

# Response: Race as a Semi-Measurable Component of Social Status

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*Numerous studies have found strong correlations between racial attributes and death sentencing. While much of the strength of these correlations reflects overt racism, the correlations also reflect a more general rule that the death penalty is most likely to be imposed on defendants with lower status for crimes against those with higher status. Indeed, race can be conceptualized as one component of social status. The increasing difficulty of measuring defendants' and victims' races also presents challenges for future researchers. These challenges invite researchers to find new ways to study the basic question: Is the death penalty reserved for the worst of the worst?*

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## INTRODUCTION

It is an honor to comment on the thought-provoking paper by my fellow Coloradans, Scott Phillips and Justin Marceau,<sup>1</sup> and I thank the editors of the *Civil Rights-Civil Liberties Law Review* for providing a space to do so. I briefly discuss two issues related to the body of research on which Phillips and Marceau are building. First, I reflect on some of the broader issues that the statistical correlations between race and death sentencing are capturing. Second, I offer some observations about how research of this sort needs to evolve. We have come a long way since the early post-*Gregg* research on race and death sentencing,<sup>2</sup> but we need to continue to develop this research, as Phillips and Marceau are doing, if we are to deepen our understanding of contemporary disparities in death sentencing.

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<sup>1</sup> Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020).

<sup>2</sup> U.S. GOV'T ACCOUNTING OFFICE, GAO/GGD-90-57 B-236876, DEATH PENALTY SENTENCING RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990).

## I. RACE AS A COMPONENT OF SOCIAL STATUS

What do the correlations between race and death sentencing actually measure? In sociology, the term “social status” refers to the level of esteem or prestige associated with a particular position, occupation, or trait.<sup>3</sup> For example, there are numerous scales of occupational prestige that rank occupations from lower (e.g., parking attendant) to higher (e.g., physician).<sup>4</sup> Some statuses, such as height, gender, and race, are ascribed statuses, or statuses assigned at birth that are difficult or impossible to change. Others are achieved, such as occupational status, which is (primarily) earned by hard work (or lack thereof). Most statuses are mixed.<sup>5</sup> For example, professional football players unquestionably work hard, but it also helps to be born a male with agility and athleticism.

Everyone has several statuses. “Socioeconomic status” is a combination of some of these: income, education, and occupational prestige.<sup>6</sup> We bestow status on the basis of who you know (“my old friend Ringo Starr.”), how you earn your money (better if earned as a teacher than as a drug dealer), and how you spend it (certain cars are more prestigious than others). Athletes receive status “points” when they win the Super Bowl, and people lose “points” when a newspaper reports that they were arrested for drunk driving.

Race is one component of status, and the historical legacy of racism in the U.S. means that people of color are generally perceived, consciously or unconsciously, by a significant number of people as having a lower social status (prestige) than others.<sup>7</sup> Arguably, that is the essence of racial bias, reflected both in attitude (prejudice) and behavior (racism). Most social scientists see race not as biological or genetic, but as a “social construct.”<sup>8</sup> What counts is its social meaning. Social status is a combination of numerous factors, one of which is race/ethnicity.<sup>9</sup>

And when we study race and death sentencing, we need to remember that *race is only one component of status*. Overt racial bias in death sentenc-

<sup>3</sup> A DICTIONARY OF SOCIOLOGY 635 (John Scott & Gordon Marshall eds., 2005).

<sup>4</sup> Robert M. Hauser & John Robert Warren, *Socioeconomic Indexes for Occupations: A Review, Update, and Critique*, 27 SOC. METHODOLOGY 177, 177–84 (1997).

<sup>5</sup> Scott & Marshall, *supra* note 3, at 635–36 (discussing the difference between “achieved” status, which is a social position resulting from personal accomplishments, and “ascribed” status, which are social positions allocated at birth or by way of family background).

<sup>6</sup> *See id.* at 624.

<sup>7</sup> *See generally* *Ethnic Stratification: A Separate Topic?*, in ISSUES IN SOCIAL INEQUALITY 237 (Gerald W. Thielbar & Saul D. Feldman eds., 1972).

<sup>8</sup> Angela Onwuachi-Willig, *How Fluid is Race? Race and Racial Identity are Social Constructs*, N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs>, archived at <https://perma.cc/CFG4-XVHD>.

<sup>9</sup> *See id.*

ing is real, but it is only part of the broader sources of disparities in death sentencing, which are embedded in social status disparities, writ large.

