Response: Expanding the Record

Barbara O'Brien & Catherine M. Grosso

TABLE OF CONTENTS

Scott Phillips and Justin Marceau add a new layer to our understanding of the role of race in the administration of capital punishment. In so doing, they join a very small but hopefully expanding body of literature that is shifting our focus to the act of execution itself.[1] Indeed, the body of complex studies of the administration of capital punishment stops short of examining decisions about whom the state actually kills with its myriad antecedent decisions.[2] Lifting the veil and sharpening our focus on this final act, alone, makes an important contribution to the literature.

But Phillips and Marceau do more than that. They add a layer of evidence to the well-established body of research showing the influence of race on capital punishment.[3] In particular, studies across a wide range of jurisdictions have consistently shown that death-eligible defendants convicted of killing at least one white victim are more likely to be charged capitally and ultimately sentenced to death.[4] Most simply stated, Phillips

[1] *See, e.g.*, CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 116–53 (2016); Frank R. Baumgartner, Janet M. Box-Steffensmeier & Benjamin W. Campbell, *Event Dependence in U.S. Executions*, 13 PLoS ONE 1, 4 (2018); Frank R. Baumgartner, Woody Gram, Kaneesha R. Johnson, Arvind Krishnamurthy & Colin P. Wilson, *The Geographic Distribution of US Executions*, 11 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2016); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1165 (2019).

[2] *See generally* Catherine M. Grosso, Barbara O'Brien, Abijah Taylor & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 525 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014) (reviewing empirical studies of the role of race in capital punishment); *see also* Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 1998 (2016).

[3] *See, e.g.*, Grosso et al., *supra* note 2, at 537–39 (reviewing empirical studies finding evidence of race-of-victim discrimination in the administration of capital punishment); O'Brien et al. *supra* note 2, at 2023–42 (finding consistent race-of-victim effects in capital charging and sentencing decisions in North Carolina cases spanning 1990–2010).

[4] *See* Grosso et al., *supra* note 2, at 537–39; *see also* O'Brien et al., *supra* note 2, at 2023–42.

and Marceau report that Georgia executed 2.26% (22 out of 972) of all defendants indicted for murder involving at least one white victim compared to 0.13% (2 out of 1,503) of all other defendants between 1973 and 1979.[5] This represents a ratio of seventeen-to-one. This mirrors and expands the disparities Baldus and Woodworth reported for unadjusted race-of-victim disparities among all murder and voluntary manslaughter cases. Baldus and Woodworth found that 11% (106 out of 981) of all defendants indicted for murder of at least one white victim received a death sentence, compared to 1% (20 out of 1,503) of all other death-eligible defendants.[6] This represented a ratio of eleven-to-one. The introduction of controls did not meaningfully diminish the disparity in either case.

I. Unregulated Selection Criteria and the Expansion of Race Disparities

Evidence demonstrating the extension of this well-established disparity into the highly unregulated process by which Georgia selects whom among death-sentenced defendants to execute validates an initial intuition. The post-*Furman* jurisprudence sought to limit arbitrary or racist decisionmaking in charging and sentencing decisions by imposing complex substantive and procedural safeguards on the process.[7] The modern statutes are designed to identify whom among all homicide case defendants are most deserving of a death sentence and, thereby, to select a reliable set of execution-ready cases.[8] We know the post-*Furman* system falls short, and that race and other extra-legal matters contribute to the sorting process. Perhaps this knowledge influenced our expectation that execution selection decisions would pick up where the death sentencing selection process stopped.

It seems worth noting that this need not be the case. A truly random system, or even a strict first-in, first-out system, would replicate—but not expand—the disparities observed in sentencing rates. The unregulated execution selection process may allow researchers the opportunity for a fresh evaluation, by comparison, of the effectiveness of the regulatory process in mitigating or interrupting the influence of race on capital charging and sentencing. Phillips and Marceau's findings reveal anew the persistent influence of race on capital punishment and raise significant questions about the efficacy of the initial sorting process.

---

[5] Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 Harv. C.R.-C.L. L. Rev. 585, 605 tbl.1 (2020) (citing unadjusted disparities in overall execution rates).

[6] David C. Baldus, George G. Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty 315 tbl.50 (1990).

