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Daniel S. Medwed

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Black Deaths Matter

THE RACE-OF-VICTIM EFFECT AND CAPITAL PUNISHMENT

Daniel S. Medwed[†]

Case A: The police recovered the body of a thirty-two year-old woman, Marquetta George, on the side of the road in East Texas just a few miles away from the trailer she shared with her boyfriend, Daniel Acker.[1] Neighbors witnessed Acker push her into his truck. After he turned himself in, prosecutors charged Acker with capital murder. The government's theory was that Acker, enraged about George's possible infidelity, strangled her and then ran her over with his vehicle. Acker admitted the kidnapping but claimed George died after leaping from his vehicle. The jury voted in favor of the death penalty, and in 2018 he was executed by lethal injection.[2]

Case B: The police recovered the body of a thirty-two year-old woman, Deanna Cook, in the bathtub of her Dallas home. Investigators determined she had been strangled and drowned.[3] Two days earlier, she had called 911 insisting her ex-husband Delvecchio Patrick was assaulting her. She can be heard on the audiotape choking, gurgling, and screaming "Delvecchio, why are you doing this?"[4] The police arrived nine minutes after

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† University Distinguished Professor of Law and Criminal Justice, Northeastern University School of Law. I am grateful to my friend, colleague, neighbor, and famed death penalty litigator Michael Meltsner for providing helpful feedback on this Essay.

1 Jolie McCullough, *Texas Puts Daniel Acker to Death, the Second Execution in Two Days*, TEX. TRIB. (Sept. 27, 2018), https://www.texastribune.org/2018/09/27/daniel-acker-execution-texas/ [https://perma.cc/ND39-CT5X].

2 *Id.*

3 Ken Kalthoff, Jury *Sentences Ex-Husband to 85 Years in Deanna Cook Murder*, NBC-DALLAS FORT WORTH (May 26, 2015), https://www.nbcdfw.com/news/local/punishment-phase-begins-in-deanna-cook-murder-trial/122278/ [https://perma.cc/8MK3-N8V5].

4 Melissa Chan, *Texas Man Convicted of Killing Ex-Wife Got Tattoo of Her Burning in Fire: Prosecutors*, N.Y. DAILY NEWS (May 26, 2015), https://www.nydailynews.com/news/national/man-killed-ex-wife-tattoo-fire-prosecutor-article-1.2236181 [https://perma.cc/L6PN-XC6Z].

> the call, knocked on the door, and left when they received no answer. Patrick had a history of controlling and abusive behavior. Prosecutors charged him with murder and sought a life sentence. In 2015, a jury sentenced him to eighty-five years in prison.[5]

What might explain the disparate treatment of the perpetrators in these two cases? The most salient distinguishing characteristic is that Case A had a white perpetrator (Acker) and white victim (George) while Case B had a Black perpetrator (Patrick) and Black victim (Cook).[6] Could the race of the victim have driven the outcome in these two cases?

Granted, it is a stretch to claim that race—especially the victim's race—provided the impetus for prosecutors to seek death, and juries to embrace it, in Acker but not Patrick. After all, correlation is not causation. The crimes occurred in different counties with different demographics and different chief prosecutors. Plus, I plead guilty to the scholarly crime of "selection bias," handpicking two cases among thousands to spark a conversation about race and capital punishment.

Even with those caveats, though, the Acker and Patrick cases highlight a troubling feature of the death penalty landscape: Similarly situated offenders frequently receive divergent outcomes. Although no two cases are direct comparables, these come quite close. Both involved strangulation committed by jealous men against thirty-two year-old women in Texas. Why then did prosecutors deem Acker worthy of death and Patrick life? If anything, many of the background factors suggest Patrick was more "deserving" of capital punishment. A lengthy history of violence marred his relationship with Cook, not to mention the chilling audio contained on the 911 tape, which captured Cook begging for her life as she drowned.[7] The Acker case, in contrast, was grounded in circumstantial evidence with a hazy theory of how George actually died.[8] I am left with the

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[5] Nerissa Knight, *Deanna Cook, Murdered While Making 911 Call, Prompts Change to Texas Emergency-Response System*, TRUE CRIME DAILY (Feb. 8, 2018), https://truecrimedaily.com/2018/02/08/woman-murdered-while-making-911-call-prompts-change-to-texas-emergency-response-system/ [https://perma.cc/EK52-WYXB].

[6] The race of Acker, Cook and Patrick were well-documented in the news coverage of their crimes. Although her race was not mentioned in the press coverage, evidence suggests George was white. *See* Acker v. TDCJ-CID, 2016 WL 3268328, at *4 n.7 (E.D. Tex. June 14, 2016) (citing autopsy report that referred to George as a "white" woman).