I wrote about this thirty years ago in a paper that documented thirty pre-*Furman*<sup>10</sup> cases in which white defendants were executed for killing Black victims.<sup>11</sup> These are rare cases, to be sure, and at first glance they seem to be outliers. Yet, they are not exceptions to the rule if the rule is that death sentences are most likely for people of low status convicted of crimes that victimize people with higher status. In twenty-six of the thirty cases, the social status of the Black victims was higher than the social status of the white perpetrators.<sup>12</sup> For example, in seven cases, the white assailants had long criminal histories.<sup>13</sup> In five other cases, the occupational status of the Black victim was higher than that of the killer.<sup>14</sup> Cases in which white defendants were executed for killing Black victims were rare, but they are not exceptions to the general rule that people from lower statuses are treated more harshly for crimes against higher status victims.

Consider another example. James Dupree Henry (a Black man) was executed in Florida in September 1984.<sup>15</sup> He was the twenty-fifth person executed after *Furman*, but only the second put to death for the murder of a Black victim.<sup>16</sup> The rarity of executions for killing Black victims makes the case look like an exception to the rule. The real story is more nuanced.<sup>17</sup> Mr. Henry was convicted of killing an eighty-one-year-old civil rights leader, one of the most prominent Black citizens in Central Florida.<sup>18</sup> Two days later, Henry slightly wounded a white police officer while being taken into custody.<sup>19</sup> Within three months of the murder, he had been convicted and sentenced to death.<sup>20</sup>

Michael Mello and I did a content analysis of all of the articles about the case published by the *Orlando Sentinel*, the largest newspaper in the

<sup>10</sup> By convention, the modern era of the death penalty in the U.S. began in mid-1972 with the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>11</sup> Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?* 30 Soc. Q. 529 (1989). In the years since that paper was published, I have not learned of any other cases to add to that list, and know of no cases in American history in which a white man was executed for the rape of a woman of color. In the years since *Furman* (through the end of 2019), there have been thirty-four cases in which a white person was executed for killing a Black person. In a dozen of those cases, the perpetrator also took the life of at least one white victim. See *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenalty-info.org/executions/execution-database>, archived at <https://perma.cc/GN3P-H93S>. Phillips and Marceau discuss one of these defendants, Brandon Hedrick. See Phillips & Marceau, *supra* note 1, at 27.

<sup>12</sup> Radelet, *supra* note 11, at 534–35.

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 535.

<sup>15</sup> Michael L. Radelet & Michael Mello, *Executing Those Who Kill Blacks: An 'Unusual Case' Study*, 37 MERCER UNIV. L. REV. 911 (1986).

<sup>16</sup> *Execution Database*, *supra* note 11.

<sup>17</sup> Radelet & Mello, *supra* note 16, at 911.

<sup>18</sup> *Id.* at 915.

<sup>19</sup> *Id.* at 916.

<sup>20</sup> *Id.* at 917.

area.<sup>21</sup> Whereas the homicide was first reported in a small article on page 1B, the wounding of the police officer made front page headlines. We measured the square inches of every picture about the case and read every newspaper story published between the date of the murder and the date of the death sentence, classifying each line according to whether it was about the Black murder victim, the slightly wounded white police officer, or "other." Overall, the vast majority of the publicity about the case concerned the police officer.<sup>22</sup> We concluded:

[T]he data indicate that it was the assault on the white police officer that made the homicide a death penalty case. . . . [T]he presence of this white victim, even though he was not a homicide victim, greatly increased the chances that the sentence for the killing of a [B]lack victim would be death.<sup>23</sup>

Henry's case is similar to the Georgia case of William Hance discussed by Phillips and Marceau.<sup>24</sup> Hance was legally (read: *technically*) executed for killing a Black woman, but the fact that he also killed two other women, one of whom was white, unquestionably adds to our understanding of why the murder of the Black woman became a capital case.<sup>25</sup>

In short, race matters. But race is not the whole picture; using it, along with other measures of marginalization supports, rather than undermines, the larger issue of proportionality. Race is only one of a wide range of factors that combine to construct the social status of victims and defendants, which in turn drives the problem of proportionality in death sentencing. In other words, race exists and interacts with other vectors of marginalization. The larger issue is proportionality. Death sentences are rendered more often for those convicted of killing white victims than for those convicted of killing Black victims (and especially for lower status defendants accused of killing higher status defendants), even given similar levels of culpability. This indicates a basic problem with the death penalty: It is not reserved for the "worst of the worst."<sup>26</sup>

## II. THE FUTURE OF RACE RESEARCH

Beyond the challenges of accurately measuring social class and other indicators of status, there is also a second reason for future death penalty researchers to broaden their approaches to the study of racial and ethnic disparities. Race and ethnicity are becoming more and more difficult to mea-

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<sup>21</sup> *Id.* at 919–22.

<sup>22</sup> *Id.* at 920–21.

<sup>23</sup> *See id.* at 923.

<sup>24</sup> Phillips & Marceau, *supra* note 1, at 607–12.