[7] *See* Steiker & Steiker, *supra* note 1, at 154–55 (discussing reforms after Furman v. Georgia, 408 U.S. 238 (1972)).

[8] *See* Kovarsky, *supra* note 1, at 1211–12 (noting that execution priority should take the risk of wrongful conviction into account).

As death sentences became increasingly rare in the past decade, executions were even more so.[9] Executions are to death sentences as death sentences are to death-eligible murder. As the Steikers note, "We have replaced (or supplemented) a lottery for death sentences with a lottery for executions . . . ."[10] Both events remain so rare as to be freakish. A tiny minority of murder defendants are charged capitally (let alone sentenced to death). Likewise, a tiny minority of death-sentenced prisoners face a present death warrant. Most such prisoners look in the distance to a future execution.[11]

Only 24 of the 127 (20%) death-sentenced persons in this study were executed.[12] This produced a significant execution rate but not the highest. Arkansas, South Carolina, Indiana, and Louisiana reported similar overall execution rates to Georgia in the post-*Furman* era.[13] In contrast, Virginia executed 70% of death-sentenced prisoners in this period, and Texas followed, having executed at least 50%.[14] At the other extreme, consider California or Pennsylvania. Both states had a large number of death-sentenced defendants (California had 740 in 2018; Pennsylvania had 160) but conducted few or no executions.[15]

In *Furman v. Georgia*,[16] the Court reckoned with the unfettered discretion of death penalty charging and sentencing and the arbitrariness it fostered.[17] States responded with highly bureaucratic death sentencing laws based on the Model Penal Code's model of constrained discretion.[18] The regulatory effort was met with mixed success,[19] but forced a certain level of

---

[9] *See generally* DEATH PENALTY INFO. CTR., *The Death Penalty in 2019: Year End Report* (Dec. 17, 2019), https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf, *archived at* https://perma.cc/N4MD-SEVN [hereinafter DEATH PENALTY INFO. CTR., *Year End Report*] (reporting long term trends for death sentences and executions).

[10] STEIKER & STEIKER, *supra* note 1, at 118.

[11] Note, for example, that the death sentencing rate for all defendants indicted for murder in the Baldus Study was 5% (128 out of 2,484). *See* BALDUS ET AL., *supra* note 6, at 314. According to the Death Penalty Information Center, 2,656 people faced a death sentence at the end of 2019. DEATH PENALTY INFO. CTR., *Year End Report*, *supra* note 9, at 2. In contrast, as of January 31, 2020, eighteen prisoners faced an execution date scheduled for 2020, eleven in 2021, six in 2022, and one in 2023. *See* DEATH PENALTY INFO. CTR., *Upcoming Executions*, https://deathpenaltyinfo.org/executions/upcoming-executions#year2020, *archived at* https://perma.cc/4H4M-8DLD.

[12] *See* Phillips & Marceau, *supra* note 5, at 601.

[13] *See* STEIKER & STEIKER, *supra* note 1, at 119–20.

[14] *See id.*

[15] *See* DEATH PENALTY INFO. CTR., *Year End Report*, *supra* note 9, at 2, 8.

[16] Furman v. Georgia, 408 U.S. 238 (1972).

[17] *See generally id.*

[18] *See* STEIKER & STEIKER, *supra* note 1, at 61 ("The distinctive feature of all of the new statutes was an effort to limit the discretion characteristic of death penalty schemes before Furman. . . . The capital punishment provision of the [Model Penal Code] offered a blueprint for this sort of approach.").

[19] *See* David C. Baldus, George Woodworth, Catherine M. Grosso, Michael Laurence, Jeffrey A. Fagan & Richard Newell, Furman *at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. EMPIRICAL LEGAL STUD. 693, 713–15 (2019) (documenting the broad scope of death eligibility in California); *see generally* Grosso

transparency in decisionmaking. State decisionmakers had to identify in advance those factors that made some murders worthier of a death sentence than others.[20]

Furman, however, never considered the risk of arbitrary decisionmaking about which death-sentenced prisoners should actually face execution. Lee Kovarsky astutely noted that the regulatory process itself, and the ensuant delay for appellate and postconviction review, separated the imposition of a death sentence and the carrying out of an execution into distinct legal events post-*Furman*.[21] The latter decision—the decision to execute—remained unregulated.[22]