[7] *Ex-Husband Convicted of Dallas Woman's Murder*, CBS DALLAS FORT WORTH (May 22, 2015), https://dfw.cbslocal.com/2015/05/22/ex-husband-convicted-of-dallas-womans-murder/ [https://perma.cc/DFB8-PCC6].

[8] *See* Juan A. Lozano & Michael Graczyk, *Texas Inmate Executed for Killing Girlfriend in 2000*, ASSOCIATED PRESS (Sept. 27, 2018), https://apnews.com/article/7a479c607d7d47e6a8211681600eff39 [https://perma.cc/P99Z-AN2S] (discussing how the prosecution changed its theory of the cause of death during the litigation process).

unsettling feeling that prosecutors sought to avenge a white woman's death with the ultimate punishment in Acker, yet reacted less harshly to a Black woman's murder in Patrick. This pattern, known as the race-of-the-victim effect, emerges time and time again when you examine homicide cases. Police and prosecutors all too often place a higher value on white crime victims than Black ones.[9] And this tendency has ripple effects that flow throughout the capital punishment process.

INTRODUCTION

Few criminal justice topics stir controversy quite like the death penalty. Is it wrong for the state to deploy government resources to carry out an execution? Or a legitimate exercise of retributive justice? In biblical terms, do you believe in the eye-for-an-eye concept? Or the power of redemption and forgiveness? Those are just some of the moral dilemmas. Consider practical ones, too. What criteria should be used for charging someone with the death penalty to begin with? What protections should be given to defendants during trial and on appeal? What protocols should govern the execution itself?

Different people give different answers to those questions. But most Americans acknowledge, even if only grudgingly, that (1) there's a racial dimension to the death penalty and (2) Black defendants get the death penalty more frequently than whites.[10] On the one hand, data from the twenty-seven states that still have the death penalty support that general proposition.[11] Black people represent roughly 13 percent of the population but comprise 42 percent of death row and 35 percent of those whose death sentences are carried out.[12] On the other hand, it's less clear that the race of the *defendant* is the key variable in the overrepresentation of the Black community. Research instead points to an even more alarming factor. The race of the *victim*, not the defendant, steers cases in the direction of death. Regardless of the perpetrator's race,

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[9] *See generally* Edwin Rios & Kai Wright, *Black Deaths Matter: Why Is It So Hard for Families of Color to Get Justice When a Loved One Is Murdered?*, MOTHER JONES (May/June 2015), https://www.motherjones.com/politics/2015/06/chester-gun-violence-black-deaths-matter/ [https://perma.cc/9ECU-FSYU].

[10] *Less Support for the Death Penalty, Especially Among Democrats*, PEW RES. CTR. (Apr. 16, 2015), https://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/ [https://perma.cc/7UX6-LV28]. *See generally* Samuel R. Gross, *The Death Penalty, Public Opinion, and Politics In the United States*, 62 ST. LOUIS U. L.J. 763 (2018).

[11] As of April 2021, 23 states have abolished the death penalty and another three have gubernatorial moratoria in place. *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/FK5B-J8KK].

[12] *NAACP Death Penalty Fact Sheet*, NAACP (Jan. 17, 2017), https://www.naacp.org/latest/naacp-death-penalty-fact-sheet/ [https://perma.cc/CRU4-P8RN].

those who kill whites are more likely to face capital charges, receive a death sentence, and die by execution than those who murder Black victims. That means whites are more likely than Black defendants to face the death penalty in cases that qualify for capital treatment because people who kill usually do so within their own race.[13] From 1976 through 2000, 86 percent of white murder victims died at the hands of other whites while Black perpetrators killed 94 percent of Black victims.[14]

That prosecutors, jurors, and judges privilege white lives over Black lives might not shock many readers. But the idea that the race of the victim weighs more heavily in the capital calculus than that of the defendant might. While perhaps baffling at first glance, this phenomenon can be seen as a cog in a criminal legal machine that consistently devalues the lives (and deaths) of Black people. The rise of the Black Lives Matter movement in recent years has drawn much-needed attention to racial inequities in how we enforce our laws, from police profiling of people of color to incidents of law enforcement brutality. These inequities are not confined to the streets; they permeate the courtroom and translate into excessive punishment for Black and Brown people. The one place where white defendants seemingly fare worse than their Black counterparts is in the execution chamber, and the perverse explanation is that prosecutors, judges, and jurors simply fail to prize Black victims as much as whites. That is one powerful reason, among many, why we should rethink our approach to choosing which defendants live and which ones die.

Part I of this Essay explores the racially biased origins of capital punishment in the United States. Next, Part II discusses contemporary death penalty practices and how the race of the victim affects charging, sentencing, and execution outcomes. Part III examines how the race of the defendant factors into these results. Finally, this Essay links the race-of-victim effect in the death penalty context to broader trends in the devaluation of Black lives in police violence and public health outcomes.

