the phrase “alternative facts” in a January 22, 2017 interview on Meet the Press, while defending White House Press Secretary Sean Spicer’s false claims about the size of the crowd at President Trump’s inauguration.

After issuing multiple public apologies for the statements about sexual assault he made in the notorious Access Hollywood tapes, Trump changed his mind about the fact of whether he had said the words, stating,

281 See LIEBOWITZ, PALISZKIEWICZ, & GOUCHOWSKI, supra note 154.
282 Williams, supra note 169.
“We don’t think that was my voice.” For Trump, the fact of whether he spoke the words was dependent on whether he felt, long after the fact, that the recorded voice sounded like his. The later impression could change the prior reality. Such affronts on the permanency of facts have been dubbed Trump’s “ontological warfare.”

And, as with his war on expertise, Trump is winning. Based on largescale national surveys, Professors R. Kelly Garrett and Brian Weeks conducted a study confirming that individuals who trust in gut instinct are more susceptible to believing inaccurate or outlandish factual claims. They measured “reliance on intuition for factual beliefs,” “importance of consistency between empirical evidence and beliefs,” and “conviction that ‘facts’ are politically constructed (Truth is political)” among Americans, and found, “Individuals who view reality as a political construct are significantly more likely to embrace falsehoods, whereas those who believe that their conclusions must hew to available evidence tend to hold more accurate beliefs.”

Trump has exploited susceptibility to disregard of facts. Researchers in *Intuition, Trust, and Analytics* conclude, “the beliefs of people today, including social media users, are fueled by emotive opinions and arguments rather than facts.” It has been said that Trump’s America is a “post-truth society.” In fact, in 2016, Oxford Dictionaries declared “post-truth” the word of the year. The term is defined as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.”

Post-truth death sentencing is unconstitutional death sentencing. The Eighth Amendment requires that jurors “consider, as a matter of law, any relevant mitigating evidence.” Indeed, “[t]he test for deciding a challenge for cause is whether the juror can ignore his preconceived ideas and render a verdict according to the evidence . . . .”

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287 Avishai, supra note 92.
289 Id.
290 LIEBOWITZ, PALISZKIEWICZ & GOLUCHOWSKI, supra note 154.
291 Noel, supra note 160.
293 LIEBOWITZ, PALISZKIEWICZ & GOLUCHOWSKI, supra note 154.
295 *Ex parte Burgess*, 827 So. 2d 193, 197 (Ala. 2000).
“must be based on the evidence at trial and the court’s instructions, such as ‘if the evidence shows.’”296 Jurors who disregard evidence disregard the constitutional requirement to base their sentencing decisions on mitigating evidence.

In Trump’s post-truth society, increased reliance on gut intuition, distrust of courts and judges, repudiation of death penalty law, folk belief in the monster-murderer, devaluation of expertise in law and science, and the relativity of facts combine to form a perfect storm of folk beliefs that overpowers constitutional principles of death sentencing.

IV. CONSEQUENCES OF DEATH PENALTY TRUMP EFFECT

The potential consequences of Trump Effect on the death penalty include an increase in executions, an increase in death sentencing, and an increase in the incidence of death sentencing based on unconstitutional folk beliefs.

U.S. executions have increased under Trump. In 2017, Trump’s first year in office, executions ticked up to 23, after having just hit a twenty-five-year low of 20 in 2016.297 The growth, though slight, is conspicuous on the heels of the historic bottoming out. Further, the first year of Trump’s presidency is the first year that the number of executions has grown at all, rather than declined, since 2009.298 For nearly a decade, the death penalty has been disappearing. Its recrudescence coincides with Trump’s rise to power.