A decision unfettered by guidance fosters, or at least permits, the type of arbitrariness that the Court found unacceptable in *Furman*.[23] The law governing executions bears an uncanny resemblance to the pre-*Furman* death penalty law in the United States.[24] Phillips and Marceau report unadjusted disparities suggesting that race emerged again as a distinct and important influence in these decisions.[25]

II. Case Culpability and the Prioritization of Executions

The lack of law governing the decision to execute, however, created a design challenge for Phillips and Marceau. Alternately stated, the unadjusted results reflected the full legal basis from which to select which defendant should be executed first. In this way, the significant unadjusted race disparities told the whole story.

Our tradition, however, suggests that studies of racial discrimination, like this one, must give decisionmakers the benefit of every doubt. This left Phillips and Marceau in search of meaningful race-neutral explanatory variables in a field lacking even the most basic consensus.[26] Not unreasonably, they presumed that Georgia would endorse a "worst of the worst" model for prioritizing executions.[27] Under this model, state officials should prioritize

---

et al., *supra* note 2 (reviewing the literature showing the influence of race on capital punishment); O'Brien et al., *supra* note 2 (updating the literature with a study on charging and sentencing in North Carolina).

[20] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 195 (1976).

[21] Kovarsky, *supra* note 1, at 1169–76 (discussing influences leading to a longer time lapse between imposing a death sentence and carrying out an execution).

[22] *Id.* at 1180 (noting that the decision to issue a death warrant may face limited procedural constraints, but it is not governed by any substantive constraints).

[23] *See id.* at 1181 (observing that "[a]cross U.S. death penalty jurisdictions . . . there is almost no law dictating which death row inmates are to die, and in what order").

[24] Furman v. Georgia, 408 U.S. 238, 248 (1972) (Douglas, J., concurring) (noting that "[j]uries . . . have practically untrammeled discretion to let an accused live or insist that he die").

[25] Phillips & Marceau, *supra* note 5, at 605–14.

[26] *See* Kovarsky, *supra* note 1, at 1185 (describing the state of "sorting dissensus—the inability to achieve consensus around the criteria used to sort condemned inmates into a meaningful order of execution priority").

[27] *See id.* at 1201–04 (articulating blame-based criteria for prioritizing executions).

executing the most culpable of the death-sentenced offenders, as defined by the Georgia death penalty statutes.[28]

This approach raised several small concerns. First, the death sentencing statutes applied to the earlier selection: that of assigning a death sentence to the most culpable homicide offenders. If the "worst of the worst" have been identified properly, the death-sentenced population should be close to equally blameworthy or, at least, their relative culpability under the terms of the statute should be legally indistinguishable.[29] Asking untrained readers to sort a set of death-sentenced cases by the defendants' culpability should lead them to frustration. The statute, if you will, has done its work. If not, the statute itself may violate the narrowing requirements of *Furman* and *Gregg*.[30]

Second, evidence suggests that limited legislative or even social thought has been given to how to prioritize executions. If asked, the state likely would argue that a defendant lacks any legal basis to resist execution, much as a defendant seeking clemency lacks a legal right to mercy.[31] The state would cite the process as defined by the state statutes. Direct evidence that state officials prioritized a particular defendant because of his race or the race of his victim would violate the Equal Protection Clause, but an effort to state a constitutional harm from anything less than that would face steep obstacles, including the lack of explicit or implicit criteria by which to evaluate the state's selection processes.[32]

If culpability provides a rational basis for prioritizing executions, the number of statutory aggravators in a case provides one approximation of culpability.[33] Phillips and Marceau adopt this approach and estimate (and control for) culpability with a scale that equates the number of statutory

---

[28] GA. CODE ANN. § 27-2534.1 (1977) (current version at GA. CODE ANN. § 17-10-30 (2017)).

[29] *See* Kovarsky, *supra* note 1, at 1204 (noting the challenges of distinguishing blame at the execution selection phase because "the retributive criteria must perform a much more granular sort—among a pool of condemned inmates that naturally represents a very narrow band of desert").

[30] *See generally* Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); *see also, e.g.*, Baldus et al., *supra* note 19 (documenting the broad scope of death eligibility in California).

