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Revealing Violence: Assessing the Effect of Viral Images on State Punitive Aesthetics

Justin Hyland*

“For, after all, executions I can find almost anywhere.”

—Robert Cover, *Violence and the World*¹

INTRODUCTION

On May 25, 2020, Minneapolis police officer Derek Chauvin knelt on George Floyd’s neck until Floyd could no longer breathe.² The encounter played out publicly—an eight-minute-and-forty-second execution captured in its entirety by bystander cell phone videos and nearby security cameras.³ The footage disseminated rapidly. Within hours, the chilling scene had traveled across social media platforms to more traditional news outlets into American households.⁴ Public response is well-documented. In the days that followed, demonstrators marched on Minneapolis’ 3rd Precinct, igniting an unprecedented wave of civilian protest that lasted through the summer months.⁵ As police violence remains endemic in American society, public unrest continues to foment.⁶

Nine months later, Brandon Bernard was put to death by lethal injection at a federal penitentiary in Terre Haute, Indiana.⁷ The lead-up to the execution had been tortuous and controversial. Bernard had spent two decades on death row for crimes committed as an eighteen-year-old.⁸ In the intervening years, Bernard’s advocates had articulated a series of mitigating factors, including proof that the state had withheld exculpatory evidence and elicited false testimony.⁹ Nevertheless, the United

* J.D., University of Connecticut School of Law (2021); Fordham University, B.A., 2014. I would like to thank Professor Steven Wilf for his guidance and direction throughout the writing process. Tremendous gratitude is also due to Rae Carrell and the entire *Indiana Journal of Law and Social Equality* for their diligent work on this Article. Finally, I would like to especially thanks James Hyland, Lucille Hyland, Qing Wai Wong, and Archie for their unwavering support and encouragement. All errors and omissions are my own.

¹ Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1624 (1986).

² See *How George Floyd Died, and What Happened Next*, *N.Y. TIMES* (May 25, 2021), <https://www.nytimes.com/article/george-floyd.html>.

³ See *id.*

⁴ See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, *N.Y. TIMES* (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

⁵ See *id.*

⁶ During the writing of this paper, Ma’Khia Bryant and Andrew Brown Jr. were killed by law enforcement. Both deaths ignited protests in their respective cities of Columbus, Ohio, and Elizabeth City, North Carolina. Mark Osborne, Marlene Lentheng & Sabina Ghebremedhin, *16-Year-Old-Girl Fatally Shot by Police in Ohio*, *ABC NEWS* (Apr. 21, 2021), <https://abcnews.go.com/US/16-year-girl-fatally-shot-police-ohio/story?id=77198246>; Adeel Hassan, *What We Know About the Killing of Andrew Brown Jr. in North Carolina*, *N.Y. TIMES* (Apr. 28, 2021), <https://www.nytimes.com/2021/04/28/us/andrew-brown-jr-shooting-north-carolina.html>.

⁷ See Christina Carrega, *Brandon Bernard Executed After Supreme Court Denies Request for a Delay*, *CNN* (Dec. 11, 2020), <https://www.cnn.com/2020/12/10/politics/brandon-bernard-executed/index.html>.

⁸ See *id.*

⁹ See *Bernard v. United States*, 141 S. Ct. 504, 504–07 (2020) (Sotomayor, J., dissenting).

States Supreme Court denied his stay of execution.¹⁰ Although Bernard's death received media attention, it did not inspire the type of public backlash incited by Floyd's murder. There were no street demonstrations or transformative protest movements. Reformers did not call for the immediate abolition of the judiciary. Why is it that these two killings—both ostensibly legal¹¹—provoked such different public reactions? The disparate response, I argue, is best explained by the way each death was conveyed.

The American regime of legal violence operates by way of obfuscation. Legal violence is everywhere, though not always recognized as such. A state officer affects a street-corner cavity search. The judge speaks and someone is confined to bondage. These occurrences—individually traumatic and unquestionably violent—are the quotidian expressions of our criminal justice system. We understand them as procedure, not pain. They exist in a separate psychic realm from criminal violence, attached securely to conceptions of justice and retribution. Misrecognition of this type is no accident. For the State to punish legally, it must do so in ways that the public accepts as legitimate.¹² This legitimacy, in turn, is predicated on how effectively the State obscures the violence of its own action. By concealing human bodies, physical pain, and personal agency, the State communicates that it is a rational actor, one consistent with prevailing liberal values.¹³ Viral images of police killings upend this project. Unmoored from the State's curation, such images denaturalize the regime of legal violence. Viral images, which can be distributed by anyone with a camera or cellphone, democratizes how violence is represented, and threatens to erode the relationship between the State and the public. Put simply, legal violence has become unmasked.

This Article analyzes the two paradigmatic forms of American State violence—capital punishment and police killings. Historically, these twin uses of power have served distinct, but complementary, functions. Capital punishment is a deeply symbolic practice designed to both educate and reinforce community values through the removal of deviant outsiders.¹⁴ Police killings, by contrast, are often unplanned and instantaneous. They bring sudden lethal force upon an individual to control criminal or disfavored populations. This Article relies on two simple premises. First, the State must render these killings “legal” by concealing the violence it inflicts. Second, recent viral images disturb this project by revealing the violence inherent in state action. This Article's purpose is to provide an analytic and theoretic account of these processes in action.

Part I introduces the concept of legal violence. Legal violence, as imagined here,

¹⁰ See *id.*

¹¹ During the writing of this article, Derek Chauvin was tried and convicted for the murder of George Floyd. See Bill Chappell, *Derek Chauvin is Sentenced to 22 ½ Years for George Floyd's Murder*, NPR (June 25, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder>. Although this individual killing was subsequently adjudged as “illegal,” the prosecution of police officers for use of lethal force remains exceedingly rare. *Id.*

¹² Cover, *supra* note 1, at 1608.

¹³ See Jürgen Martschukat, *Nineteenth-Century Executions as Performances of Law, Death, and Civilization*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT* 49, 55 (Austin Sarat & Christian Boulanger eds., 2005) (discussing the methods in which Western states perform rationality through punitive expression).

¹⁴ See generally DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* (1990); EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (1893).

involves the official distribution of punishment by state actors to achieve various social functions. These practices are the dialectic products of an ongoing negotiation between the State and the public.¹⁵ To maintain its monopoly over legal violence, the State must transmit violent acts through an intelligible medium. In modern times, this involves anesthetization and concealment. The public is more likely to tolerate violence communicated as procedural, rational, and necessary. To realize this end, the State must disguise violence as something else entirely.

Part II explores the first pillar of legal violence—capital punishment. This section briefly traces the history of the American death penalty, recounting its transformation from public spectacle to private procedure.¹⁶ The rest of this section is dedicated to describing what this Article deems “concealment technologies.” Concealment technologies are the various processes, aesthetics, and systems by which the State renders violence both intelligible and palatable to the broader public. In doing so, the State retains monopoly control over force and is afforded greater latitude to carry out social functions.

Part III investigates concealment in the context of police killings. Specifically, this section assesses the ways “proceduralization,” instantaneity, and narrative have historically obscured violence committed by law enforcement. As with capital punishment, these technologies work to render violence palatable to public audiences, thereby naturalizing the existing terrain of state force.

Part IV argues that viral images of police killings are destabilizing the State’s concealment project. These images reintroduce unmediated state violence to the mainstream public through rapid dissemination across media platforms. Removed from state control, such depictions diffuse concealment technologies and realign the perceptual framework in which legal violence is understood. The result is state violence reframed. In the eyes of the public, police transform from social guardians to vigilante outlaws. Judges become gatekeeping apologists rather than arbiters of truth and justice. This perceptual shift fractures communicative ties between the State and the public.

Part V examines stakeholder responses to this communication breakdown. On the one hand, vast public coalitions have mobilized against state violence at unprecedented rates.¹⁷ These protest movements—emblemized most famously by Black Lives Matter—are calling for broad institutional reform.¹⁸ On the other hand, reinstatement of the federal death penalty¹⁹ can be seen as the State’s attempt to

¹⁵ *Id.* at 33. (“Penal sanctions or institutions are not simply dependent variables at the end of some finite line of social causation. Like all social institutions, punishment interacts with its environment, forming part of the mutually constructing configuration of elements which make up the social world.”).

¹⁶ See generally Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937*, 36 *LAW & SOC’Y REV.* 607, 616–22 (2002).

¹⁷ See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, *N.Y. TIMES* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

¹⁸ See Jonathan Allen & Trevor Hunnicutt, *U.S. Protesters Call to ‘Defund the Police.’ What Would That Look Like?*, *REUTERS* (June 5, 2020, 12:59 PM), <https://www.reuters.com/article/us-minneapolis-police-defunding-explaine/u-s-protesters-call-to-defund-the-police-what-would-that-look-like-idUSKBN23C2I9>.

¹⁹ *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, *U.S. DEP’T JUST.* (July 25, 2020), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

rechannel violence through legal mediums. Finally, law enforcement has attempted to stifle the dissemination of police misconduct through the physical intimidation of journalists and bystanders.²⁰ Although the current legal landscape is deeply unsettled, this Article argues that destabilization can provide sightlines to new realities. Unmasking state violence allows us to reconsider its utility in the first instance.

I. LEGAL VIOLENCE

The destruction of physical bodies is capable of complex and contradictory meanings.

Nowhere is this more apparent than in the field of law. Violence, legally speaking, is multivocal. It is simultaneously the crime and the punishment. To the individual, violence initiates and culminates the criminal justice process. The criminal defendant finds her violent action reflected back upon her in handcuffs, in courtrooms, and in prison cells. Murder begets execution. The destruction of another ends in the destruction of the self. On a social level, violence stains and purifies. Both the outlaw's threat and the State's justice are accomplished through corporeal destruction. How then can an identical act—the taking of life—be both lawful and unlawful in disparate circumstances? The answer has to do with perception. Violent meanings are shaped by the actors who perpetrate violent action, the audiences who perceive such action, and the arenas in which this action is performed. Violence's legality—the perceptual and tangible distinction between crime and justice—is an interpretive project. This Article investigates the ways by which these interpretations are distributed and channeled. Its purpose is to reveal the processes that render discrete violent acts lawfully justified.