Trump Effect could certainly be felt prior to Trump taking office, during the fervor and civil unrest of the campaign season. But the 2016 execution figures would not immediately reflect the cultural shifts of 2016. Executions take time. For instance, the governor of Florida, “[w]ithin 30 days after receiving [a] letter of certification from the clerk of the Florida Supreme Court” providing notice that a defendant’s judicial proceedings are complete, “shall issue a warrant for execution . . . directing the warden to execute the sentence within 180 days, at a time designated in the warrant.”299 A governor who might be inspired by Trumpian folk belief to increase the rate of executions—and garner political support by leveraging fear of the archetypal monster-murderer300—would still need to leave time for the Florida Department of

298 See id.
300 See Steiner et al., supra note 97, at 499 (discussing the tendency of “politicians to assume a ‘get tough’ posture . . . as a way of garnering support from a public ever wary
Corrections to prepare. The result would come months later. In Oklahoma, judges notify county sheriffs of defendants’ death-readiness and choose an execution date “not less than sixty (60) nor more than ninety (90) days from the time of the judgment.” 301 Judges inspired by Trumpian folk belief in 2016 to set execution dates as soon as possible, and thus increase the execution rate, could only make so much headway.

Death sentencing has also increased under Trump. After hitting a forty year low in 2016, death sentencing ticked up in 2017, from 31 to 39. 302 The growth, though slight, is conspicuous on the heels of the historic bottoming out. Further, the first year of Trump’s presidency brought the greatest increase in death sentencing since 2002. 303 Because capital trials are lengthy, bifurcated affairs, changes in juror decision-making resulting from changes in folk belief popularized in 2016 would take time to result in increased death sentencing.

As with the economy, there are too many variables affecting the death penalty to know for sure whether the growth in executions and death sentencing is fairly attributable to “Trump bump.” 304 But, as described above, there is good reason to believe the most powerful person in the nation continually calling for executions, igniting fear of murder, dehumanizing murderers by repeatedly calling them animals, encouraging distrust of instructions from courts that would circumscribe death sentencing, encouraging distrust of mental health experts that might offer scientific bases to find a defendant undeserving of death, and encouraging distrust of mitigating evidence might well increase use of the death penalty.

Surprisingly, evidence that Trump Effect increases death sentencing can be found abroad. In 2016, Saudia Arabia faced global outrage for a mass execution of forty-seven individuals, including protesters convicted of sedition. 305 Maya Foa, Director of the human rights organization Reprieve, explained, “International condemnation of the

of crime.”).

303 See id
304 Ydstie, supra note 96.
mass killing is thought to have been a key factor in the kingdom’s decision to halt the executions of protesters.\footnote{Ahmed, supra note 305.} However, in 2017, a visit from President Trump coincided with the return of death sentencing for protesters.\footnote{Id.} Foa argued, “it appears that president Trump’s recent visit, and his explicit approval of the Saudi regime despite gross human rights abuses, may have emboldened Saudi authorities, who are now signaling their intention to resume protest-related executions.\footnote{Id.} Perhaps death penalty Trump Effect increasing executions overseas makes consistent data at home less dubious.

The U.S. murder rate has also increased in the Trump Era, inviting still more increases in death sentencing and executions. FBI Uniform Crime Reporting reflects that murder and non-negligent manslaughter—quicker to respond to cultural shifts than sentencing and executions—increased during the campaign excitement of 2016 to 16,459 from 15,181 in 2015 by 8.6\%.\footnote{Jeff Asher, The U.S. Murder Rate Is Up But Still Far Below Its 1980 Peak, FIVE THIRTY EIGHT (Sept. 25, 2017, 9:55 AM), https://fivethirtyeight.com/features/the-u-s-murder-rate-is-up-but-still-far-below-its-1980-peak/.} While there have been other yearly increases, the murder rate has trended downward since the early 1990s.\footnote{Murder Rates Nationally and By State, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/murder-rates-nationally-and-state#nat1970 (last visited Apr. 8, 2018).} Again, the growth is conspicuous.