[31] *See generally* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

[32] *See* Phillips & Marceau, *supra* note 5, at section V.B.1 (concluding that a rigged state lottery that disadvantaged certain defendants would violate the Constitution); *cf.* McCleskey v. Kemp, 481 U.S. 279, 292–99 (1987) (requiring defendants claiming racial discrimination to offer evidence of purposeful discrimination in the defendant's case).

[33] *See, e.g.*, David C. Baldus, Catherine M. Grosso, George Woodworth & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1270 tbl.4 (2011) (including the number of aggravating factors in a model analyzing the influence of race in death sentencing decisions); O'Brien et al., *supra* note 2, at 2025 tbl.3 (using the number of aggravating factors in a case as a simple control for level of culpability in a table analyzing the role of race in death sentencing).

aggravators with the level of blameworthiness.[34] However, the inconsistent weight accorded different aggravating factors presents a challenge to using this kind of scale. Indeed, David Baldus's analyses of these data showed that some aggravating factors were more predictive of a death sentence than others.[35] Adding to this complicated landscape, Sherod Thaxton's work (also in Georgia) showed that the statutory aggravators applied unevenly by race, attaching with more strength and frequency to some cases than others.[36] A scale that aggregated aggravators masked these differences and risked obscuring race effects.

III. The Challenges of Data Availability

Even with these limitations, the number of aggravators in the case provides a rough but reliable measure of the level of aggravation in other studies, and it seems to do the same here in predicting execution. In order to apply this measure, however, Phillips and Marceau needed to update and expand the Baldus charging and sentencing data to include executions. Ideally, the decision to sentence some defendants to death and then to carry out the death sentence would be chronicled in meticulous detail. Such a profound and irreversible decision should be guided and constrained by carefully vetted and well-considered procedures that provide enough transparency to allow for meaningful accountability.

Yet official actors in the criminal justice system do not keep comprehensive data at any level on how the system functions or even who the relevant parties might be.[37] The Bureau of Justice Statistics collects information about the occurrence of certain crimes and incarceration, but even those data are spotty because the process depends on local agencies to report the information.[38] State agencies may track some kinds of data. For example, North Carolina has a medical examiner who can provide a list of every homicide victim and how they died.[39] But this varies from state to state. Nongovern-

---

[34] *See* Phillips & Marceau, *supra* note 5, at section IV.B (explaining the use of statutory aggravators as controls).

[35] Baldus et al., *supra* note 6, at 319–20 tbl.52 (showing different odds multipliers for different aggravating factors).

[36] Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 Am. J. Crim. L. 95, 139–53 (2018) (finding that statutory aggravators and mitigators have different and even opposite effects based on the race of the victim on a prosecutor's decision to charge a case capitally).

[37] *See, e.g.*, Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 Ky. L.J. 651, 654 (2016).

[38] *See* Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 Geo. Wash. L. Rev. 1490, 1517 (2018) ("[A] pervasive and persistent problem in criminal justice has been a lack of adequate data across local jurisdictions."); *see also* Samuel R. Wiseman, *The Criminal Justice Black Box*, Ohio St. L.J. 349, 379–84 (2017) (noting the shortcomings of Bureau of Justice Statistics data collection).

[39] *See* O'Brien et al., *supra* note 2, at 2014 n.96 (noting that the state medical examiner provided case-level information).

mental actors fill in some additional gaps, but not all.[40] Moreover, the failure of government agencies to collect data contemporaneously, when doing so would be most cost-efficient and accurate, hampers nongovernmental initiatives.[41]

Phillips and Marceau faced significant challenges in collecting necessary case-level information. They deserve substantial credit for navigating this frustrating and unnecessarily difficult process. Their experience with the system's lack of transparency regarding punishment, even punishment that involves the most extreme penalty available, illuminates (again) the need for reform in this arena.[42]

This lack of transparency applies to both the front and back ends of the criminal process. Phillips and Marceau address the back end—executions. Police investigations constitute the front end. Police decisionmaking about which cases to prioritize and how thoroughly to investigate each homicide likely influence the race effects observed at later stages of the process, but analysis of that process remains overwhelmingly absent from this body of research.[43] This results, at least in part, from the extraordinary difficulty of obtaining relevant data on policing and police investigations.[44]

---

[40] For example, the National Registry of Exonerations documents extensive information on every known exoneration. *See The National Registry of Exonerations*, U. OF MICH. L. SCH., https://www.law.umich.edu/special/exoneration/Pages/about.aspx, *archived at* https://perma.cc/9MUK-JEWE. The Death Penalty Information Center documents key information about capital punishment. *See* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org, *archived at* https://perma.cc/UFR7-YFCX.