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[13] *See generally* John H. Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL L. STUD. 165, 166 (2004) (noting that "based on the number of murders, African Americans are sentenced to death at lower rates than whites. As explored below, African Americans commit more than 50 percent of the country's murders yet they comprise 40 percent of death row. Furthermore, the excess of the African-American percentage of murderers over the African-American percentage of death row is greatest where the conventional wisdom would least expect it-in the South").

[14] *See* Blume et al., *supra* note 13, at 192.

I. THE RACIALLY CHARGED HISTORY OF THE AMERICAN DEATH PENALTY

As Professors Carol Steiker and Jordan Steiker have explained in convincing fashion, law enforcement officials applied capital punishment in a racially-charged and discriminatory manner even before the dawn of the republic.[15] In the seventeenth century, Black residents comprised a small proportion of colonial America, yet their execution rate far outstripped that of whites on a per capita basis.[16] Even so, most executions took place in the New England area and involved white defendants. That changed in the eighteenth century. As the colonial population exploded in size—due largely to the influx of African slaves in the south—execution trends shifted.[17] Most eighteenth century executions took place in the South, and most of those put to death were Black.[18] While whites were typically executed only after being convicted of murder, Black defendants got the death penalty even for nonlethal crimes.[19] Worse yet, they experienced harsher *methods* of execution. Although hanging was the norm, more torturous routines were reserved for Black people, especially slaves found guilty of revolt or major infractions against whites, like alleged rape. These methods included decapitation, dismemberment, and "gibbeting" (hanging in chains or a cage).[20] Scholars have long maintained that capital punishment served as a means of social control to keep slaves in line.[21]

Regional variations in the use of the death penalty accelerated throughout the nineteenth century. In the North, without slavery as a factor to affect criminal justice policy, states were often receptive to progressive ideas circulating across the globe.[22] Northern states gradually limited capital punishment and, by 1860, many only authorized execution for murder or treason.[23] Some jurisdictions in the North even restricted the penalty's availability to certain *types* of murder. Around this

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15 Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 245–46 (2015).

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*; *see also* Margaret Burnham, *Retrospective Justice in the Age of Innocence*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 291, 291–313 (Daniel S. Medwed, ed. 2017) (discussing how southern states disproportionately charged African Americans with the death penalty for alleged sexual assaults).

21 *See, e.g.*, Burnham, *supra* note 20.

22 *See The Abolitionist Movement*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement [https://perma.cc/XJJ4-9C4K].

23 *See* Steiker & Steiker, *supra* note 15, at 248.

time, as well, the Midwest gave birth to a burgeoning movement to abolish capital punishment, with Michigan in 1846 becoming the first English-speaking government to eliminate the death penalty for murder.[24] Rhode Island and Wisconsin followed suit a few years later by eradicating all forms of capital punishment.[25] No such steps were taken in the South. To the contrary, capital punishment expanded with respect to people of color and any limitations were only set up to protect whites.

After the Civil War, Southern states continued to use the death penalty primarily against Black citizens, notwithstanding the passage of the Fourteenth Amendment's equal protection and due process guarantees.[26] Right after the Civil War ended in 1865, states from the former Confederacy promulgated laws designed to curtail the rights and freedoms of newly freed slaves.[27] Congress responded three years later with the Fourteenth Amendment, and made acceptance of its provisions a condition to rejoin the Union.[28] Although Southern states nominally acceded to this demand, practices on the ground resurrected many aspects of racial segregation, including the racially disproportionate application of the death penalty.

Prosecutorial charging decisions, all-white juries, and lynch mobs achieved what the Fourteenth Amendment had intended to bar—a capital punishment regime shaped by race.[29] Executions allowed whites to subjugate the newly-freed African-American community even without blatantly discriminatory laws on the books; it's no coincidence that lynchings reached their apex during the late nineteenth and early twentieth centuries. The vast majority of executions during this era, whether through legal means or extralegal lynching, happened in the South. More than 75 percent of those executions involved Black people.[30]

Although lynchings declined throughout the twentieth century, Southern states crafted what some might call "legal lynching" techniques.[31] For one thing, they retained the broad

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[24] *Id.* at 247–50.

[25] *Id.*; *see also The Abolitionist Movement*, *supra* note 22.

[26] *See* Steiker & Steiker, *supra* note 15, 250–51; *see also* Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95, 120 (2018) ("And, in fact, the legislative history for the Fourteenth Amendment reveals that the framers specifically intended for it to prohibit the unequal enforcement of the states' criminal laws based on racial distinctions.").

[27] *See History of Law: The Fourteenth Amendment*, TUL. U. L. SCH. (July 9, 2017), https://online.law.tulane.edu/articles/history-of-law-the-fourteenth-amendment [https://perma.cc/98DG-Z33P].