There is a strong basis for attributing the rise in murder rate to Trump Effect. Randolph Roth, historian and author of the seminal work on U.S. murder rates \textit{American Homicide}, could not have known how prophetic his words were when, at the time of the 2008 election, he stated, “It is . . . a good sign that most of the leading candidates in the American elections of 2008 recognized that divisive rhetoric is capable of inciting violence and deliberately stepped back from the worst excesses of partisanship.”\footnote{Roger Lane, Taking the Mystery Out of Murder Rates: Can It Be Done?, 8 OHIO ST. J. CRIM. L. 553, 563 (2011).} Eight years later, Trump recognized no such thing, and did not step back in the slightest.

During the 2016 campaign, Trump repeatedly demanded that protesters be “roughed up” and that supporters “knock the crap” out of them.\footnote{Potock, supra note 75.} He offered to pay the resulting legal fees.\footnote{Id.} He lamented, “We’re not allowed to punch back anymore” and got a roar from the crowd by
saying, “I’d like to punch him in the face. I’ll tell you.” He reminisced, “In the good old days this doesn’t happen because they used to treat them very, very rough.” In response to delays caused by removing protesters, Trump said, “Part of the problem, and part of the reason it takes so long, is nobody wants to hurt each other anymore, right?” Later, as president, he tweeted “a video of himself at a pro-wrestling event throwing to the floor a man with a CNN logo for a head,” prompting CNN to issue a statement that Trump was encouraging violence against reporters.

SPLC research confirms that “[t]he campaign language of the man who would become president spark[ed] hate violence, bullying, before and after the election.” SPLC documented 1,094 incidents of “hate violence and incidents of harassment and intimidation around the country” in the first thirty-four days after the election. SPLC reported that, among post-election hate crimes, “the vast majority appeared to be celebrating his election victory.” An astonishing “37% of them directly referenced either President-elect Trump, his campaign slogans, or his infamous remarks about sexual assault.” For instance, a Boston man who beat a homeless man with a pipe and urinated on him because he was a “wetback” later confirmed to arresting officers, “Donald Trump was right. All these illegals need to be deported.”

There is no reason to believe Trump-inspired violence stops short of homicide. There is every reason to believe Trump-inspired violence includes the 8.6% spike in intentional homicide reported by the FBI. In American Homicide, Roth places “stress on the primacy of political attitudes” as a driver of murder rates. Roth points to “national feeling and the empathy, trust, and goodwill that flow from it” as a counterforce of murder never fully recovered from the American Civil War. In Trump’s America, SPLC documents “[t]he number of hate groups in the United States rose for a second year in a row in 2016 as the radical right rise continues.”

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315 Id.
316 Id.
317 Pengelly & Walters, supra note 179.
318 Potock, supra note 75.
319 Id.
320 Id.
321 Potock, supra note 75.
322 Lane, supra note 311, at 561.
323 Id. (though noting that alternate explanations for the spike in murder rate of the 1840s and 50s include the invention of the Colt pocket revolver and an influx of desperate Irish refugees).
was energized by the candidacy of Donald Trump.”

Trump expresses regret that “nobody wants to hurt each other anymore.”

Roth also points to “belief in the legitimacy of the social hierarchy [as] a factor tending towards homicidal behavior,” which Professor Roger Lane regards as a “more sophisticated variant of the old, too simple, and often discredited notion that poverty, or bad times, are in themselves root causes of violence.” Trump has done much to convince Americans that the elite holders of power were making it impossible for them to prosper. He sparked raucous applause during his campaign by insisting, “It’s not just the political system that’s rigged, it’s the whole economy,” and argued that he could overhaul the system so that an elite few in power would no longer keep wages down in order to enrich themselves.

Lane and Roth also point to “personal respect or male ‘honor,’ which has led us into an often deadly tendency both to fight on slight provocation and to tolerate (even honor) those who do” as a driver of murder rates. Trump bemoans, “We’re not allowed to punch back anymore,” threatens to punch people in the fact who disagree with him, and longs for “the good old days [when] . . . they used to treat them very, very rough.”

Trump’s campaign hit all the key touchpoints to boost the murder rate. The results are evident.