Physical violence of the type at play here can be sorted into two general categories: illegal and legal. Illegal violence involves the range of proscribed behaviors whereby one common citizen inflicts bodily harm upon another. These actions comprise the substantive content of the criminal common law and are perceptually recognizable as illicit. The lay name given to the behavior is frequently identical to criminal charge.²¹ Legal violence, in contrast, describes a set of harmful actions committed by state officials against common citizens to achieve some social function. Not only are the actions considered lawful, but they are understood as governance. Violence is so intrinsic to governance that its harmful content is taken for granted.²² The State, subject to a few exceptions, exercises a monopoly over these forms of violence, including, but not limited to, capital punishment, bondage, and police force.²³

²⁰ See Sergei Klebnikov, *Journalists Targeted While Covering Protests: 328 Press Freedom Violations and Counting*, FORBES, <https://www.forbes.com/sites/sergeiklebnikov/2020/06/04/journalists-targeted-while-covering-protests-279-press-freedom-violations-and-counting/?sh=66bc3c0e184f> (last updated June 6, 2020, 1:32 PM).

²¹ Words such as murder, rape, assault each describe an individual behavior and a criminal act. As such, it is difficult to perceptually separate the action from the attendant criminal sentence. The very word implies illegality.

²² Cover, *supra* note 1, at 1610 n.22.

²³ Certain criminal defenses, such as self-defense, are violent actions committed by lay citizens rather

Legal violence is an exercise in state legitimacy. Legitimacy derives from shared understandings. Although the State maintains a monopoly power over the forms of legal violence, its expression is limited—particularly in liberal societies—by the people it governs. As Robert Cover recognizes, “[t]he imposition of [legal] violence depends upon the satisfaction of social preconditions for its effectiveness.”²⁴ Legal violence, then, is best understood as the dialectic product of state-public dialogue.²⁵ To punish lawfully, the State requires popular recognition of the modes and technologies by which it punishes—recognition that is informed by both parties. Existing state practices, normalized over time, help shape the contours of what the public can recognize as legitimate. But broader community sentiment also conveys which practices the public is willing to accept. The State must transmit violence in ways that the public understands and acknowledges as proper, tolerable, and lawful.²⁶ Should the State exceed the bounds of what the public deems acceptable, it risks loss of legitimacy. When state legitimacy is threatened, so too is state monopoly over legal violence.

Aesthetics, symbols, and rituals are central to this project. By deploying recognizable systems of meaning, the State can more readily classify which violence is lawful and which is not.²⁷ The public perceives these systems as familiar and can contextualize them amongst existing conceptions of justice and legality. Here, the courtroom is a paradigmatic example. By channeling violence—even death—through courts of law, the State communicates that it is acting within legal bounds. Each aspect of the adjudicative experience is meant to reinforce public recognition of the courtroom medium. Elaborate formalities and ceremonial procedures evoke the twin emotions of respect for the law and hatred for the criminal aggressor.²⁸ The physical space is composed in a way that amplifies state power.²⁹ Judges and prosecutors speak in the language of moral rhetoric, phrase issues in emotive terms, and conjure community feelings against the accused.³⁰ Each aesthetic signals to the public that the State’s procedure—regardless of the violence inflicted—is a legitimate exercise of power. Repeated performances of these procedures over time serves to reinforce normative perceptions of legality.

Finally, it is important to recognize that the dialectic process of legal violence is

than state officials. Still, violence of this type must be ratified by state actors before being rendered lawful.

²⁴ Cover, *supra* note 1, at 1616.

²⁵ See GARLAND, *supra* note 14, at 22.

²⁶ The instrumental use of penal measures for control purposes is always in tension with social and psychological forces which place clear limits upon the types and extent of punishment which will be acceptable in any specific situation. The principles of discipline and power—knowledge techniques may provide a technology of control with a given logic and potential but the extent to which it is used, and the purposes to which it is put, will depend upon wider social and cultural forces.

Id. at 189.

²⁷ *Id.* at 198. (“Punishment, then, can be viewed as a complex cultural artefact, encoding the signs and symbols of the wider culture in its own practices.”).

²⁸ See George Herbert Mead, *The Psychology of Punitive Justice*, 23 AM. J. SOCIO. 577, 585–87 (1918).

²⁹ See generally Costas Douzinas, *The Legality of the Image*, 63 MOD. L. REV. 813, 813–30 (2000) (explaining how the legal system organizes image, symbol, and empty space to augment its own power).

³⁰ GARLAND, *supra* note 14, at 90.

dynamic. Shifting sensibilities set the stage for recalibration. Forms of legal violence that were once widely accepted may become taboo as community values evolve and change. The scaffold, for instance, has yielded to the execution chamber. Vengeance is no longer a tolerable justification for state-sanctioned punishment—criminal sentences are meted out in more polite forms.³¹ Today’s violent regime operates through technologies of concealment. The State renders violent punishment acceptable—and therefore lawful—by obscuring the violence of its own action.

Through this concealment project, the State communicates that it is reasonable, civilized, and tolerant. Its violent aesthetics are constructed to be consistent with prevailing social mores. The following sections explore this process at work within the two paradigmatic forms of state violence: capital punishment and police killings. In each, state force is conveyed as reactive and necessary, reserved only for the socially repugnant and morally irredeemable. Even then, the violence is anesthetized. Pain, autonomy, and even humanity, dissolve to the background. These processes reinvokethe “truth” of living in a more rational and advanced moment in social history.³² The victim, the killer, and the killing act are each cloaked in different robes.

II. THE CONCEALMENT TECHNOLOGIES OF CAPITAL PUNISHMENT

Capital punishment is the quintessence of lawful violence. It is the purest form of force the State may bring against an individual. The death penalty is also quintessentially American.³³ Despite its abolition in twenty-three states, capital punishment remains a salient feature of the American legal experience.³⁴ For four centuries, the death penalty has been deployed as a highly ritualized, deeply symbolic practice, designed to reinforce state values through the eradication of disfavored outsiders. As commentators have noted, the practice has evolved over time. Part A traces the history of the American death penalty, outlining its development from public spectacle to private procedure. Part B describes how capital punishment operates in modern society, specifically how contemporary practices function to disguise the violence of state execution.

³¹ *Id.* at 84.

³² Martschukat, *supra* note 13, at 55.

³³ Not only is the United States one of the last remaining nations to employ capital punishment, its use aligns with our individualist ethos. As Judith Randle explains,

[s]upport for the death penalty also resonates with the historically individualistic paradigm through which Americans perceive human behavior. Partly a derivative of the ‘American Dream’—that success comes to anyone who works hard enough—upon which the United States was founded, and partly due to decontextualized, merciless portrayals of criminals—particularly within law and order politics—Americans believe that criminality stems from individual evil rather than societal conditions that shape individual choices.

Judith Randle, *The Cultural Lives of Capital Punishment in the United States*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT* 92, 92–95 (Austin Sarat & Christian Boulanger eds., 2005).

³⁴ Seventeen individuals were executed in 2020, ten of whom at the hands of the federal government. *See The Death Penalty in 2020: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2020), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report>.

A. History

In May 1691, Jacob Leisler was publicly executed for leading an insurrection against British colonial authorities.³⁵ Spectators gathered, amidst falling rain, to witness Leisler executed in the manner prescribed: hanged “by the Neck and being Alive their bodys be Cutt downe to the Earth and their Bowells be taken out and they being Alive, burnt before their faces; that their heads shall be struck off and their Bodys Cutt in four parts [*sic*].”³⁶ The crowd—stirred to frenzy by the violent display—cut Leisler’s garments into small pieces to divide amongst themselves and keep as relics.³⁷ Although Leisler’s execution was particularly sensational, scenes like this were not uncommon in colonial America. Early capital punishment was intended as a type of public theater.³⁸ Acquiring a near-religious quality, these ceremonies took the character of morality plays—designed to glorify sovereign authority and stir public passion against the condemned. Criminal processions began at the jailhouse, advanced through public streets, and culminated at the town square.³⁹ Dying speeches were common affairs—the scaffold reproduced the stage.⁴⁰ Through these spectacles, the State sought to deter and instruct. On an individual level, audiences witnessed the consequences of proscribed behaviors and learned the path of righteous living.⁴¹ More abstractly, public executions were “to be interpreted as ritualized answers to the evil in the world and as reproductions of the social structure in a divine order.”⁴²

American execution procedure underwent a broad transformation in the nineteenth century.⁴³ Revolution in punitive method was largely brought about by pragmatic and legitimacy concerns. By the early 1800s, audience participation had grown chaotic and unpredictable.⁴⁴ Public executions began to more closely resemble public festivals than they did solemn rituals. These events were increasingly characterized by drunkenness, merriment, and petty criminality.⁴⁵ In other instances, public executions seemed to lead to psychic destruction, inspiring more violence than they deterred.⁴⁶ Scholar Annulla Linders aptly demonstrates this phenomenon through the story of Levi Kelly, “a man of respectable connections [who] had never

³⁵ Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 N.W. J. L. & SOC. POL’Y 194, 202 (2018).

³⁶ *Id.*; see also JOHN D. LAWSON, AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY 517 (1914–1936).

³⁷ LAWSON, *supra* note 36, at 517.

³⁸ See Steven Wilf, *Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England*, 5 YALE J. L. & HUMAN. 55 (1993); see also Linders, *supra* note 16, at 616–21.

³⁹ Dwight Conquergood, *Lethal Theatre: Performance, Punishment, and the Death Penalty*, 54 THEATRE J. 339, 344–45 (2002).

⁴⁰ *Id.*; see also Wilf, *supra* note 38, at 55.

⁴¹ See Martschukat, *supra* note 12, at 54.

⁴² *Id.*

⁴³ Linders, *supra* note 16, at 607.

⁴⁴ See *id.* at 618.

⁴⁵ *Id.*

⁴⁶ *Id.*

been distinguished for immorality of any kind.”⁴⁷ “Less than two weeks after Kelly had witnessed an execution, he killed an acquaintance, and was promptly condemned to death.”⁴⁸ A spectator at Kelly’s execution then hanged himself the same night.⁴⁹ These unintended responses revealed an interpretive fracture between the State’s message and public understanding.