[41] Measures for Justice is a nonprofit organization dedicated to compiling and disseminating reliable data about every stage of the criminal justice process. *See* MEASURES FOR JUSTICE, https://measuresforjustice.org/about/overview/, *archived at* https://perma.cc/2PK5-XFFW. The National Registry of Exonerations was founded by university professors because there was no single, authoritative database of instances where the system convicted people who were very likely innocent. *See The National Registry of Exonerations: Our Mission*, U. OF MICH. L. SCH., https://www.law.umich.edu/special/exoneration/Pages/mission.aspx, *archived at* https://perma.cc/JR85-LYK7. The Death Penalty Information Center is a nonprofit organization that serves a similar purpose by collecting and disseminating information about the death penalty. *See* DEATH PENALTY INFO. CTR., *About Us*, https://deathpenaltyinfo.org/about/about-us, *archived at* https://perma.cc/T78S-JXCS. Data on police violence are also lacking, leading private actors to attempt to fill the gaps. *See* Lynne Peeples, *What the Data Say about Police Shootings*, NATURE (Sept. 4, 2019), https://www.nature.com/articles/d41586-019-02601-9, *archived at* https://perma.cc/8WSQ-5NDF.

[42] *See* Phillips & Marceau, *supra* note 5, at 592–99.

[43] *See generally* Nick Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities*, CRIM. JUST. REV. 1, 3–4 (2017), https://doi.org/10.1177/0734016817721291, *archived at* perma.cc/FS6Q-J8SV (reviewing the literature and noting the absence of relevant research).

[44] For one unusual effort, see generally Glenn L. Pierce, Michael L. Radelet, Chad Posick & Tim Lyman, *Race and the Construction of Evidence in Homicide Cases*, 39 AM. J. CRIM. JUST. 771 (2014), https://doi.org/10.1007/s12103-014-9259-1, *archived at* https://perma.cc/LQN3-M5V6 (evaluating amount of investigatory and prosecutor effort in prosecutorial files on over 400 homicide cases from Caddo Parish, Louisiana).

IV. A Short Postscript

In the final section of their Article, Phillips and Marceau query whether the Eighth Amendment governs execution prioritization.[45] They turn here to the law of clemency and appellate procedures as possible sources of regulation.[46] Here, their analysis—while perhaps limited by necessity—seems inapposite. While it is true that a clemency application becomes ripe when a death warrant issues,[47] and that most jurisdictions refrain from issuing a death warrant while significant issues remain under appeal,[48] neither body of law pertains to the ultimate decision to issue a death warrant in a particular case. In stretching to identify relevant or analogous case law, Phillips and Marceau may inadvertently confuse readers. At the bottom line, only limited procedural rules govern execution decisions. That may be all that needs to be said.

---

[45] Phillips & Marceau, *supra* note 5, at section V.B.

[46] *Id.*

[47] *See, e.g.*, Christian Boone, *Georgia Parole Board Spares Life of Condemned Prisoner*, The Atlanta J.-Const. (Jan. 16, 2020), https://www.ajc.com/news/crime--law/breaking-georgia-parole-board-spares-the-condemned-prisoner/3mWrCC4CknbzgKBYNUbTqM/, *archived at* https://perma.cc/TQ9V-ZKJ8 (noting that the parole board granted clemency hours before the scheduled execution).

[48] *See* Andrew Cohen, *Missouri Executed This Man While His Appeal Was Pending in Court*, The Atlantic (Feb. 1, 2014), https://www.theatlantic.com/national/archive/2014/02/missouri-executed-this-man-while-his-appeal-was-pending-in-court/283494/, *archived at* https://perma.cc/8J32-4LC6 ("[S]tate officials have an affirmative duty not to proceed with an execution if they know a Supreme Court appeal is pending.").