

Response: Race-of-Victim Disparities and the “Level Up” Problem

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In 2009, as a new professor at the University of Iowa School of Law, I had the profound privilege of overlapping with the inimitable David Baldus in his last year of teaching. Professor Baldus was and is celebrated for the comprehensive “groundbreaking” Baldus Study (actually two studies) at the center of *McCleskey v. Kemp*,¹ the infamous case in which the Supreme Court upheld the death penalty in the face of evidence of its overwhelming disparate racial impact. The Baldus study demonstrated that Georgia’s capital punishment system was infested with racial bias, namely, that the white race of the homicide victim correlated significantly with the defendant being sentenced to death.² Baldus and coauthors opined, “our data strongly suggests that Georgia is operating a dual system, based upon the race of the victim, for processing homicide cases.”³

Professor Baldus showed this young criminal law professor and stranger such warmth. He must have discussed *McCleskey v. Kemp* innumerable times and found the whole matter banal, but he was candid and giving in our discussion of the case, as in all our too few interactions. One day, I mentioned in passing that I was teaching *McCleskey* that week and it felt surreal with him just two doors away. He replied, and I am paraphrasing here, “I think it was a big mistake that we brought *McCleskey*’s case to the Supreme Court.”

“Why?” I thought to myself. Was it because the study was too modest or incomplete? Surely not, given that Professor Baldus and his colleagues had amassed data from over 2,000 cases with analyses of over 400 individual factors contributing to capital decisions.⁴ Indeed, the *McCleskey* litigation record included testimony from a celebrated statistician that the Baldus study was “far and away the most complete and thorough analysis of sentencing” ever conducted.⁵ Was it because the new Rehnquist Court had shown itself to be hostile to empirical evidence? The Court was not necessa-

¹ 481 U.S. 279 (1987).

² See David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707–09 (1983); see also DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI JR., *The Influence of Racial and Suspect Factors in the Postconviction Phases of Georgia’s Capital-Sentencing System*, in EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 140–97 (1990).

³ Baldus et al., *supra* note 2, at 709–10.

⁴ See *id.*; see also Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905, 1911–12 (2012).

⁵ *McCleskey v. Kemp*, 753 F.2d 877, 907 (11th Cir. 1985) (Johnson, J., dissenting) (quoting expert testimony from Dr. Richard Berk).

rily more hostile to scientific data than in times past.⁶ I settled on the explanation that the Supreme Court of 1987 was just too, for lack of a better phrase, tolerant of racism to be receptive to a disparate impact challenge to capital punishment.⁷ I had taught *McCleskey* for several years and had adopted the conventional reading that the Court bent over backward to sustain the death penalty because they feared expanding Equal Protection doctrine—they feared “too much justice.”⁸

Thus, what Professor Baldus said next took me by surprise. “He killed a cop,” Baldus explained, “we were never going to win.” Could it be true that the most momentous race and criminal law opinion of all time was not about racial discrimination doctrine but boiled down to the Court’s instinct that cop-killing is a worst-of-the-worst crime that merits the ultimate penalty? Years later, I took a deep dive into this question while writing an essay for a thirtieth anniversary symposium on *McCleskey*.⁹ Professor Baldus, unsurprisingly, was right. Justice Lewis Powell, the majority opinion author, was preoccupied with the victim’s status as an officer, and the facts of the killing served to bolster his belief that capital punishment was a morally required and socially beneficial remedy in individual heinous cases, regardless of larger patterns of enforcement. In a memo to his clerks, he remarked, “The opponents of capital punishment hardly could have picked a weaker case for this argument. Petitioner planned the armed robbery, was the trigger man, he shot an officer twice, and had a substantial record of other serious felonies.”¹⁰ The upshot for Powell: “[I]t is not easy to believe that general statistics only could be relevant to whether McCleskey was guilty of a capital offense for which death is a proper punishment under Georgia law.”¹¹

In my essay, *Equal Protection Under the Carceral State*, I analyzed the opinions in the *McCleskey* litigation, Justice Powell’s other equal protection holdings, and the archival record.¹² I concluded that Powell’s primary “fear of too much justice” was not the fear of expanding Equal Protection doctrine to include discriminatory impact but, as Justice Stevens pointed out in dis-

⁶ See Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1346–48 (2018) [hereinafter Gruber, *Equal Protection*].

⁷ See Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 443 (1988); Jeffrey Fagan & Mukul Bakshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 3 (2007); Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of “Equal” Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J. L. & PUB. POL’Y 85, 140 (2002).

⁸ *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

⁹ See Gruber, *Equal Protection*, *supra* note 6.