Moreover, the State found itself under increased pressure from liberal reform movements. Rises in industrialization, capitalism, standards of living, and rational ways of thinking combined to lower the public tolerance for violence.⁵⁰ This cultural transformation—incorporating Enlightenment values, such as tolerance and rationality—had rendered public displays of violence regressive and uncivilized. The prevailing punitive methods were falling behind the times. Linders deftly summarizes the shifting zeitgeist:

By the mid-nineteenth century, however, brutality had become a liability and visible pain a sign of failure . . . the emergence of a humanitarian ideology and new middle-class sensibilities, ma[de] blood and agony intolerable elements of the execution . . . the expansion of science, br[ought] efficiency, proficiency, and rationality to the heart of the execution ritual.⁵¹ To maintain its violent regime, the State had to find new, rational ways to kill. As a result, executions were removed from the public square and relocated within jailhouse walls.⁵² By privatizing—indeed, concealing—capital punishment, the State recalibrated legal violence to match public sentiment.

B. Concealment Technologies

We are still in the age of concealment. Indeed, much of the debate on capital punishment during the twentieth and twenty-first centuries debate has centered on finding more perfect methods to obfuscate the violence done.⁵³ As capital punishment is the most extreme and irrevocable manifestation of legal violence—because the State cannot negate the violence of execution—the concealment project takes on special salience. Viewed another way, capital punishment exists on the far periphery of public tolerance. The State faces greater pressure to overcome normal aversions to pain and death.⁵⁴ Perfect displays of force require perfect obfuscation. The following subsections describe the ways the State conceals capital punishment and the perceptual ramifications of such concealment.

⁴⁷ *Id.* at 619.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Randle, *supra* note 33, at 94.

⁵¹ Linders, *supra* note 16, at 630.

⁵² Conquergood, *supra* note 39, at 343.

⁵³ Recent death penalty decisions have been largely occupied with defining the contours of rational killing. The companion cases *Stanford v. Kentucky*, 492 U.S. 361 (1989) and *Roper v. Simmons*, 543 U.S. 551 (2005) jostled over the minimum age requirement. *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Atkins v. Virginia*, 536 U.S. 304 (2002) grappled with the issue intellectual disability.

⁵⁴ *See Cover*, *supra* note 1, at 1622.

i. Spatial Concealment

The most straightforward of the State's concealment project, spatial concealment, describes the physical removal of incarcerated bodies from the public to the private sphere. Displaced from the town square, capital punishment is now meted out behind the closed doors of the execution chamber.⁵⁵ The death sentence is no longer public affair. In the most literal sense, violence is concealed.

Spatial relocation has had significant interpretive effects. First and foremost, private executions convey state rationality. As indicated above, concealed executions are closely tied to the reform and progressive movements of the nineteenth century.⁵⁶ Changing sensibilities communicated that the public would no longer tolerate grisly spectacles. Execution rituals were cast as degenerate—the hallmarks of primitive and uncivilized cultures—not processes characteristic of an enlightened State.⁵⁷ In concealing the execution process, the State sought to match the new liberal zeitgeist. Indeed, by punishing rationally, the State conveyed that it was itself a rational, progressive actor.

Privatizing execution also provides the State with greater control over audience composition.⁵⁸ The ability to curate spectator populations has alleviated pragmatic and hermeneutic concerns. Prison walls afford the State a right to exclude—a gatekeeping discretion that could not be enforced in the town square. As a result, the character of execution audiences has become less democratic. Spectators now comprise only a small network of state actors.⁵⁹ Monopoly control over the execution environment not only ensures orderly procedure; it diminishes the likelihood of perceptual error. The smaller—and less hostile—the audience, the greater success of the state's intended messaging. The general public is no longer present to interpret the killing act in unexpected and inadvertent ways. Reduced transparency permits legal violence to proceed unquestioned.

Spatial concealment further obscures state violence by dividing sentencing and execution into public and private realms.⁶⁰ By publicizing the trial, and concealing death, the State draws public attention entirely to legal ceremony. Doing so places enormous symbolic magnitude on the courtroom ritual—the judge bears responsibility for legitimating the killing act to the viewing public.⁶¹ But the courtroom is also the interpretive arena over which the State exercises vast control.⁶² Rules of procedure and evidence dictate which cases and information are allowed to reach the public.

⁵⁵ See Jen Kirby, *Photos: A Haunting Look at America's Execution Chambers*, N.Y. MAG. (May 16, 2014), <https://nymag.com/intelligencer/2014/05/haunting-photos-of-us-death-chambers.html>.

⁵⁶ See Martschukat, *supra* note 13, at 55.

⁵⁷ See *id.* at 56–57.

⁵⁸ See Linders, *supra* note 16, at 613–14.

⁵⁹ See *id.* at 614.

⁶⁰ The penal process of modern societies has become a fragmented, differentiated sequence of events, in which certain aspects are subjected to close public scrutiny and involvement, and others are left to the management of professionals who, for the most part, maintain a low visibility and control their own information output.

See GARLAND, *supra* note 14, at 89.

⁶¹ Cover, *supra* note 1, at 1622.

⁶² GARLAND, *supra* note 13, at 86.

Tradition and decorum mediate this information in specific and intentional ways. In bifurcating the sentence and execution, the State prevents the public from interpreting the violent act—the execution evades scrutiny. Instead, public interpretation is limited to a courtroom performance curated to communicate its own legitimacy. Witnessing the validation for the violent act, rather than the act itself, naturalizes the State's justice.

Spatial displacement also conceals the humanity of the criminally accused. Public aversion to violent action has inadvertently resulted in the abstracting of state force. Despite the macabre nature of execution spectacles, these performances retained a human element. Ritual processions and dying speeches impressed the defendant's personality upon execution audiences.⁶³ Spectator response was then informed by the individual—certain defendants might provoke contempt while others elicited sympathy. These individuated responses bespoke an awareness of what the execution act was doing—namely, destroying a human life. By privatizing capital punishment, the State complicates that awareness. Spatial concealment transforms the human body into a nameless, faceless abstraction. Extricated from contemporaneous witness, the criminal defendant is stripped of her human characteristics—she is rendered *tabula rasa*. This sanitizing process, in turn, amplifies the defendant's susceptibility to narratives of criminality and personal responsibility. The result is a more tolerable killing act—the justified death of an abstract being.

Finally, removing execution from the public eye obstructs the public's ability to empathize with the condemned. Pain, in some sense, is already uncommunicable.⁶⁴ It is so personal a feeling that the individual in pain becomes unable to convey her experience with those around her. This incapacity is only intensified by concealment. By locating executions behind prison walls, the normative realities of the free public and the death row inmate are irreconcilably fractured. Concealing pain destroys the public's ability to comprehend the inmate's experience in any meaningful sense because there is no experiential referent by which it can relate. The inmate's experience transcends public imagination. Without shared understanding, the public may begin to question whether this pain and death exist at all. Are people killed, or do they simply disappear?

ii. Pain Concealment

Capital punishment's second concealment technology implicates the evolution of execution procedures over time. While executions were originally intended to accentuate suffering, the modern State has sought progressively "humane" ways by which to kill.⁶⁵ From the firing squad, to the electric chair, to lethal injection,

⁶³ Conquergood, *supra* note 39, at 345.

⁶⁴ Whatever pain achieves, it achieves in part through its unshareability, and it ensures this unshareability in part through its resistance to language. . . . Prolonged pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.

Cover, *supra* note 1, at 1602–03 (quoting ELAINE SCARRY, *THE BODY IN PAIN* 4 (1985))

⁶⁵ Martschukat, *supra* note 13, at 55.

advancements in violent methodology have worked to obscure the pain inherent in state displays of force.

Like the physical relocation of capital punishment, transformation in execution procedure was in part catalyzed by changes in public sentiment. Especially gruesome execution methods became associated with the medieval and unreformed—the primal expressions of unevolved states.⁶⁶ To preserve its violent monopoly, the State had to adapt its killing instrumentalities to more appropriately reflect the rationality of the era.⁶⁷ What transpired was a sort of arms race in anaesthetized killing technology. In the late nineteenth century, New York state empaneled a three-member death penalty commission tasked with discovering a more humane method of execution.⁶⁸ The recommendation was electrocution.⁶⁹ Unlike hangings, which were often susceptible to botched procedure and user error,⁷⁰ the electric chair was the killing tool for an enlightened age.⁷¹ Through sophisticated machinery, specialized knowledge, and careful preparation, electrocution was capable of killing scientifically and instantaneously.⁷² The electric chair became the nation's chosen method of execution.⁷³

Over a century later, we have arrived at an execution process that eliminates nearly all sensory output. Lethal injection mimics a medical procedure.⁷⁴ Chemical compounds silently usher the condemned from life to lifelessness.⁷⁵ No violence is heard or smelled—it can barely be seen.⁷⁶ This hushed process renders killing dreamlike and unreal.

The near-perfecting of rational killing technology has had perceptual ramifications. Through pain concealment, the State has reframed execution as a last necessity rather than a sadistic prerogative. Pre-modern violent spectacles reveled in agony—it was precisely through the physical destruction of the body that the state achieved its deterrent ends.⁷⁷ Sensationalized violence served as a public warning, a didactic instruction on state power and behavioral norms. Lethal injection realigns this narrative. Now, only the most heinous offenders are put to death through only the most lenient means.⁷⁸ The absence of criminal suffering communicates the absence of state celebration. This partially explains why botched executions cause

⁶⁶ *Id.* at 56.

⁶⁷ See Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 *FORDHAM URB. L.J.* 789, 791 (2008).

⁶⁸ See RICHARD MORAN, *EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR* 74 (2007).

⁶⁹ Dieter, *supra* note 65, at 791.

⁷⁰ See Greg Miller, *America's Long and Gruesome History of Botched Executions*, *WIRED* (May 12, 2014), <https://www.wired.com/2014/05/botched-executions-austin-sarat/>.

⁷¹ See *id.*; see also MORAN, *supra* note 68, at 72.