[28] *Id.*

[29] *See* Steiker & Steiker, *supra* note 15, 250–51.

[30] *Id.*

[31] *Id.* at 251.

death penalty statutes that characterized the antebellum era and deployed them mainly against Black people. Famed criminologist Marvin Wolfgang concluded that Black men in the former Confederate and bordering states represented a whopping 89 percent of all people executed for rape between 1930 and 1974.[32] For another, southern "reformers" adopted a curious strategy to deter lynching. They streamlined the capital trial and sentencing process to mollify the white masses.[33] Faster trials and earlier execution dates meant fewer whites clamoring for vigilante justice—and fewer safeguards for Black defendants.

The one-two punch of (1) targeting Black suspects with the death penalty and (2) using truncated procedures to implement it not only offended principles of fairness, but also produced grave injustices. Professor Michael Radelet's work reveals that, in the past two decades, state officials have posthumously pardoned at least six people who were executed in the first half of the twentieth century.[34] Five of the six pardons involved Black defendants wrongfully convicted of murdering white people in Georgia, Maryland, and South Carolina.[35]

One of those pardoned—George Stinney—was only fourteen-years-old at the time of his execution.[36] In 1944, two white girls, ages eight and eleven, were beaten over the head with a railroad spike and left for dead in a ditch. The police came for Stinney in the small, segregated town of Alcolu, South Carolina where his family lived. They maintained that Stinney and his little sister were the last people to see the victims alive. Once Stinney was in custody, they sent him to a small interrogation room where they grilled him without a lawyer or family members present until he purportedly "confessed" to the crime. The alleged motive? That Stinney wanted to have sex with the eleven year-old.[37]

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[32] *See* Burnham, *supra* note 20, at 291; *see also* Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 123 n.23 (May 1973). In 1977, the Supreme Court outlawed the death penalty for rape crimes not on equal protection grounds, but as a violation of the Constitution's prohibition against cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977).

[33] *See* Steiker & Steiker, *supra* note 15, at 251–53.

[34] Michael L. Radelet, *How DNA Has Changed Contemporary Death Penalty Debates*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 138, 143–44 (Daniel S. Medwed, ed. 2017).

[35] *Id.*

[36] Lindsey Bever, *It Took 10 Minutes to Convict 14 Year-Old George Stinney Jr. It Took 70 Years after His Execution to Exonerate Him*, WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution/ [https://perma.cc/6M3T-SDYB].

[37] *Id.*

The authorities rushed to court. After a two-hour trial—and ten minutes of jury deliberation—Stinney was convicted and sentenced to die by electrocution. To call the evidence against Stinney flimsy would be charitable. On the witness stand, the police recounted Stinney's confession, but there was no written record of it at all. His lawyer waged a paltry defense, putting on few witnesses and not even bothering to file an appeal. In June 1944—a mere three months after Stinney was first apprehended—South Carolina killed him.[38] Stinney's youth, and the weakness of the evidence against him, mobilized many people to question the legitimacy of his execution in the ensuing decades, including my colleague Margaret Burnham and her students with the Civil Rights and Restorative Justice Project at Northeastern University who played a role in exposing the injustice in 2014.[39] To this day, he remains the youngest person put to death in the United States in the modern era.[40]

Widespread racial inequities and singular tragedies like the Stinney case provided a backdrop for progressive lawyers to take aim at capital punishment in the Deep South. In practice, a full-fledged frontal attack on the death penalty (and by extension, on southern customs and mores) carried many political risks. So, savvy lawyers opted for a creative approach.[41] The NAACP Legal Defense Fund devised a litigation strategy that focused on the capital procedures in vogue rather than the substantive injustices underlying the whole death penalty apparatus. Scholars have long heralded this tactic as a masterstroke. It let judges address flaws in capital punishment without making the debate entirely about race at a time when the white community was not fully aware of, much less amenable to, arguments of that nature. And it avoided any direct assault on the intentions of southern leaders.[42]

This strategy proved successful in the short run. The Supreme Court held all existing death penalty regimes unconstitutional based on procedural concerns in the 1972 case of *Furman v. Georgia*.[43] The Court reasoned that capital punishment merits more rigorous procedures than run-of-the-mill cases, and that the "discretionary" nature of death penalty statutes makes them "pregnant with discrimination, and

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[38] *Id.*

[39] *See* Lauren Barbato, *The Youngest American Executed Wasn't Guilty*, BUSTLE (Dec. 17, 2014), https://www.bustle.com/articles/54488-the-youngest-person-executed-in-america-george-stinney-jr-almost-certainly-wasnt-guilty [https://perma.cc/LJ62-G9CQ].

[40] *See* Radelet, *supra* note 34, at 143.

[41] For an interesting and insightful discussion of this strategy, see Steiker & Steiker, *supra* note 15, at 253–64.