¹⁰ Memorandum from Justice Lewis F. Powell to Leslie & Ronald 3 (Nov. 1, 1986) (on file with Washington & Lee University School of Law Library), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles>, archived at <https://perma.cc/8G5R-FK56>.

¹¹ Memorandum from Justice Powell to Leslie 2–3 (Sept. 16, 1986) (on file with Washington & Lee University School of Law Library), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles>, archived at <https://perma.cc/8G5R-FK56>.

¹² Gruber, *Equal Protection*, *supra* note 6.

sent, the “fear that acceptance of McCleskey’s claim would sound the death knell for capital punishment in Georgia.”¹³ Indeed, Powell regarded “petitioner’s challenge is no less than to our entire criminal justice system.”¹⁴ The majority opinion accordingly emphasized that “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties.”¹⁵

In the past, Justice Powell had not shown a particular aversion to discriminatory impact claims. He had recently authored *Batson v. Kentucky*,¹⁶ the most important antidiscrimination case to date. *Batson* was, at that time, quite singular in its forthright embrace of circumstantial evidence to prove discriminatory intent.¹⁷ Taking up the question of discriminatory petit jury strikes, Powell held that defendants could establish a prima facie case of jury selection discrimination simply by pointing to a prosecutor’s “pattern” of excluding African Americans from the jury.¹⁸ In *McCleskey*, Justice Powell did not withdraw support for statistical pattern evidence in jury selection cases—or in housing, voting, and employment discrimination cases.¹⁹ Instead, he took pains to distinguish *McCleskey* based on the “unique nature of the decisions at issue in this case.”²⁰ Powell believed that the criminal justice system could weather challenges to jury selection, but McCleskey’s discrimination claim threatened to tear it all down. Justice Blackmun rebuked Powell for his “death is different” argument that “capital punishment [merits] a lesser standard of scrutiny under the Equal Protection Clause.”²¹

Justice Powell feared that abolition was the inevitable consequence of the disparity argument. Indeed, the link between racial disparity data and abolition is often seen as inherent. Professor Randall Kennedy has explained that abolitionist sentiments have long “determined the response of those outraged by racial patterns in capital sentencing.”²² However, as Kennedy observed, disparity can be addressed either by the level-down measure of abolition or by a “level-up solution . . . to increase the level of capital sen-

¹³ *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

¹⁴ Memorandum from Justice Powell to Leslie & Ronald G. (Nov. 3, 1986) (on file with Washington & Lee University School of Law Library), <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1168&context=casefiles>, archived at <https://perma.cc/8G5R-FK56>.

¹⁵ *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987).

¹⁶ 476 U.S. 79 (1986).

¹⁷ See James J. Tomkovicz, *Twenty-Five Years of Batson: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 IOWA L. REV. 1393, 1403 (2012) (calling *Batson*’s lowering of the threshold for proof of petit jury selection discrimination a “dramatic, revolutionary step”).

¹⁸ *Batson*, 476 U.S. at 96–97.

¹⁹ *McCleskey*, 481 U.S. at 293–94.

²⁰ *Id.* at 297 (emphasis added).

²¹ *Id.* at 347–48 (Blackmun, J., dissenting).

²² Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1393 (1988).

tencing for [B]lack-victim murders.”²³ Put another way, ensuring that capital defendants never receive the death penalty is no better at eliminating disparity than ensuring that they always do. In fact, the framing of the racial argument often points to the level-up solution. Proponents argue that the racial disparity deprives Black victims of the “sense of closure and justice that the death penalty affords”²⁴ or that the death penalty has been unfairly reserved “for whites only,”²⁵ suggesting that the answer is giving more Black victims’ families the closure of a capital sentence. Nevertheless, the Supreme Court had already ruled mandatory execution unconstitutional, taking a primary level-up remedy off the table and leaving level-down abolition as the most plausible outcome of McCleskey’s impact claim.²⁶ Powell would have been more sanguine about the Equal Protection challenge had he seen a way to eliminate racial disparity while preserving the death penalty.

Reading *McCleskey* as a case about preserving the punishment apparatus rather than a case about limiting Equal Protection or eschewing science lays the groundwork for a friendly caution to those studying sentencing disparities: “[V]ictim-based disparity claims, that is, arguments and evidence that the criminal system treats those who offend against minority victims with undue leniency, often converge with larger interests in bolstering the American penal state.”²⁷ Although a level-up solution was not viable in *McCleskey*, leveling up is possible in other areas of criminal liability and sentencing. In *Graham v. Collins*²⁸ and similar capital cases, for example, conservative Justices have been happy to trot out racial disparity arguments to limit mitigating evidence. Right-wing lawmakers have justified draconian three-strikes and mandatory-minimum laws on the ground that they prevent sentencing disparities.²⁹ In the 1980s, conservatives and liberals came together to decry disparities in criminal sentencing,³⁰ and receptive lawmakers quickly settled on mandatory federal sentencing guidelines.³¹ Not surpris-

²³ *Id.* at 1436.