⁷² Dieter, *supra* note 67, at 791.

⁷³ *Id.*

⁷⁴ GARLAND, *supra* note 14, at 275; Jonathan Groner, *Lethal Injection: A Stain on the Face of Medicine*, *PMC* (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1124498/>.

⁷⁵ GARLAND, *supra* note 13, at 275.

⁷⁶ *Id.*

⁷⁷ Martschukat, *supra* note 12, at 55.

⁷⁸ Randle, *supra* note 33, at 95.

such public discomfort.⁷⁹ Failed procedures signal return to an unreformed era. The public will tolerate lawful execution, but it will not tolerate suffering.

In a related way, pain concealment legitimates lawful violence by framing the State as merciful. Modern capital punishment seems to play with conceptions of proportionality— execution methods are tolerated when they appear less lurid than the underlying criminal act. Although the State still punishes crime with death, sensationless violence is perceived as less severe than the unlawful violence of gunshots and stabbings. The painlessness of lethal injection is juxtaposed against the innocent victim's suffering—an interpretive process that conjures impressions of humane paternalism. The State aligns execution technology with the more merciful methods of euthanizing animals rather than the disordered violence of human killing.⁸⁰ And like animal euthanasia, the individual death relieves suffering and preserves the health of the collective.

iii. Written Concealment

The third concealment technology examines the role of the judicial opinion in disguising state violence. A highly malleable form, the written opinion obscures the human aspects of criminal defendants through omission and manipulation. Because the judicial opinion becomes the public record for capital punishment, it plays an indispensable part in justifying lawful violence.

On its surface, the judicial opinion is meant to provide an objective account of an individuated adjudicatory result. The form is both descriptive and explanatory. In the criminal context, it recounts the factual scenario that leads to prosecution and provides the legal justification for the judge's verdict. But the legal opinion is also a narrative medium.⁸¹ Judicial texts tell stories and these stories impart moral instruction. Beneath its objective veneer, the opinion is susceptible to partiality and obfuscation. The form, substance, and language of the judicial opinion serves to further the State's concealment project.

Text necessarily suppresses image. While this appears as an obvious statement, its hermeneutic consequences are worth deeper exploration. The judicial opinion is not a contemporaneous broadcast, but an *ex post* rendering. The reader neither witnesses the criminal act nor sees the courtroom. Instead, her understanding of the adjudicative event is shaped entirely by the judge's words—she must imagine both the crime and the trial through judicial language. This necessarily reduces the range of interpretive outcomes. Even the most comprehensive written account will fail to convey the quantity of emotion, detail, and meaning made possible through visual observation. Image begets information, and the absence of image results in evidentiary withholding. Readers are neither able to perceive the defendant's face, nor gauge her reaction to sentencing. Courtroom interaction is lost, and with it, legacies of

⁷⁹ See Ed Pilkington, *Outcry after Oklahoma Prisoner Vomits and Convulses During Execution*, *GUARDIAN* (Oct. 29, 2021), <https://www.theguardian.com/us-news/2021/oct/29/oklahoma-prisoner-convulsed-vomited-execution-john-grant>; see also Debbie Siegelbaum, *America's 'Inexorably' Botched Executions*, *BBC* (Aug. 1, 2014), <https://www.bbc.com/news/magazine-28555978>.

⁸⁰ *Id.*

⁸¹ See generally PETER BROOKS & PAUL GEWIRTZ, *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (1996); see also Richard A. Posner, *Legal Narratology*, 64 *U. CHI. L. REV.* 737, 739 (1997).

bias and hostility. The public is shielded from the defense lawyer's apathy or the defendant's incapacity to communicate with the court in any meaningful way. Mitigating factors such as remorse, fear, and youth disappear from the judicial narrative.

The State's written concealment project is augmented by the opinion's substantive content. Not only does the written text eschew image, but judicial opinions often omit physical descriptors that help contextualize and explain punitive decision making. This process has a depersonalizing effect. Stripped of bodily dimensions, defendants come to resemble stock characters in crime narratives rather than distinct human lives. The judge may also choose to emphasize or omit a defendant's behavioral and environmental characteristics. A common technique is to highlight the defendant's past criminal history but withhold legacies of personal or structural hardship that may help explain recidivism.⁸² The criminal act is portrayed as the product of intrinsic failure or deviant morality rather than as a response to external stimuli. Even the most destitute and desperate victims of society are deemed to be free, equal, and autonomous actors.⁸³ Such decontextualized analysis frames capital punishment as proportional to the underlying crime. In a vacuum, it is simple calculus to punish death with death. Presumed to control their own destiny, these defendants are understood to deserve whatever violence the state imposes. On the other hand, the judge may stress environmental factors to associate the defendant with known criminal tropes. In this way, judicial opinions fashion a sort of ecological criminality where the defendant's surroundings produce and explain her actions. Situating the defendant within gang narratives or "high crime areas"⁸⁴ serves as an instructive example. Finally, the opinion may sustain attention on the crime victim's sympathetic character. By depicting the victim as benevolent or socially productive, the judge casts the defendant as a sub-human foil.⁸⁵

Linguistic techniques play a role as well. As stated above, judicial opinions—especially at the lower court level—are ostensibly objective documents meant to memorialize the facts and reasoning behind a particular legal outcome. Appellate court judges are more likely to use the opinion as an occasion for symbolic pronouncements, but the text is still meant to belie subjectivity.⁸⁶ Claimed objectivity

⁸² Within this strange world of the court-room, individuals come to be seen as legal subjects, bearing all the attributes of free will, responsibility, and hedonistic psychology which the standard bourgeois individual is deemed to possess, no matter how far the actualities of the case depart from this 'ideal'. The defendant's personality and actions are viewed through the prism of this ideological form which is at once mythical and socially effective, so that even the most destitute and desperate victims of market society are deemed to be free and equal and in control of their own destinies once they appear in a court of law.

GARLAND, *supra* note 14, at 112

⁸³ *Id.*

⁸⁴ *Illinois v. Wardlow*, 528 U.S. 119, 139 (2000) (holding that an individual's presence in a "high crime area" is a relevant consideration in determining reasonable suspicion).

⁸⁵ Randle, *supra* note 33, at 96.

⁸⁶ Most American appellate judges eschew attempts to give their opinions a distinctive authorial style. Judges may take pride in what they write, and edit and revise extensively, but still strive for a voice that is impersonal and in a sense 'voiceless.' The implication in the writing is that the state and the rule of law are speaking rather than the judge.

David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 LEGAL STUD. F. 449, 461 (1999)

is enhanced by the third-person narration in which judicial opinions are predominantly written. The essence of third-person narration is the disembodied storyteller—she describes events from an omniscient vantage point. Such narrative framing conceals the fact that judicial opinions are written by individual state actors with particular commitments.⁸⁷ As a result, the judge as individual is perceptually attenuated from the opinion as legal command. She is left free to smuggle personal biases, character judgments, and political choices under the guise of objectivity. Moreover, opinions are written in such a way as to augment the inevitability of the judge's own decision.⁸⁸ High rhetoric weaves judicial choice to notions of eternal truth and justice.⁸⁹ Judges also use the past selectively, creating contexts and histories that render judgment—and the defendant's fate—preordained. These linguistic factors combine to naturalize the conception of the law as omnipotent. The opinion is no longer created by a particular state actor but appears written from the perspective of the law itself.

In contrast, linguistic techniques work to frame the criminal defendant as a subjective, autonomous actor. The manipulation of active and passive voice draws attention to certain behaviors while obscuring others.⁹⁰ Criminality is emphasized through grammatic construction—the defendant “acts” while the victim is “acted upon.” Such techniques highlight the defendant's agency.⁹¹ She is given near-complete power to shape the textual landscape, each subsequent event emanating from her initial lawless act. Where criminal behavior is framed as personal choice, criminal sentences become a personal responsibility.

iv. Temporal Concealment

Capital punishment proceeds in two acts: the State sentences; the State executes. In today's criminal justice apparatus, these acts are temporally distanced. An inmate may spend a lifetime on death row, enduring successive appeals, before ultimately being put to death. This is a strategic process—the State conceals violence through the manipulation of time.

The temporal separation between the death sentence and the execution diverts attention from the killing act. Whereas a simultaneous—or temporally close—pronouncement and execution would accentuate state power, separating the two diminishes the immediacy of violence. A break in time provides a cooling period. When a defendant is condemned to death, the public understands that the execution will not take place until years, maybe decades, down the line.⁹² Daily existence assuages collective tension. Future violence is discounted, the value of life abstracted. As time passes, the public may become distracted or focus on other matters. Even

⁸⁷ Robert A. Ferguson, *Rhetorics of the Judicial Opinion*, 2 YALE J.L. & HUMAN. 201, 206 (1990) (“The monologic voice [of the judicial opinion] seeks its own embodiment by projecting an actual judicial person into the frame of an opinion.”).

⁸⁸ *Id.* at 213.

⁸⁹ *Id.*

⁹⁰ Paul J. Hirschfield & Daniella Simon, *Legitimizing Police Violence: Newspaper Narratives of Deadly Force*, 14 THEORETICAL CRIMINOLOGY 163, 163–64 (2010).

⁹¹ *Id.*

⁹² Randle, *supra* note 33, at 95;

where the sentence is flawed or unjust, the public understands that the defendant will be given opportunities to rectify judicial error.⁹³ Temporal spacing paves way for appeals, stays, and habeas petitions. These proceedings are diversified across a broad range of courts and judges—often implicating both the state and federal systems—and ensure that no single actor is wholly responsible for the death sentence. Redemptive chances and super due process⁹⁴—even where functionally meaningless—communicate rationality and fairness.

v. Institutional Concealment

Today's execution is a choreography of legal violence. A constellation of state actors each assume a different role in the sentencing, imprisonment, and execution of the criminal defendant.⁹⁵ This institutional design assuages internal tension, aggrandizes state power, and communicates rationality.