[42] *Id.*

[43] Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

discrimination is an ingredient not compatible with the idea of equal protection of the laws."[44]

The impetus behind the Court's move in the 1970s was the notion that death is "different."[45] *Furman* was a slim victory for death penalty abolitionists, however, with only five of the nine Justices voting in favor of the result. While those five Justices found some common ground in the holding, they offered an array of underlying reasons for reaching it. Each of the five wrote a separate opinion to explain their stance. What went largely unsaid by many Justices was that those "arbitrary and capricious" results invariably applied to Black people.[46]

After *Furman*, states went about modifying their death penalty procedures to convince the Supreme Court that the risk of "arbitrary and capricious" outcomes was no longer substantial. These modifications took several forms.[47] First, prosecutors could only make a murder case a capital one if certain legislatively-prescribed aggravating factors existed, say, the killing of multiple victims or a police officer. Generally speaking, prosecutors only seek the death penalty in a smattering of eligible cases (approximately 1 percent in recent years).[48] Circumscribing prosecutorial discretion through legislation, then, was a major concession and a potential harbinger of race-neutral charging decisions. Second, states developed bifurcated proceedings in which jurors initially evaluated the defendant's guilt-or-innocence (known as the "guilt phase"). If convicted, the defendant had a separate trial about the appropriate sentence (the "punishment phase") where defendants were allowed to present mitigating evidence and jurors could vote for death only if they found the presence of those aggravating factors. Last, but not least, defendants were afforded mandatory appellate review of death sentences.[49]

In 1976—a mere four years after *Furman*—the Supreme Court agreed that this "guided discretion" approach passed constitutional muster, upholding Georgia's revamped capital punishment system in *Gregg v. Georgia*.[50] The Court found that "the

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44 *Id.* at 256–57.

45 *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting that a sentence of death is "qualitatively different from a sentence of imprisonment, however long").

46 Evan J. Mandery, *It's Been 40 Years Since the Supreme Court Tried to Fix the Death Penalty—Here's How It Failed,* MARSHALL PROJECT (Mar. 30, 2016), https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed [https://perma.cc/EKC5-JLR8].

47 *Id.*

48 *Race and the Death Penalty*, ACLU, https://www.aclu.org/other/race-and-death-penalty [https://perma.cc/L2JK-RBXV].

49 For a discussion of *Furman*'s features, see Mandery, *supra* note 46.

50 Gregg v. Georgia, 428 U.S. 153, 207 (1976).

Georgia legislature has plainly made an effort to guide the jury in the exercise of its discretion," and that "it gave the Georgia Supreme Court the power and the obligation to perform . . . the task of deciding whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion."[51] The Justices went on to proclaim that if Georgia's highest court "properly performs the task assigned to it," then "death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside."[52] The Supreme Court appears to have put too much faith in the Georgia judiciary's ability, or willingness, to "properly perform the task" because, shortly after the Justices renewed their blessing of capital punishment, the race-of-victim effect took center stage in that state.[53]

II. CONTEMPORARY CAPITAL PROCEDURES AND THE RACE-OF-VICTIM EFFECT

The foregoing historical interlude shows how America's death penalty legacy is characterized by a regional divide that emanates from slavery and perpetuates an erratic approach that lingers to this day. In the contemporary United States, a vibrant abolitionist movement thrives next to a death penalty machine that boasts one of the top execution rates in the world.[54] This contradiction masks a crucial takeaway from the recent data: The year of the American bicentennial did not mark a sea change in how Black people experience the death penalty. Regardless of its promise, the "guided discretion" model has simply failed to protect against racial bias at all stages of the process. To add insult to injury, that racial bias manifests itself most boldly in a stunning lack of regard for Black victims.

Georgia's capital punishment regime exemplified this problem. Sanctioned by the Supreme Court in *Gregg*, prosecutors in Georgia immediately began to wield the death penalty in a racialized manner. Law professor David Baldus and two colleagues took a deep empirical dive into capital charging decisions in Georgia throughout the 1970s.[55] They found that Georgia prosecutors pursued the death penalty for 70 percent of Black

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[51] *Id.* at 222–23.

[52] *Id.* at 224.

[53] *See infra* notes 55–56 and accompanying text.

[54] *See* Steiker & Steiker, *supra* note 15, at 249–50.