That murder grows with the death penalty should be unsurprising. The death penalty is known to be criminogenic:

Each execution has two opposing effects. First, the execution creates a brutalization effect: it contributes to creating a climate of brutal violence. The execution sets an example of killing to avenge grievances, an example that some private individuals then follow. Second, the execution creates some deterrence: potential criminals recognize

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325 Tiefenthaler, *supra* note 314.
326 Lane, *supra* note 311, at 560.
327 *Id.* at 560–61.
329 Lane, *supra* note 311, at 564.
that the state is willing to wield the ultimate penalty.\footnote{Shepherd, \textit{supra} note 201, at 206.}


When Oklahoma reinitiated use of the death penalty in 1990 after a twenty-five-year post-\textit{Furman} moratorium, there was “a significant increase in killings involving strangers,” and “a multivariate autoregressive analysis, which include[d] measures of the frequency of executions, the level of print media attention devoted to executions, and selected sociodemographic variables, produced results consistent with the brutalization hypothesis for total homicides.”\footnote{William C. Bailey, \textit{Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma’s Return to Capital Punishment}, 36 \textit{Criminology} 711, 711 (1998), http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9125.1998.tb01263.x/abstract.} A later study in Arizona concluded “executions cause more homicides than they prevent” and “that Arizona’s first execution in more than 29 years had no deterrent effect on Arizona homicides, but instead, led to increases in several types of homicides consistent with the predictions of brutalization theory.”\footnote{Ernie Thompson, \textit{Deterrence Versus Brutalization: The Case of Arizona}, 1 \textit{Homicide Studies} 110 (1997), http://journals.sagepub.com/doi/abs/10.1177/1088767997001002002.} A study in Georgia focused on public awareness through media coverage and concluded “a publicized execution is associated with an increase of 2.6 homicides, or 6.8 percent, in the month of the publicized execution” and identified 55 homicides associated with executions during the time period analyzed.\footnote{S. Stack, \textit{Execution Publicity and Homicide in Georgia}, 18 \textit{Am. J. of Crim. Just.} 25, 25 (1993), https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=154886.}

The death penalty teaches vengeance killing better than it deters. To a would-be murderer, the threat of execution is speculative and remote, but the learned folk belief towards revenge is bone-deep and immediate. Unfortunately, legislators fail to understand what Jim Henson, creator of the Muppets, understood of children: “They don’t remember what you try to teach them. They remember who you are.”\footnote{Brian Jay Jones, \textit{Jim Henson: The Biography} 153-54 (2016).}

The joint growth of murder and execution in the Trump Era is
redolent of their common ancestry. The Steikers emphasize that “[o]ne of the strongest predictors of a state’s propensity to conduct executions today is its history of lynch mob activity more than a century ago.”337 This is true because the death penalty is a descendent of murder. In 2015, the Equal Justice Initiative released a report titled *Lynching in America: Confronting the Legacy of Racial Terror,*338 based on an extensive study which found “the death penalty’s roots are sunk deep in the legacy of lynching.”339 By comparing a county-by-county history of lynchings to a history of death penalty usage, EJI concluded that “the decline of lynching... relied heavily on the increased use of capital punishment,”340 as “public executions to mollify the mob continued after the practice was legally banned.”341

Thus, counties that lynched became counties that execute. In light of the rise in hate groups and hate crimes in Trump’s America, and in light of the disturbing evidence of brutalization effect, it can only be hoped counties that execute do not once again become counties that lynch. The increased murder rate in Trump’s American threatens greater increases in executions, which threaten greater increases in murder, which threaten greater increases in execution.

The likelihood is great that Trumpian folk beliefs are driving the cycle of killing. It cannot be known to what extent, and it cannot be known whether the numbers will continue to trend. But one thing is certain. Trump need not be overly regretful that “nobody wants to hurt each other anymore.”342 In Trump’s America, as murderers and as jurors, that is precisely what people want to do.

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339 *Id.* at 6.
340 *Id.*
341 *Id.* at 6
342 Tiefenthäler, *supra* note 314.