The division of “execution labor” serves an important psychic function. Institutionalization diffuses responsibility. By fragmenting capital punishment into component parts, state actors can separate themselves from the killing act. Coordination is the hallmark of our criminal justice apparatus.⁹⁶ The judge sentences but does not execute. The prison guard executes but does not sentence. Each individual is charged with a range of duties narrow enough to either deny responsibility for the killing act or to delegate that responsibility to others. More abstractly, attenuation from the killing act provides opportunities for role distancing.⁹⁷ This phenomenon describes a central reality of professional action, which “characterizes the distance between the individual and the role”—the difference between doing and being.⁹⁸ The “individual does not deny the role, but rather the possible self, which the role implies for all role-holders.”⁹⁹ Put differently, the judge may necessarily cause death as a condition of governance, but he is not a murderer. The ability to separate action from personal essence assuages psychic tension. Through these cognitive processes, state actors conceal violence from themselves.

Coordination also enables state actors to perform violence in the first instance. This clarification is important because individuals are not born state agents. Rather, state actors often retain mainstream sensibilities—such as an aversion to violence—in their personal lives. To overcome these inhibitions, an actor's autonomous self must be subordinated by “agentic” behavior.¹⁰⁰ The behavioral shift arises in hierarchical

⁹³ Randle, *supra* note 33, at 95; See generally Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

⁹⁴ Radin, *supra* note 94 (super due process refers to additional procedural safeguards available to defendants in capital cases).

⁹⁵ See Cover, *supra* note 1, at 1617.

⁹⁶ See *id.*

⁹⁷ Harald Welzer, *Mass Murder and Moral Code: Some Thoughts on an Easily Misunderstood Subject*, 17 HIST. HUM. SCI. 15, 30 (2004).

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting Erving Goffman, *Rollendistanz*, in *SYMBOLISCHE INTERAKTION* 260, 265 (Heinz Steinert ed., 1973)).

¹⁰⁰ Stanley Milgram, *OBEDIENCE TO AUTHORITY* 133 (1st ed. 1974).

settings, where learned obedience transcends the capacity to act autonomously.¹⁰¹ Division of labor facilitates this process. Orders and signals from institutionally legitimated authorities suppress the individual distaste for violence.¹⁰² Whereas responsibility for the entire act may be intolerable to discrete actors or may stoke internal dissent against a violent system, obedience numbs deviant impulses.¹⁰³ The state actor comes to view herself as the instrument for carrying out the orders of a higher authority and therefore no longer sees herself as responsible for her actions.¹⁰⁴ The moral burden of the act is externalized to the higher authority. The guard takes her cue from the judge, and the judge from the law itself.

Institutionalization has a disorienting effect on both the criminal defendant and the public audience. Because no single person is entirely responsible for the execution, it becomes difficult to discern the locus of power behind the killing act. The judge, warden, guard, and defendant each share in the violence inflicted.¹⁰⁵ Execution, then, does not appear as the discrete act of a particular individual, but as the faceless process of an omnipotent State. This serves two functions. First, it amplifies state power. The criminal defendant is cast as an individual actor against a collective and impersonal force, a relative framing that accentuates the futility of the defendant's position.¹⁰⁶ Alone in a world stacked against her, the defendant's only rational choice is to succumb to State discretion. Second, it legitimates lawful violence in a modern era. Institutionalization imbues execution with meaning. Similar to the electric chair, the institutional scheme replicates modern values associated with liberal societies, including efficiency, technology, and mass production.¹⁰⁷ As such, the division of execution labor communicates rationality by reducing the appearance of arbitrariness. Each state actor becomes a vital cog in a just system. This interpretation is juxtaposed against citizen violence, which is framed as the meaningless product of discrete badactors—human frailty contrasted against the rational machine.

Finally, as coordinated execution is institutionalized and repeated, it becomes naturalized. The same qualities that amplify state power obfuscate the public's ability to reform and reimagine the system. As time passes, the public forgets that execution is the product of interplay between the State and the community, reflecting a political choice. Institutionalization hides that these processes are subject to change.

III. THE CONCEALMENT TECHNOLOGIES OF POLICING

Capital punishment is not the only regime of state violence that obscures the

¹⁰¹ *Id.* at 135–38.

¹⁰² *See id.* at 123–64.

¹⁰³ *Id.* at 26–30.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ Cover, *supra* note 1, at 1620.

¹⁰⁶ This phenomenon is reproduced in criminal case citations, which are frequently named “State v. Doe,” or “Commonwealth v. Doe.”; Jocelyn Simonson, *The Place of ‘The People’ in Criminal Procedure*, 119 Columbia L. Rev. 249, 250 (2018) (“The customary case caption in criminal court, ‘The People v. Defendant,’ pits the local community against one lone person in an act of collective condemnation.”)

¹⁰⁷ Randle, *supra* note 33, at 95.

violence of its actions. Police killings have been endemic in American life for nearly as long as judicial executions.¹⁰⁸ Although lacking the rhetorical and ritual symbols that work to justify death sentencing, police violence has also been legitimated by way of concealment. This is accomplished through proceduralization, instantaneity, and narrative.

A. *Proceduralization*

Police violence is camouflaged by language. It operates lawfully under different names.

In our criminal industrial complex, a police killing is neither murder nor manslaughter; it is the “use of deadly force.”¹⁰⁹ Semantic reinvention is perceptually effective. Different words conjure different meanings in the public mind. Redefining police violence allows the State to cognitively separate law enforcement killings from violent common-law crimes. But reframing police violence transcends verbal deception. The linguistic shift has produced a new legal/occupational standard—one that permits civilian killing without adjudication or due process.¹¹⁰ This is a tremendous power. It exceeds even capital punishment, which requires judicial sanction from a network of state decisionmakers. The State has legitimated this power by establishing it as an occupational and professional procedure.

Use of force is bureaucratic.¹¹¹ It is described in training manuals, instilled at police academies, and interpreted by reviewing courts and agencies. Like other occupational procedures, it is frequently reanalyzed and applied in new contexts. This standard, in substance and through the process by which it is defined, renders the justificatory threshold for police killings far below that of civilian crimes. Substantively, the current regime establishes a set of environmental circumstances and procedural steps that authorize lethal force against a civilian.¹¹² So long as the officer satisfies these criteria, she is vindicated in taking a life. Regarding process, the prolonged attention by judicial and executive agencies conveys that the State, as a purported rational actor, takes the problem of police violence seriously. This concentration on lawful justification also naturalizes a perceptual reframing. Public focus is redirected from the violent action toward the professional standard. This is important, of course, because the standard is self-determined and

¹⁰⁸ See Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the US*, SMITHSONIAN (July 27, 2017), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>.

¹⁰⁹ 10 C.F.R. § 1047.7 (2021); see generally *Graham v. Connor*, 490 U.S. 386 (1989).

¹¹⁰ See *Graham*, 490 U.S. at 396 (holding that the barometer for use of force is reasonableness—the “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight).

¹¹¹ See William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOC. PROBS. 144, 146 (1984) (“Police use of firearms is formally governed by state laws and the policies and guidelines of particular police departments.”).

¹¹² See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that the Fourth Amendment permits the use of deadly force where the police officer reasonably believes that the suspect committed or attempted to commit crimes involving the infliction or threatened infliction of serious physical injury and a warning of the intent to use deadly physical force was given whenever feasible). Statutory justifications include self-defense and apprehension. See 10 CFR § 1047.7

self-imposed. The State decides entirely which behaviors constitute lawful action and which do not. In doing so, it creates a tangible realm of individual violent behavior removed from criminality. The standard becomes self-reinforcing. Officers who toe the justificatory line are vindicated in the eyes of the law. Officers who stray too far—triggering public disapproval—can be written off as aberrant—acting exclusively within the criminal realm. In both cases, the use of legal violence is never questioned. The public’s attention is not on whether the officer killed an individual, but whether she deviated from the occupational standard.

Similarly, “use of deadly force” conceals the officer’s autonomy.¹¹³ On a personal level, lethal decision-making is easily redirected toward the professional standard, which is shared across law enforcement and reinforced by the legal regime. So long as the officer stays within the lawful realm, she was simply “doing her job.”¹¹⁴ The decision to use force, then, is not a personal choice but an occupational necessity mandated by the State. Framed as such, the officer may easily refer back to common narratives.¹¹⁵ She may have been acting in self-defense to an imminent social threat. She may express personal distaste for violence but believe that its necessity transcends individual feeling. She may even disclaim the autonomous self entirely, representing the violent act as reflexive, instinctual, or imperative. Each justification obscures the officer’s agency. This process protects the officer so long as she operates within lawful bounds. When officer violence is justified by the prevailing professional standard, she was acting, not as an individual, but as part of the state machinery. In contrast, officers who transgress the standard are deemed personally responsible and sacrificed to the criminal justice apparatus. The system preserves itself.

Finally, this regime of legal violence derives meaning from violent lawlessness. Juxtaposed against civilian criminality, the bureaucratic standard is conceived of as a procedural response to irrational and immoral behavior. Again, the ability to monopolize and reproduce rational behavior, to approximate mass efficiency, signals legitimacy to the public. More interesting, however, is that lethal force may be legitimated through its continued use. One would assume that the frequency of police killings would erode state control over lawful violence. Perhaps counterintuitively, killing legally may serve to fortify the state monopoly over force. Through “use of force,” the State has recognized a right to violence. Like any right, its contours are strengthened and defined by repeated exercise over time.¹¹⁶ As legitimate “use of force” is found in new contexts, the State’s ability to kill lawfully—indeed, to conceal the violence of its action—is further engrained into the legal conscience. Each case is contextualized against past killings and sets precedent for future ones. The conditions for lawful violence are constantly rediscovered in novel environments, enlarging the factual scenarios where police may justifiably kill. As a result, police killings appear as an unchangeable legal reality.

¹¹³ See Hirschfield & Simon, *supra* note 90, at 162.

¹¹⁴ See *id.* (discussing the processes that render police actions logical, accordant with professionalism, and legally permissible).

¹¹⁵ See *infra* Section IV.C.

¹¹⁶ See Waegel, *supra* note 111, at 145.