[55] This study consisted of a detailed empirical analysis of nearly 2,5000 Georgia homicide cases in the 1970s, and the Supreme Court relied on it in McCleskey v. Kemp, 481 U.S. 279, 286–88 (1987) (holding that, despite evidence of racial bias in the application of the death penalty as demonstrated by the Baldus study, the Georgia capital punishment system was constitutional).

defendants whose victims were white, yet only for 15 percent of Black defendants with Black victims.[56] That is not all. Prosecutors drew upon an array of courtroom maneuvers to magnify the chance that Black capital defendants, once charged with killing a white person, were convicted. One county District Attorney in Georgia, Joseph Briley, tried thirty-three death penalty cases from the mid-70s to the mid-90s.[57] In cases involving a Black defendant and a white victim, Briley manipulated the jury selection process to disadvantage the defense. In the selection process, litigants may try to remove prospective jurors "for cause," *i.e.,* if they have a conflict of interest, or through drawing on a set number of "peremptory challenges" to strike jurors for no articulable reason.[58] Briley exercised *96 out of 103* possible challenges to strike prospective Black jurors from being empaneled.[59]

In 2019, the Supreme Court addressed the racially discriminatory use of peremptory challenges in the case of Curtis Flowers, a Black man charged with the death penalty for murdering four people in a Mississippi furniture store. Over the course of six trials, the state sought to dismiss forty-one of forty-two prospective African-American jurors.[60] Justice Kavanaugh's majority opinion built upon a prominent 1986 case, *Batson v. Kentucky*,[61] in decrying the racially discriminatory use of peremptory challenges, and found it notable that prosecutors in *Flowers* had spent far more time questioning potential Black jurors than white ones.[62]

Studies across the nation reveal charging patterns comparable to Georgia's, including in jurisdictions north of the Mason-Dixon line. A 2007 report on capital punishment in Connecticut found that defendants were far more likely to face the death penalty in cases where the victim was white rather than a person of color.[63] An analysis of death penalty cases in New Mexico from 1979 to 2007 reached a similar conclusion. It determined that, even though non-Hispanic whites only represented 30 percent of all homicide victims, they comprised 50 percent of all the victims

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[56] *Id.*

[57] *See Race and the Death Penalty*, *supra* note 48.

[58] For information about the issues related to peremptory challenges, see JOSHUA DRESSLER ET AL., CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 1225–52 (7th ed. 2020).

[59] *Id.*

[60] Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

[61] Batson v. Kentucky, 476 U.S. 79 (1986) (holding that litigants may not deploy peremptory challenges in a way that reflects a pattern of racial discrimination).

[62] *See* DRESSLER ET AL., *supra* note 58, at 1245.

[63] *Death Penalty and Race*, AMNESTY INT'L (May 18, 2017), https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-and-race/ [https://perma.cc/6WVE-GVYM].

in homicides charged as capital offenses.[64] Incidentally, Connecticut (2012) and New Mexico (2009) have since repealed the death penalty.[65] Abolition efforts have not made much headway in the former Confederate states, aside from Virginia, which jettisoned capital punishment in 2021.[66]

The race-of-victim effect also rears its ugly head after the initial decision to charge someone with a capital offense and dramatically influences sentencing outcomes. The Baldus study, adjusting for a range of variables, found that in Georgia "defendants whose victims were white, on average, faced odds of receiving a death sentence that were 4.3 times higher than similarly situated defendants whose victims were [B]lack."[67] Another study analyzed all homicide cases in North Carolina from 1993 to 1997. It determined that the odds of getting a death sentence were three and a half times greater if the murder victim was white as opposed to Black.[68] A subsequent study of North Carolina capital cases from 1990 to 2009 concluded that "[d]efendants who killed at least one white victim faced more than twice the odds of receiving a death sentence than those defendants who killed no white victims."[69] Consider Kentucky as well: Twenty-eight people resided on Kentucky's death row in 2005. Not one of them was there for killing a Black person, even though more than a thousand Black people had been murdered in the state since 1977.[70]

The race of the victim even figures into whether defendants sentenced to death are eventually *executed*. Not all people on death row wind up in the execution chamber—a high percentage of capital sentences are overturned on appeal and lead to terms of life in prison. Among those who are executed, however, the characteristics of the murder victim in the underlying incident play a pivotal role. More than 75 percent of the victims in all capital cases that resulted in execution from 1976 to 2019 were white.[71] Findings from a separate study

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[64] Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 285 (2008).

[65] For a current list of states with the death penalty, see *State by State*, *supra* note 11.

[66] Amanda Golden & Geoff Bennett, *Virginia Becomes 1st Southern State to Abolish the Death Penalty As Governor Signs Law,* NBC NEWS (Mar. 24, 2021), https://www.nbcnews.com/politics/politics-news/virginia-becomes-first-southern-state-abolish-death-penalty-governor-signs-n1261974 [https://perma.cc/M64L-95BK].

[67] McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

[68] *See Race and the Death Penalty*, *supra* note 48.

[69] Barbara O'Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1999, 2043 (2016).

[70] DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW 194 (2005).