²⁴ Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 149 (1998) (internal quotations omitted); see also Kennedy, *supra* note 22.

²⁵ *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

²⁶ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

²⁷ Gruber, *Equal Protection*, *supra* note 6, at 1365.

²⁸ 506 U.S. 461, 478–89 (1993) (Thomas, J., concurring).

²⁹ See, e.g., Letter from Steven J. Ipsen, President, Ass’n of Deputy Dist. Attorneys, to Tricia Knight, The Repeat Criminal Offender/Three Strikes Fair Sentencing Act of 2006, at 1 (Jan. 20, 2006), archived at <https://perma.cc/YF29-QYND> (providing “a complete, proportionate or consistent statutory structure for appropriately and fairly sentencing repeat offenders” in California).

³⁰ See Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 573 (2005); see also MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 164 (1995).

³¹ See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 (1988) (noting the “general consensus” on mandatory federal sentencing guidelines); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 31–32 (1988).

ingly, the regime was a “one-way upward ratchet” of harsh sentences, exposing lawmakers’ instinctive aversion to leveling down.³²

It is upon this backdrop that I now turn to the excellent study by Professors Scott Phillips and Justin Marceau published in their article, *Whom the State Kills*, the centerpiece of this symposium.³³ Like the Baldus Study, the Phillips-Marceau study is thorough, meticulous, and groundbreaking. It is the most comprehensive study to date following the capital process from charge to execution. It traces the Baldus Study’s collection of homicide cases past condemnation to commutation or execution. Its findings are quite remarkable. Far from being equalizers, post-conviction judicial and administrative processes, though they appeared successful at producing many commutations, exacerbated the victim-based disparities found in the distribution of death sentences. To put it plainly, those convicted of killing white victims were more likely to be sentenced to death *and* to be put to death.³⁴ The study is an enormous achievement in itself, and it adds significantly to the body of information on race and the death penalty.

The authors express optimism that the study will combine with other evidence and arguments to finally “sound the death knell for capital punishment.”³⁵ As Professor Kennedy might have predicted, pre-existing abolitionist sentiments appear to have determined the authors’ hopes for how the data will flow in the world. Phillips and Marceau ruminate that today’s courts and legislatures are more receptive to statistical evidence and to racial disparity claims than legal bodies in the past, and today’s public is less pro-capital punishment.³⁶ The authors point to Washington state, where researchers took up an implicit challenge from the state supreme court in 2012 to examine racial bias in the capital punishment system. After the researchers produced a comprehensive study demonstrating sentencing disparities, the Washington Supreme Court struck down capital punishment in 2018.³⁷

Professors Phillips and Marceau nevertheless recognize that it will be a challenge to convince courts to invalidate a sentencing scheme because of post-sentencing disparities.³⁸ However, they are optimistic that such stark proof of disparate impact will lead states to “simply reject *McCleskey* as a matter of state law.”³⁹ Alternatively, the authors anticipate that the evidence could lead to a “tinkering with the appellate machinery” that ultimately portends a leveling down of death.⁴⁰ Specifically, they foresee a *Batson*-like

³² Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 *STAN. L. REV.* 235, 246 (2005).

³³ Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 *HARV. C.R.C.L. L. REV.* 585 (2020).

³⁴ *Id.* at 605–06.

³⁵ *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting).

³⁶ Phillips & Marceau, *supra* note 33, at 625–28.

³⁷ *Id.* at 628–29.

³⁸ *Id.* at 631–33.

³⁹ *Id.* at 636.