B. Instantaneity

Unlike capital punishment, where the symbolic pronouncement and violent action are temporally distanced,¹¹⁷ police killings happen instantaneously. In this context, however, immediacy enhances the State's ability to commit and conceal killing. Executions are concretely tied to adjudication, which serves as the public justification for the killing act. The adjudication then must shoulder the burden of rendering death sentences intelligible to public audiences.¹¹⁸ Temporal distance assists this project because it attenuates and abstracts the violence inherent in the judicial command. As time passes, the public may focus on other concerns, understanding that the defendant will proceed through a lengthy appeal process before the execution is rendered final. In contrast, police traditionally operate without the presence of large public audiences or the fear of being documented.¹¹⁹ Because police violence frequently happens off-script, there is no need for the complex systems of symbols and methods used to rationalize capital punishment. Absent these constraints, law enforcement is afforded greater latitude for state killing and greater opportunity to justify these killings *ex post facto*.

The concealment technology of instant killing is evidentiary control. Sudden and immediate force creates an informational void. The contemporaneous perception of a particular action is confused, distorted, and even destroyed within the emotionally fraught landscape of violence. At its most extreme, the police killing of a criminal suspect eliminates the possibility of counter-narrative. Criminal defendants are afforded process. Even if there is little chance for acquittal, criminal defendants are given the opportunity to recount their experience before a court of law.¹²⁰ The taking of life results in the absence of story. Without the victim's narrative, the State can better control the history of the encounter. This effect is amplified when the killing occurs outside third-party observation. In these circumstances, the officer's perspective is the only remaining source of information. The State may omit, embellish, or generate facts necessary to render the killing lawful.¹²¹

Even where there are witnesses, instantaneous killing provides avenues for evidentiary manipulation. Immediacy breeds confusion. As police violence is often sudden and undocumented, there is less certainty surrounding the actual circumstances of the encounter. The State uses chaos to its advantage, deploying self-preserving narratives to fill informational gaps.¹²² These accounts may spotlight the

¹¹⁷ See *supra* Section III.B.iv.

¹¹⁸ See Cover, *supra* note 1, at 1622.

¹¹⁹ But see Nicol Turner Lee, *Where Would Racial Progress in Policing be Without Camera Phones?*, BROOKINGS (June 5, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones/>.

¹²⁰ Although criminal defendants are not required to testify at their own trials, the Sixth Amendment provides generally that criminal defendants have the right to be informed of the nature and cause of their accusation, to be confronted with witnesses against them, to have compulsory process in obtaining witnesses in their favor, and to have the assistance of counsel for their defense. See U.S. CONST. amend. VI. Instantaneous killings deprive the accused of these safeguards.

¹²¹ See Hirschfield & Simon, *supra* note 90, at 172.

¹²² *Id.*

defendant's criminal history or frame the officer's action as self-defense.¹²³ Structural access to media sources then provides opportunities to disseminate those narratives to broad audiences.¹²⁴

Where law enforcement evidence conflicts with witness evidence, the State emphasizes its own legitimacy to minimize dissenting voices and obfuscate the truth of the matter. Individual accounts—particularly where perception or character is flawed—are unlikely to carry the day against the State. This power imbalance is amplified where both the victim and witness belong to a marginalized or disempowered group.¹²⁵

Optics can also work in the State's favor. Police-encounter killings are rarely observed from start to finish. Because many people trust law enforcement, third parties that arrive late to the confrontation may presume that the defendant has acted unlawfully and deserves his fate. Pushed further, certain visuals conjure criminal meanings in the mind of the viewing public.¹²⁶ The police chase, for example, signifies that the victim is attempting to evade the law rather than escape a personal danger.¹²⁷ Race—of both the witness and the witnessed—also complicates perception.¹²⁸ Common narratives of black criminality work to tilt the justificatory presumption toward law enforcement.¹²⁹

C. Narrative

The most prominent method of police concealment is narrative. Through the production and distribution of police mythology,¹³⁰ the State frames police killings as the paradigm of popular justice. These stories are familiar. The police officer is alternatively conceived as hero, proceduralist, and necessary vigilante.¹³¹ She is simultaneously reactive to proactive threats and the avenger of innocent victims and fallen comrades. Such narratives congeal in the public mind, framing the police as indispensable guardians of social order.

Even before the production of myth, the State obscures police violence through disseminative control. State actors have temporal and professional access to information and information distributors.¹³² Police officers and agencies are

¹²³ See *id.* at 170–71.

¹²⁴ *Id.* at 158.

¹²⁵ See Robert Staples, *White Racism, Black Crime, and American Justice: An Application of the Colonial Model to Explain Crime and Race*, 36 *PHYLON* 14, 19–22 (1975); see generally Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUSTICE (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

¹²⁶ See generally Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. PERS. & SOC. PSYCH.* 876 (2004).

¹²⁷ See generally Amy L. Landers, *Hyperreal: Law and the Interpretation of Visual Media*, 109 *KY. L.J.* 127, 164 (2020).

¹²⁸ Eberhardt et al., *supra* note 110.

¹²⁹ See generally *id.*

¹³⁰ Shima Baughman, *Crime and the Mythology of Police*, 99 *WASH. U. L. REV.* 1, 40–69.

¹³¹ Hirschfield & Simon, *supra* note 90, at 157 (“Three police archetypes that may link the police depicted in news of police violence to broader cultural frames are the professional, the vigilante, and the oppressor.”)

¹³² *Id.* (“[S]tate agencies, who control the initial flow of information about most police-related news derive legitimacy from perceived adherence to established rules and procedures without regard to race and social

necessarily the first—or among the first—parties to learn of citizen killings.¹³³ This provides the State with two distinct advantages. First, law enforcement may frame events in a positive light before other parties have a chance to learn of and interpret the act.¹³⁴ Opposition narratives therefore must not only be plausible—they must discount or discredit the original. This additional burden works in favor of state legitimacy. Second, early knowledge establishes a gatekeeping power. As stated above, police may be the only surviving source of information. Even where there are contemporaneous witnesses, those individuals may be difficult to track down or afraid of reprisal. Other entities, such as the press, then become reliant on official sources for informational access.¹³⁵ The State can then curate and disseminate narrative content as it sees fit. For example, “[p]ursuant to administrative rules, police often withhold names and identifying characteristics of officers involved in civilian deaths.”¹³⁶ “Journalists who cannot identify officers are . . . prevented from probing their character and background.”¹³⁷ Because the public may “have positive images of police, [audiences] may . . . associate faceless officers with a timeless and benevolent social role.”¹³⁸ Omitting an officer’s personal characteristics also conceals her individual responsibility for the killing act. Instead, the faceless officer reifies conceptions of the omnipotent state. The police killing ceases to be the product of individual choice, proceeding instead as a collective state function. Official sources may conceal the name and personal characteristics of the criminal victim as well.¹³⁹ This also serves a dehumanizing role, but in a different way. Because the public may harbor negative images of criminals, it may be less able to conceive of them as complete individuals. Excluding personal information from the narrative transforms the victim into a subhuman type.

As journalists become increasingly reliant on official sources for information, they may be more willing to frame state actors in a favorable light to maintain professional relationships.¹⁴⁰ Newspaper and electronic accounts reproduce many of the same linguistic techniques that judges do in written opinions. These stories omit images, manipulate active and passive construction, and employ euphemisms to sanitize violence.¹⁴¹ Exceeding even the judicial opinion, the press may manipulate narrative point of view to enhance state legitimacy. Police are imagined as protagonists in hard-boiled crime stories.¹⁴² Criminal victims are their monstrous foils. Each of these factors combine to render the State’s narrative to be the definitive

status.”)

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 158.

¹³⁶ *Id.* at 164.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 168–69.

¹⁴⁰ *Id.* at 158 (“Even crime-beat reporters eager to expose police malfeasance face professional norms and constraints that foster exculpatory accounts. Conventions dictate that they, in pursuit of efficiency, defer to official definitions of crime events.”)

¹⁴¹ *Id.* at 163.

¹⁴² *See id.* at 157.

account of a police killing.

Substantive narratives also play an integral role in concealing police violence. Beyond disseminative control, myths inform popular perception of law enforcement by imagining police killings as lawful and justified. One popular narrative imagines the police as hero. Framed in opposition to the criminal type, the officer represents a benevolent force, risking personal harm to safeguard the community. The “thin blue line” is a popular iteration.¹⁴³ In this narrative, law enforcement is assigned with protective responsibility for all of civilized humanity. Police officers represent the last and only bastion separating social order from criminal anarchy.¹⁴⁴ Where law enforcement ceases to exist, or becomes too weak to effectively function, the delicate social ecosystem disintegrates. This narrative divides humanity into three types: the innocents, the criminals who threaten their safety, and the officers who eliminate those threats. Viewed in this light, police killings are not only justified, they are net positives. While the criminal’s death may be unfortunate, it becomes necessary to protect innocents from lawless violence. Moreover, innocents are assigned more value than criminals, thus justifying police killings by way of utilitarian calculus. Of course, the “thin blue line” hardly reflects an objective reality. Various other social conditions work to maintain order, including education, aversion to violence, and the hegemonic effect of the law. Human beings eschew typology and are instead colored by race, class, and sexuality.¹⁴⁵ This latter point reveals the narrative’s tendency toward elitism and bias. Still, the myth has achieved popularity in American culture.¹⁴⁶

Another version of the police hero narrative centers on the human qualities of individual officers. Positive portrayals work to redeem the officer from the killing act.¹⁴⁷ The policeman may have killed the criminal victim but is otherwise considered to be a “good cop,” “family man,” or “pillar of the community.”¹⁴⁸ Violence becomes a narrative outlier—at odds with the individual’s essential character. It is then more difficult to assign malevolent motive to the officer’s action. This myth often works in tandem with the conception of police as proceduralist. The professional police officer employs deadly force within legal parameters, deriving legitimacy from adherence to the established standard.

Where officers fail to act as either heroes or proceduralists, their actions may be justified by a darker narrative. Some demographics believe that the judiciary fails to effectively correct criminal behavior and protect society from criminal danger.¹⁴⁹

¹⁴³ Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 305 (2018).

¹⁴⁴ See *id.* at 305–06.

¹⁴⁵ See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. FORUM 139 (1989).