[71] *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim [https://perma.cc/JYX8-9H6P].

reinforced the power of the race-of-victim effect in capital case outcomes. Between 1976 and 2013: (1) seventeen white people were executed for killing a Black person while 230 Black people were executed for killing a white person; (2) Black people were put to death more than twice as often for killing a white person (230 executions) than for killing a Black person (108 executions); (3) although 85 percent of Black people found guilty of homicide were accused of killing Black victims, fewer than 40 percent of the executions of Black people were for the homicide of Black victims; and (4) "white-on-white" homicides were treated proportionately, with a 1.02 ratio of homicide convictions that produced executions versus those that did not.[72]

Most notably, Professors Scott Phillips and Justin Marceau recently analyzed the outcomes of the cases cited in another study by David Baldus, his seminal 1990 analysis of capital charging and sentencing.[73] Phillips and Marceau reached a startling conclusion: that "2.26% (22/972) of the defendants who were convicted of killing a white victim were ultimately executed, compared to just .13% (2/1503) of the defendants convicted of killing a Black victim."[74] As a result, "the overall execution rate is a staggering *seventeen times greater* for defendants convicted of killing a white victim (emphasis added)."[75]

III. THE RACE-OF-DEFENDANT EFFECT

Now that I have explored the impact of the victim's race on death penalty results, it's time to revisit a question raised at the outset of this Essay: Does the race of the *defendant* affect capital case outcomes? The answer is yes, the defendant's race seeps into charging and sentencing decisions in meaningful and disturbing ways. While Black assailants who kill Black victims are charged with capital offenses at a lower rate than white pertrators who kill other whites, Black people who kill white victims—a rare event—are the most likely offenders to receive the death penalty.

A number of studies illustrate this phenomenon. In his analysis of Georgia, Baldus fused the race of the victim with the race of the defendant and established that the death penalty was

[72] Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013*, 3 POL. GROUPS & IDENTITIES 209–21 (2015).

[73] *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

[74] Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 587 (2020).

[75] *Id.*

imposed at the following rates: cases with a Black defendant-white victim (22 percent); white defendant-white victim (8 percent); white defendant-Black victim (3 percent); and Black defendant-Black victim (1 percent).[76] An empirical assessment of capital punishment in Virginia found that death sentences materialized in 3.6 per 1,000 Black defendant-Black victim cases, 18.3 per 1,000 white defendant-white victim cases and an astonishing *64.5 per 1,000 Black defendant-white victim cases*.[77] Despite a small sample size that made it hard to draw firm conclusions, an examination of death penalty cases in Nebraska from 1973 to 1999 buttressed these conclusions. It deduced that cases with minority defendants and white victims were 16 percent more likely to be charged as capital crimes than those with other defendant-victim racial combinations.[78]

The racial makeup of the jury affects not only whether a Black defendant is convicted of the underlying crime in the guilt phase, but also whether the jury votes for the death penalty at sentencing. Research indicates that white male jurors are more likely to give Black defendants a death sentence than jurors of color and white women.[79] Those studies also show that white male jurors may occasionally deploy emotion-laden arguments to sway other jurors toward their side.[80]

The upshot is that racial biases against Black defendants amplify the risk of capital punishment. Even so, studies find that the strongest predictor of a death penalty charge and sentence remains the presence of a white murder victim. As noted earlier, given the race-of-victim effect and the fact that most murders involve perpetrators and victims of the same race, white people who kill are more likely to be sentenced to death than Black defendants.[81] This is known in the academic literature as a "reverse racial disparity." This pattern surfaces in data from the 2000s showing that although Black people allegedly commit more than half of the murders in this country, they make up 40 percent of

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[76] McCleskey v. Kemp, 481 U.S. 279, 286 (1987).

[77] *See* Blume et al., *supra* note 13, at 199.

[78] David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1976–1999)*, 81 NEB. L. REV. 486, 585 (2002). Please note that the authors used the term "minority" in this piece, which is I why I used the term in referring to their findings.

[79] *See* Craig Haney & Mona Lynch, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 LAW & SOC. INQUIRY 377, 382 (2015); Craig Haney & Mona Lynch, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the 'Empathic Divide,'* 45 LAW & SOC'Y REV. 69, 69 (2011); Allison Nobles, *Racial Bias and the Death Penalty*, SOC'Y PAGES (Sept. 12, 2019), https://thesocietypages.org/trot/2019/09/12/racial-bias-and-the-death-penalty/ [https://perma.cc/M2LZ-7YA7].

[80] *See* sources cited *supra* note 79.

[81] *See supra* notes 12–14 and accompanying text.

death row.[82] In the words of one of team of scholars, "the excess of the African-American percentage of murderers over the African-American percentage of death row is greatest where the conventional wisdom would least expect it—in the South."[83]

CONCLUSION

The documented effect of a murder victim's race on capital charging, sentencing, and execution rates defies the popular belief that the race of the defendant largely dictates decision-making in this area. A corollary of the race-of-victim effect—that white perpetrators receive the death penalty at a higher rate than Black perpetrators—also runs counter to many common assumptions.