⁴⁰ *Id.*

process where a capital defendant whose number is up can use data to make a prima facie case of discrimination, which could ultimately culminate in commutation.⁴¹

Let me say here that I am opposed to capital punishment, which I see as a legacy of slavery, an unacceptable exercise of state authority, and an ineffective, inefficient, and socially costly way to address private violence. I thus find the Phillips-Marceau study compelling and admirable. Yet, as I ruminate on the authors' hopes, which I share, I cannot stop my creeping skepticism. The interest-convergence analysis outlined above, borrowed from Derrick Bell,⁴² predicts that political and legal bodies will tout the study as ground for abolition when they are *already* predisposed toward eliminating capital punishment. Of course, this is consequential, and I would be pleased to see the study utilized instrumentally for these ends. Nevertheless, it is likely the study will not budge the capital-punishment friendly bodies, among which I count the Supreme Court in its current and foreseeable iteration. These bodies will, as the authors fear, simply say that post-sentencing administrative and appellate procedures are irrelevant to the constitutionality of sentences.⁴³ Even the study's stark proof that the odds of execution are like "the odds of being struck by lightning" will likely fall on deaf ears.⁴⁴

My more paranoid concern is that the data will be utilized in nefarious ways to level up capital punishment. Recall that existing constitutional jurisprudence prevented Justice Powell from eliminating the racial disparity through leveling up (mandating death sentences) and he was unwilling to endorse an "affirmative action" program to selectively increase death sentences in Black-victim cases.⁴⁵ By contrast, many level-up responses are possible in the post-sentencing context. When Professors Phillips and Marceau discuss "tinkering with the machinery" of habeas appeals, prison regulations, and executive clemency, I recall with trepidation Professor Kennedy's insight that the death disparity can be addressed by executing fewer killers of white people or *more* killers of Black people.⁴⁶ Faced with a backlog of *Batson*-like complaints, Bureau of Prisons officials could adopt an execution "affirmative action" plan, the likes of which made the *McCleskey* justices so squeamish. When designating execution dates, applying the criteria for quick or slow execution, and prioritizing prerogatives, the Bureau could take pains to ensure that for every white-killer execution, there is a Black-killer execution, much in the way college admissions officials try to

⁴¹ Phillips & Marceau, *supra* note 33, at 634–36.

⁴² See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

⁴³ Phillips & Marceau, *supra* note 33, at 632–33.

⁴⁴ *Id.* at 636 (citing *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring)).

⁴⁵ See Gruber, *Equal Protection*, *supra* note 6, at 1353–58.

⁴⁶ See Kennedy, *supra* note 22, at 1436.

comply with diversity mandates. Professor Kennedy, who introduced the idea of affirmative action in capital punishment, warned of its dangers. In addition to the potential that increasing executions in Black-victim cases “might actually lead to the execution of more [B]lack defendants,”⁴⁷ there is the danger “that defendants might be sentenced to death primarily to create ‘good’ statistics.”⁴⁸

But my paranoia goes deeper. At the post-sentencing stage, state actors have an array of general level-up reforms to decrease opportunities for leniency, ensure that more defendants are executed, and executed quicker, and thereby reduce disparities. Imagine what a conservative lawmaker bent on streamlining—even abolishing—the post-sentence appeals process could do with the talking point that the capital habeas process is “pregnant with discrimination.”⁴⁹ Today, many state and federal officials believe that the injustice of capital punishment for victims and society (and some say defendants) lay in the decades-long periods that condemned individuals remain on death row. They repeatedly argue for expediting or eliminating legal and prison administrative challenges to speedy execution.⁵⁰ These groups could highlight the study as proof that reforms to streamline appeals, in addition to producing justice for victims and society, also further racial equality.

In fact, it is reasonable to surmise that the more automatic and expedited the execution process, the less post-sentencing racial disparity there will be. Consider, for example, the Petrie and Coverdill study of capital punishment in Texas from 1974 to 2009, discussed in the Phillips-Marceau article.⁵¹ Like the Phillips-Marceau study, the Petrie-Coverdill study examined disparities in executions, not just death sentences. But unlike the Phillips-Marceau study, it found *no* racial disparity between those who received judicial relief and those who were executed.⁵² Now, as Phillips and Marceau point out, hundreds of the capital defendants counted in that study remained on death row at the time of its publication, such that future analysis might reveal disparities.⁵³ Nevertheless, Petrie and Coverdill linked the lack of disparity to structural aspects of Texas’s system. They asserted that the equal distribution of death was a product of Texas defining aggravating factors

⁴⁷ *Id.* at 1392.

⁴⁸ *Id.* at 1439.

⁴⁹ *Furman*, 408 U.S. at 257 (Douglas, J., concurring).

⁵⁰ *See, e.g., 2008 Republican Party Platform*, (Sept. 1, 2008), <https://www.presidency.ucsb.edu/documents/2008-republican-party-platform>, archived at <https://perma.cc/JWR9-6AA3> (“[F]ederal review of [capital] sentences should be streamlined to . . . prevent delaying tactics by defense attorneys.”); *see also* Keri Blakinger, ‘Express Lane to Death’: Texas Seeks Approval to Speed Up Death Penalty Appeals, Execute More Quickly, *HOUS. CHRON.* (Apr. 2, 2018), <https://www.chron.com/news/article/Express-lane-to-death-Texas-seeks-approval-12799384.php>, archived at <https://perma.cc/YB4F-NURQ>.