¹⁴⁶ David Hernandez, *The Thin Blue Line: The History Behind the Controversial Police Emblem*, SAN DIEGO TRIB. (July 6, 2020), <https://www.sandiegouniontribune.com/news/public-safety/story/2020-07-06/the-thin-blue-line-the-complex-history-and-thoughts-behind-the-police-emblem>.

¹⁴⁷ Holly Baxter, *The ‘Good Cop’ Narrative Dominates American Culture but the Truth is There is No Such Thing*, INDEP. (June 16, 2020, 5:42 PM), <https://www.independent.co.uk/independentpremium/long-reads/blm-black-lives-matter-racism-police-america-us-george-floyd-a9566466.html>.

¹⁴⁸ See Andrew Cohen, *Good Cops, Bad Cops, and the Self-Fulfilling Prophecy of the Police Movement*, BRENNAN CTR. FOR JUSTICE (June 17, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/good-cops-bad-cops-and-self-fulfilling-prophecy-police-protest-movement>;

¹⁴⁹ Kate Kelly, *Extrajudicial Killings in the United States: The International Human Rights Perspective*, HUMAN

Judicial inefficiency then legitimates alternative methods of crime control—namely the vigilante policeman. Subscribers to this narrative understand that the death penalty has decreased in frequency or is increasingly reserved for the most heinous offenders. Diminution in execution results in both under enforcement and under punishment.¹⁵⁰ As a result, an entire criminal subclass evades proportionate retribution. Police killings fill these punitive interstices.¹⁵¹ It does not matter if the officer acted on heroic impulses or within legal authorization because he nonetheless performed a beneficial social function. Police killings work to redeem a society corroded by crime.

Finally, police violence is justified through narrative framing. Police killings are cast as reactive instead of proactive, reinforcing the impression that officers had no other choice than to resort to deadly force.¹⁵² This conceals the fact that lethal encounters can frequently be the result of police provocation.¹⁵³

IV. VIOLENCE REVEALED

The punitive landscape is becoming visible. Viral images of police killings have undressed state violence and restored it to the forefront of public consciousness. Seemingly each week, a tragic new video circulates on social media and enters American homes, ripe for interpretation.¹⁵⁴ The result is a perceptual watershed. State violence had been detached from its expressive channels, and without expressive control, the State cannot limit the range of interpretive meanings. The public is free to contextualize viral videos within a limitless backdrop of preexisting knowledge—and the association is lawlessness. These images denaturalize the regime of legal violence because they convey criminal meanings. Scenes depict racial terror, random and arbitrary decision making, and abuses of power—characteristics ostensibly absent from a rational criminal justice system. In short, violence is perceived for what it is—violence. The State’s panoramic concealment project is unable to suppress these images or redeploy them through a legal medium. As such, the understanding between the State and the public regarding the use of legal violence is threatened.

Perhaps the most salient way that viral images upset the State’s concealment project is that they are broadcast publicly. Widespread dissemination of state killing contravenes the nineteenth-century paradigm shift in punitive methodology. Public

RIGHTS AT HOME BLOG (Dec. 10, 2017), https://lawprofessors.typepad.com/human_rights/2017/12/extrajudicial-killings-in-the-united-states-the-international-human-rights-perspective.html.

¹⁵⁰ See generally Lawrence W. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VANDERBILT L. REV. 71 (1980).

¹⁵¹ *Id.*; see also Ashley L. Smith, #BlackWomenMatter: Neo-Capitalist Punishment Ideology in the Wake of State Violence, 85 J. OF NEGRO EDUC. 261, 262–63 (2016).

¹⁵² Hirschfield & Simon, *supra* note 90, at 170–71.

¹⁵³ *Id.*

¹⁵⁴ See Mark Berman, John Sullivan, Julie Tate & Jennifer Jenkins, *Protests Spread over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html.

hangings were deemed regressive and socially unacceptable in the 1800s.¹⁵⁵ Community intolerance has only amplified after years of concealment and institutionalization. Execution scenes are now unrecognizable to the American mainstream. Outside fictionalized, foreign, or historical accounts, there is little with which to contextualize executions as just or legitimate. Compounding misrecognition, today's public executions are aggravated by technological advancements. Whereas nineteenth-century spectacles were confined to city squares, viral images are distributed instantaneously to global audiences. Twentieth-century civilians who may have never witnessed a single discernible act of state force are now repeatedly exposed to police killings, as they are a regular staple of the daily news cycle.¹⁵⁶ The character of state violence is more public than it has ever been.¹⁵⁷

It is true that police killings have traditionally occurred in the public realm, but they have often played out chaotically and without spectators. Even where observers were present, witness accounts were delegitimated through procedural standards, evidentiary manipulation, and narrative.¹⁵⁸ The ability to control information sources—to trade in confusion—allowed the State to skew violent interpretation in its favor. Today, confusion is mitigated by modern mediums. Social media and mobile recording devices have democratized the ability to portray state violence.¹⁵⁹ The result is market intervention—the State is now forced to compete with viral distributors for disseminative control. New diversity in distributive sources has multiplied the amount of violent content available for public viewing, and this additional content fills evidentiary gaps. Mobile phones record the contemporaneous actions of police officers and immediately distribute them to public audiences.¹⁶⁰ Whereas police killings may once have destroyed any counter-narrative, viral recordings preserve the original encounters for collective interpretation. For the first time in recent history, the public audience receives state violence unmediated. Viewers are then able to pause, rewind, and repeatedly view the scenes. The once-chaotic encounter is now susceptible to analysis and deconstruction, allowing the public to more freely assign responsibility for violent action. Even still, viral distributors are able to distort content through their own aesthetics, redeploying public understandings against the State.¹⁶¹ Through content cutting, editing, and manipulation, these subjective accounts subvert state legitimacy by enhancing the criminality of police action.¹⁶²

Viral scenes also restore humanity to state violence. The State's concealment project has operated to suppress image and audience. Suppression, in turn, has

¹⁵⁵ Martschukat, *supra* note 13, at 56.

¹⁵⁶ Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015), <https://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>.

¹⁵⁷ *Id.*

¹⁵⁸ *See supra* Part IV.

¹⁵⁹ *See generally* Tony Cheng, *Social Media, Socialization, and Pursuing Legitimation of Police Violence*, 59 CRIMINOLOGY 391 (2021).

¹⁶⁰ Lee, *supra* note 106.

¹⁶¹ Benedict Stork, *Aesthetics, Politics, and the Police Hermeneutic: Online Videos of Police Violence Beyond the Evidentiary Function*, FILM CRITICISM (July 2016), <https://quod.lib.umich.edu/ffc/13761232.0040.210/-aesthetics-politics-and-the-police-hermeneutic-online-videos?rgn=main;view=fulltext>.

¹⁶² *Id.*

enabled private executions and judicial texts to depersonalize criminal defendants. These processes abstract human qualities and replace them with criminal narratives, destroying the possibility of public empathy. In contrast, viral images reintroduce the human face to killing acts. We see victims of police violence experience fear, express regret, and plead for mercy.¹⁶³ They are returned to their personal and environmental backdrops—recolored with identity. We learn their names and listen to their families. Even pain reenters the arena—the sensory deprivation of rational execution technology upended by acute, visual agony. We feel the scene’s tension crescendo to climax, hear gunshots, and see blood. Victims of state violence no longer live in the realm of abstraction. The public understands that the human toll is very real.

Viral images also reveal the human face of the executioner. Law enforcement officers can no longer conceal their identities behind procedural rules and narrative control.¹⁶⁴ Through image, the public can quickly match thumbprint to trigger finger. When officers are identified, their actions can be studied and contextualized. Often, police perpetrators are discovered to have personal legacies of bias and misconduct—histories of excessive force that seem to render killing inevitable.¹⁶⁵ Law enforcement then ceases to be the impersonal arm of a powerful state and is instead a collection of individuals predisposed to violent choice. And this individualization reveals the irrationality of state force. We see that legalized violence is not always the product of a coordinated and orderly apparatus but is instead the arbitrary decisions of empowered individuals—individuals proactive and vindictive in their actions. Victims are stripped of process, juries, criminal appeals, and all the other trappings of coherent justice.

When arbitrariness is exposed, so, too, are the myths of autonomy and proportionality. Victims of state violence are frequently dispossessed of the very agency later claimed to justify their punishment. Instead, they are targeted for their identity rather than for their participation in criminal behaviors.¹⁶⁶ Personal choice is removed entirely from the equation—whether they engaged in social deviance becomes irrelevant to their executioner. And even where victims do exhibit evidence of criminality, the magnitude of punishment far exceeds the harm. The State does not simply discipline murder with death. Pawned cigarettes and forged checks receive

¹⁶³ See Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> (explaining that McClain’s death received significant attention partly due to his final words, which were captured on body cam audio, during which he apologized and expressed empathy for the officers even as they continued to restrain him).

¹⁶⁴ See *supra* Part IV.

¹⁶⁵ See Erin Corbett, *The Officers Who Killed George Floyd Have Done This Before—Many Times*, REFINERY29 (May 29, 2020, 4:33 PM), <https://www.refinery29.com/en-us/2020/05/9846650/minneapolis-police-derek-chauvin-history-force>; Darcy Costello & Tessa Duvall, *Former Detective Brett Hankinson Faces 3 Charges After Breonna Taylor Shooting*, COURIER J., <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/09/23/what-we-know-about-officer-brett-hankinson-indicted-in-breonna-taylor-shooting/5490411002/> (last updated Sept. 23, 2020, 6:42 PM).

¹⁶⁶ See generally Jeffrey A. Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951 (2020).

identical sentences.¹⁶⁷ So, too, does innocence.¹⁶⁸ With concealment subverted, the public perceives the State as exceeding the social contract on punishment.¹⁶⁹ The result is communication breakdown between the State and the public.

V. FRACTURED RESPONSE

Unsurprisingly, unveiled state violence has had a destabilizing effect in American society. Each stakeholder—public, state, and law enforcement—has moved to exercise dominion over violent action and representation. Public response has been prodigious. Viral distribution of police violence has catalyzed an unprecedented wave of demonstration. In the summer of 2020, immediately following George Floyd’s death, Black Lives Matter protests mobilized upward of twenty-six million people across the United States.¹⁷⁰ The protests have been diverse and intersectional, incorporating groups across race, gender, and class divides.¹⁷¹ These figures would make the protests the largest movement in the country’s history.¹⁷² As viral images of police violence continue to disseminate, demonstration has become a common expression of public life.