At the same time, the devaluation of Black lives that lies at the core of the race-of-victim data is consistent with larger criminological (and societal) trends. Police who kill Black people are seldom punished with criminal sanctions at all, let alone subjected to the death penalty. Exhibit A: New York City police officer Daniel Pantaleo, who evaded both state and federal criminal charges after using a chokehold to kill Eric Garner in Staten Island in 2014.[84] One reason why Pantaleo never faced the music in criminal court is that prosecutors sang an unusual tune in pursuing an indictment before the grand jury.[85] In most cases, prosecutors are aggressive in seeking to indict a suspect, and only introduce the evidence that supports guilt. In contrast, Staten Island prosecutors apparently put forth a measured, even-handed presentation of the evidence before Pantaleo's grand jury, which failed to yield an indictment.[86]

The indifference that the criminal justice system shows to Black people is mirrored in other aspects of American life, including how the medical community treats its patients. Look at the public health data. The infant mortality rate for Black children is 2.2 times that of whites.[87] Also, the Center for Disease Control and Prevention reports that Black adults between the ages of

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[82] *See* Blume et al., *supra* note 13, at 166.

[83] *Id.*

[84] Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for NYPD Officer*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/nyregion/eric-garner-daniel-pantaleo.html [https://perma.cc/W89B-VM2L].

[85] *See, e.g.*, Daniel S. Medwed, *A Sobering Truth: A Look at Differential Treatment after Ferguson and Staten Island,* COGNOSCENTI (WBUR BLOG) (Jan. 6, 2015), https://www.wbur.org/cognoscenti/2015/01/06/michael-brown-eric-garner-daniel-s-medwed [https://perma.cc/7Q87-CW5X].

[86] *Id.*

[87] *Infant Mortality and African Americans*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF MINORITY HEALTH (July 8, 2021), https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23 [https://perma.cc/YYS4-3XCW].

eighteen and forty-nine are twice as likely as whites to die from heart disease, and middle-aged Black people (ages 35–64) are 50 percent more likely to suffer from high blood pressure than whites.[88] These are but a few examples of how society tolerates an unconscionable level of risk when it comes to the lives of Black people. The race-of-victim effect in capital punishment goes hand in hand with this trend.

Could we be on the brink of changing this macro-level pattern of devaluing the lives of Black people, a tendency reflected at a micro-level in the data surrounding the race-of-victim effect in death penalty cases? The killing of George Floyd in Minneapolis in May 2020, preceded by the homicides of Ahmaud Arbery in Georgia and Breonna Taylor in Louisville earlier that year, propelled the Black Lives Matter movement forward, even as the COVID-19 pandemic raged across the nation. Unprecedented calls to defund and even abolish the police gained traction. Whether this movement builds momentum or fades remains to be seen. Perhaps the call for racial justice will stand the test of time and produce genuine reform even as institutional forces push back. A federal judge in Seattle wrote in a 2020 opinion granting a temporary restraining order barring the police from using chemical and other less-lethal weapons against protestors:

> The city and nation are at a crisis level over the death of George Floyd. One would be missing the point to conclude that the protests that are the subject of this motion are only about George Floyd. His death just happens to be the current tragic flashpoint in the generational claims of racism and police brutality in America. The global strength of the Black lives movement and the obvious commitment to change are a clear indication—not just to this Court, but globally—that these protests will not be short-lived, and the protestors have made it clear that their determination will be relentless until change . . . is made.[89]

It's not farfetched to say that the longstanding, systemic devaluation of Black lives in the United States is a direct descendant of slavery. President John Quincy Adams, no paragon of virtue when it came to matters of race, once called slavery "the great and foul stain upon the North American union."[90] Two

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[88] *African American Health*, CTRS. DISEASE CONTROL & PREVENTION (July 3, 2017), https://www.cdc.gov/vitalsigns/aahealth/index.html#anchor_1490279874 [https://perma.cc/P6XR-VSHH].

[89] Black Lives Matter Seattle-King County v. City of Seattle, Seattle Police Dep't, 466 F. Supp. 3d 1206, 1210 (W.D. Wa. 2020).

[90] THE DIARY OF JOHN QUINCY ADAMS, 1794–1845, 225–32 (Allan Nevins ed., 1951).

hundred years later, this stain still tarnishes how we prize the lives of homicide victims in the American death penalty process.

If we, as a society, are going to allow the death penalty, then we must strive to eliminate the risk of racial bias by curtailing prosecutorial discretion and monitoring charging decisions to safeguard against racially-disproportionate results. If we are unable to do that, then that is reason enough to abolish the ultimate punishment.

Black lives—and deaths—matter.