<sup>25</sup> *Id.* at 609–11.

<sup>26</sup> *Cf.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L. J.* 1835, 1883 (1994).

sure.<sup>27</sup> We are becoming a more diverse nation, and the traditional measures of race and ethnicity (e.g., white, Black, and/or Hispanic) are often too simple to capture this diversity.

If future researchers want to continue to document inequities in the administration of the death penalty, we will have to move beyond the relatively simple tools we have used over the past four decades to survey race and ethnicity.

When David Baldus did his work in Georgia, he divided the population into white and Black categories.<sup>28</sup> I started to do research on the death penalty some forty years ago in Florida,<sup>29</sup> and the paper based on that work does not even mention Latinx defendants or victims (or any other races or ethnicities). The same is true in the subsequent 1985 and 1991 papers.<sup>30</sup>

At long last, in 2002, Glenn Pierce and I had a data set that allowed us to go beyond the white/Black binary. At the request of Illinois Governor George Ryan, and with much help from his office, we were able to build a comprehensive data set of Illinois cases.<sup>31</sup> The data showed that death sentencing rates for cases with Hispanic victims were similar to cases with Black victims, with 3.8% of those with (only) white victims being sentenced to death, 1.1% of those with (only) Black victims, and 1.5% of those with (only) Hispanic victims.<sup>32</sup>

California is one of the most diverse states in the U.S., and the demographics are rapidly changing.<sup>33</sup> One of our studies looked at death sentencing in that state during the 1990s.<sup>34</sup> During that decade alone, the Hispanic population increased from 25.8% of the population to 32.4%.<sup>35</sup> Our analysis focused on nearly 34,000 homicides.<sup>36</sup> At first we did not find

<sup>27</sup> While such research is getting more difficult, it is far from impossible. Furthermore, even if there are occasional errors in coding race and/or ethnicity, the correlations observed in virtually all the post-*Furman* race research are so strong that a small number of coding errors in a given study would have no effect on (and may even strengthen) the study's ultimate conclusions.

<sup>28</sup> DAVID C. BALDUS, GEORGE WOODWORTH, & CHARLES PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 399–403 (1990).

<sup>29</sup> Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 *AM. SOCIOLOGICAL REV.* 918, 918 (1981).

<sup>30</sup> Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 *LAW & SOC'Y REV.* 587, 587 (1985). "Latinx" or "Hispanic" are ethnicities, and not races, and at the time most Hispanics in the U.S. were white, but the published paper does not discuss this. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 *FLA. L. REV.* 1, 2 (1991). We did point out that failing to differentiate white and Latinx cases served to underestimate any race/ethnicity effects on death sentencing since more lenient prosecutions of cases with Latinx victims would serve to reduce any white-victim effects. *Id.* at 21 n.190.

<sup>31</sup> Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 *OR. L. REV.* 39, 39–40 (2002).

<sup>32</sup> *See id.* at 93 tbl. 27.

<sup>33</sup> Glenn Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 *SANTA CLARA L. REV.* 1, 4 (2005).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *See id.* at 4 tbl.1a.

<sup>36</sup> *Id.* at 41–43.

strong race-of-victim effects because we included Hispanic defendants and victims with white defendants and victims. Once we separated out Hispanic victims, we found that death sentencing rates for that group were more like the low death sentencing rates for Black victims, thereby exposing huge differences in death sentencing rates between cases with white and non-white victims.<sup>37</sup>

My goal here is not to focus on differential death sentencing rates by race and ethnicity, but rather to point to the increasing diversity of the United States, and more importantly, our attention (or lack thereof) to that diversity. The world is no longer Black and white. In fact, research conducted by a panel of the National Academy of Sciences estimated that in 1970 the white population comprised over 80% of the American population, but by 2050 it is expected to fall to around 53%.<sup>38</sup> Future death penalty scholars will need to not only incorporate broader measures of social status, but also figure out how to better measure race so we can continue to see its effects.

#### CONCLUSION

Race matters, both in and of itself and as a component of broader conceptualizations of social status. A focus solely on race shrouds other sources of disparities, such as social class and prestige. Consideration of these broader factors will not lessen the effects of race that we already know about, but instead will likely produce evidence that the disparities in death sentencing are even larger than we are currently documenting. Race itself is an ambiguous concept, in part because the social meanings attached to it vary in time and space, and in part because it is more and more difficult to measure. We will need to attend to these issues in future research to continue the pioneering work of David Baldus that Phillips and Marceau have now built upon.

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<sup>37</sup> *Id.* at 20.

<sup>38</sup> Gary D. Sandefur et al., *An Overview of Racial and Ethnic Demographic Trends*, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 40, 43–44 (Neil J. Smelser, William Julius Wilson, & Faith Mitchell eds. 2001).