Mass demonstration has also amplified calls for radical action. The public has not simply voiced an intolerance for isolated incidents; it is demanding institutional overhaul.¹⁷³ Endemic police violence has inspired demands for police defunding and outright abolition—reform initiatives that would have been considered unthinkable ten years ago.¹⁷⁴ These measures envision the reallocation of state resources toward social infrastructure.¹⁷⁵ Police budgets frequently occupy a disproportionate amount of state discretionary spending.¹⁷⁶ Progressives argue that funds could be spent more effectively and less violently. Reinvesting in affordable housing, drug rehabilitation, and mental health counseling reflects alternative ways of deterring crime.¹⁷⁷ More ambitious reformers demand the wholesale dismantling of the police apparatus.¹⁷⁸

¹⁶⁷ See Matt Furber, Audra D.S. Burch & Frances Robles, *What Happened in the Chaotic Moments Before George Floyd Died*, N.Y. TIMES, <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html> (last updated June 10, 2020) (pointing out that George Floyd and Eric Garner were detained for suspected forged currency and pawned cigarettes); Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

¹⁶⁸ Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/article/who-was-elijah-mcclain.html>.

¹⁶⁹ GARLAND, *supra* note 14, at 242.

¹⁷⁰ Buchanan et al., *supra* note 17.

¹⁷¹ Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/12/us/george-floyd-white-protesters.html>.

¹⁷² Buchanan et al., *supra* note 17.

¹⁷³ Aaron Ross Coleman, *Police Reform, Defunding, and Abolition, Explained*, VOX (July 16, 2020, 8:00 AM), <https://www.vox.com/21312191/police-reform-defunding-abolition-black-lives-matter-protests>.

¹⁷⁴ Buchanan et al., *supra* note 17.

¹⁷⁵ *Id.*

¹⁷⁶ Luke Darby, *This is How Much Major Cities Prioritize Police Spending Versus Everything Else*, GQ (June 1, 2020), <https://www.gq.com/story/cops-cost-billions>.

¹⁷⁷ Coleman, *supra* note 173.

¹⁷⁸ Keeanga-Yamahatta Taylor, *The Emerging Movement for Police and Prison Abolition*, THE NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison>.

Believing law enforcement to be a tool of racial subordination, they understand modest reform as merely treating symptoms of a much larger disease.¹⁷⁹ Abolitionists seek to eliminate the root conditions of violence through community empowerment, thereby transcending the need for violent policing.¹⁸⁰

The State has largely resisted these efforts. Instead, public upheaval has resulted in increased efforts to restore punitive legitimacy. As monopoly control of force is threatened, the state has resorted to terroristic and forcible displays of punishment.¹⁸¹ This response has manifested in two ways. First, the State has increased the use of capital punishment.¹⁸² In July 2019, the Department of Justice reinstated the death penalty after a two-decade absence.¹⁸³ A year later, both during and after the protests, the federal government commenced an unparalleled wave of executions. The ten inmates put to death that year were the most since 1896.¹⁸⁴ Second, the State has militarized in response to public activism.¹⁸⁵ Protestors in Minneapolis, Minnesota, and Portland, Oregon, have been met with the National Guard.¹⁸⁶ The ensuing clashes resulted in violent crowd-control measures, citizen injuries, and extraconstitutional detentions.¹⁸⁷ These responses sought to quell public unrest and rechannel violence through legal mediums.

Law enforcement has had a unique reaction to viral distribution of police violence. During protests, officers have turned their attention toward journalists and bystanders, attempting to censor dissemination through shows of force.¹⁸⁸ Individuals reporting on and recording police activity have been beaten, pepper sprayed, and shot with rubber bullets.¹⁸⁹ These incidents can be read as law enforcement attempting to exercise control over punitive aesthetics.

Perhaps no situation better reflects the current legal terrain than the death of

abolition.

¹⁷⁹ Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>

¹⁸⁰ *Id.*

¹⁸¹ GARLAND, *supra* note 14, at 78.

¹⁸² Francesca Giuliani-Hoffman, *The US Government Has Executed 10 People This Year—The Most Since 1896*, CNN, <https://www.cnn.com/2020/12/17/politics/federal-death-penalty-2020-trnd/index.html> (last updated Dec. 17, 2020, 5:34 PM).

¹⁸³ DEP'T OF JUST., *supra* note 19.

¹⁸⁴ Giuliani-Hoffman, *supra* note 182.

¹⁸⁵ Christina Carrega, *BLM Protesters Were Targeted by Federal Government with Stiffer Punishments, an Analysis Shows*, CNN (Aug. 20, 2021), <https://www.cnn.com/2021/08/20/politics/blm-protesters-analysis/index.html>; Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html>.

¹⁸⁶ Alexandra Sternlicht, *Over 4,400 Arrests, 62,000 National Guard Troops Deployed: George Floyd Protests by the Numbers*, FORBES (June 2, 2020, 5:30 PM), <https://www.forbes.com/sites/alexandrasternlicht/2020/06/02/over-4400-arrests-62000-national-guard-troops-deployed-george-floyd-protests-by-the-numbers/?sh=28fa8ce3d4fe>; Maxine Bernstein, *Gov. Kate Brown Sends 50 Oregon National Guard Members, 100 State Troopers to Protect Portland*, OREGONIAN, <https://www.oregonlive.com/crime/2020/06/governor-to-deploy-less-than-100-oregon-national-guard-to-portland-state-police-to-send-100-troopers.html> (last updated June 1, 2020, 7:21 PM).

¹⁸⁷ *Portland Protests: Oregon Sues over 'Unlawful Detentions'*, BBC (July 19, 2020), <https://www.bbc.com/news/world-us-canada-53460495>.

¹⁸⁸ Klebnikov, *supra* note 20.

¹⁸⁹ *Id.*

Andrew Brown Jr. in Elizabeth City, North Carolina. During the writing of this article, Brown was killed by police officers in what is alleged to be an execution-style shooting.¹⁹⁰ The uncertainty surrounding the lethal encounter has ignited a legal battle over the public release of officer body-cam footage.¹⁹¹ The State, as of this writing, has only disseminated a short clip from a single deputy's camera; between seven and eight deputies were said to be at the scene.¹⁹² It is expected that law enforcement will release more video in the coming days.¹⁹³ Anticipating that new footage will reveal police misconduct, the mayor of Elizabeth City has declared a state of emergency.¹⁹⁴ Its prophylactic measures include increasing law enforcement presence and establishing a citywide curfew, curtailing the public's capacity for protest.¹⁹⁵ Indeed, narrative justifications for the shooting have also begun to spread. In the days since Brown's death, mediasources have obliquely tied Brown to criminal drug trafficking, discounting his humanity and redirecting attention away from state violence.¹⁹⁶ Brown's case is a microcosm of stakeholder response. The State struggles to suppress what the public demands to interpret.

CONCLUSION

Suffice it to say, the regime of legal violence is unstable. Naked violence has summoned state force to the interpretive battleground. Punitive methods, long accepted and long obscured, are today at the forefront of public concern. As viral images express state violence outside concealment technology, the line between justice and criminality is blurred. Violent meanings merge in the public mind, subverting the perceptual divide between legitimate and illegitimate use of force. Where it once stood firm, the legal reality of state violence is collapsing underfoot. And as with any tectonic shift, there is collateral damage. Attempts to reestablish control over state violence, and the various ways it is expressed, has resulted in tangible harms. Demonstrations are the visible products of power struggle. The State does not easily surrender its control of force, nor its ability to curate violent aesthetics. These are matters of life and death.

But regime instability also provides sightlines to new legal realities. It is through deconstruction—through perceiving flaws in the prevailing state of things—that just futures are built. Without discounting the human toll, this Article argues

¹⁹⁰ Natasha Chen, Gregory Lemos & Eric Levenson, *Attorney for Andre Brown Jr.'s Family Says Video of Fatal Police Shooting Shows 'Execution'*, CNN (Apr. 27, 2021, 1:14 AM), <https://www.cnn.com/2021/04/26/us/andrew-brown-elizabeth-city-shooting/index.html>.

¹⁹¹ Laurel Wamsley, *N.C. Judge Delays Public Release of Bodycam Footage of Andrew Brown Jr.'s Death*, NPR, <https://www.npr.org/2021/04/28/991590657/n-c-judge-will-not-release-bodycam-footage-of-police-shooting-andrew-brown> (last updated Apr. 28, 2021, 3:45 PM).

¹⁹² Hassan, *supra* note 6.

¹⁹³ *Id.*

¹⁹⁴ *Elizabeth City Declares State of Emergency Before Release of Body Camera Video in Andrew Brown Jr. Case*, WBTW (Apr. 26, 2021, 11:29 AM), <https://www.wbtv.com/2021/04/26/elizabeth-city-declares-state-emergency-before-release-body-camera-video-andrew-brown-jr-case/>.

¹⁹⁵ *Id.*

¹⁹⁶ Joe Tacopino, *Andrew Brown Jr. Was Known Drug Dealer with Rap Sheet over 180 Pages*, N.Y. POST (Apr. 27, 2021, 2:16 AM), <https://nypost.com/2021/04/27/search-warrant-claims-andrew-brown-jr-was-dealing-drugs-from-his-house/>.

that the public should see the current moment as a paradigm shift in state punitive relations. The nineteenth century revolution in violent method provides a useful illustration. Where execution spectacles outlasted their efficacy, the public demanded modern, rational expressions of state violence. Now, it appears state violence has outlived rational meaning. How could it be otherwise? Despite the complex machinery that perpetuates and preserves lawful force, objective, lucid violence has always been fiction. Killing is never impersonal—not to the person. The ability to perceive state violence clearly, to understand its tendency toward arbitrariness and incoherence, transforms the legal imagination. Violence revealed denaturalizes violence's necessity. Laid bare before us, we can properly confront the moral and political foundations of state force and question the purposes it serves. The time has come to reconsider the lawful use of violence.