⁵¹ Phillips & Marceau, *supra* note 33, at 597 (citing Michelle A. Petrie & James E. Coverdill, *Who Lives and Dies on Death Row? Race, Ethnicity, and Post-Sentence Outcomes in Texas*, 57 *SOC. PROBS.* 630 (2010)).

⁵² *Id.*

⁵³ *Id.*

narrowly (ostensibly reducing the pool of capital defendants), limiting juror discretion (ostensibly making the death sentence more automatic for this pool), and “executing a larger proportion of condemned inmates than most states” (ostensibly making death more automatic for the pool).⁵⁴

Apart from narrowing aggravating factors, the other structural aspects of Texas’s system are level-up measures. One could thus imagine a capital-punishment proponent reacting to the Phillips-Marceau study by pointing to Texas as an exemplar of how to solve post-sentence disparity. Of course, any abolitionist would be horrified by Texas’s tinkering, even if such tinkering has had the effect of racially balancing executions. In 2009, the last year of the Petrie-Coverdill study, Texas killed twenty-four condemned individuals, just shy of the combined number of executions in all other states.⁵⁵ In 2018, Texas killed thirteen condemned individuals, more than the number of executions in all other states.⁵⁶ From 1982 to 2018, Texas put 558 of its citizens to death.⁵⁷ In 2018, Texas asked the Department of Justice for authorization to fast-track federal habeas appeals under a never-before used provision of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).⁵⁸ In short, the states that cling to capital punishment against the tides of modernity may be more than happy to remedy death disparities by executing more prisoners more quickly.

My warning about the unpredictable and possibly carceral effects of race-of-victim data is in no way meant to cast aspersions on the Phillips-Marceau study, for as I said above, it reads to this non-empiricist as a meticulous, pioneering, and highly significant work. Nor am I arguing that social scientists should avoid avenues of study out of concern that the research might be manipulated in furtherance of unpalatable philosophical positions or policies. Rather, I am cautioning researchers engaged in the crucial endeavor of studying race, crime, and punishment to be aware of the promises and the perils of data. One need not adopt what Duncan Kennedy calls a “paranoid structuralist” view that the American legal system is endemically shaped by hierarchies that will always find clever ways to reproduce themselves.⁵⁹ One need not believe that a significant number of those assessing Black-victim data will be like Donald Trump who capitalized on statistics of Black victimhood in Chicago (Barack Obama’s “hometown”) to criticize

⁵⁴ *Id.*

⁵⁵ TEXAS COALITION TO ABOLISH THE DEATH PENALTY, *Texas Death Penalty Developments in 2009: The Year in Review* 1, 1 (2009), <https://tcadp.org/wp-content/uploads/2010/06/2009annualreport.pdf>, archived at <https://perma.cc/6NFL-EGAG>.

⁵⁶ TEXAS COALITION TO ABOLISH THE DEATH PENALTY, *Texas Death Penalty Developments in 2018: The Year in Review* 1, 7 (2018), <https://tcadp.org/wp-content/uploads/2019/01/Texas-Death-Penalty-Developments-in-2018-final-print-version.pdf>, archived at <https://perma.cc/M6TH-DCV4>.

⁵⁷ *Id.*

⁵⁸ Blakinger, *supra* note 50. The DOJ decision regarding Texas’ request to opt-in to speed up the death penalty appeals process is still pending. See U.S. DEP’T OF JUST., <https://www.justice.gov/olp/pending-requests-final-decisions>, archived at <https://perma.cc/UEH4-VCF6>.

⁵⁹ Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1169–75 (2001).

liberal politics and publicize his tough-on-crime platform.⁶⁰ Nevertheless, racial justice advocates and incarceration critics ignore the dangers of such statistics at their peril. We need to understand the risk that our research and arguments will be used to carceral ends so that we may take measures to mitigate it.

⁶⁰ Philip Bump, *America's Big Issue is 'Black Africans' Killing Each Other, Sebastian Gorka Says*, WASH. POST (Oct. 24, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/10/24/americas-big-issue-is-black-africans-killing-each-other-sebastian-gorka-says/>, archived at <https://perma.cc/65V4-SDMN> (quoting Donald Trump (@realDonaldTrump)), TWITTER (Nov. 22, 2015, 3:05 PM), <https://twitter.com/realDonaldTrump/status/668520614697820160>, archived at <https://perma.cc/PV55-7QK8>).

