

THE COLOR OF DEATH: Race and the Death Penalty

We may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system . . . discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing.

—SUPREME COURT JUSTICE HARRY BLACKMUN¹

In January 2003, Illinois Governor George Ryan ignited a national debate by announcing that he had commuted the sentences of all of the state's 167 death row inmates to life in prison.² He justified his unprecedented and highly controversial decision, which came three years after he announced a moratorium on executions, by stating that "our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die." Governor Ryan, who left office two days after making the announcement, also stated that he was concerned about the effects of race and poverty on death penalty decisions. He acknowledged that his decision would be unpopular but stated that he felt he had no choice but to strike a blow in "what is shaping up to be one of the great civil rights struggles of our time."

Similar views were expressed a decade earlier by Supreme Court Justice Harry A. Blackmun, who announced in February 1994 that he would "no longer tinker with the machinery of death."³ In an opinion dissenting from the Court's order denying review in a Texas death penalty case, Blackmun charged the Court with coming "perilously close to murder" and announced that he would vote to oppose all future death sentences. He also stated that the death penalty was applied in an arbitrary and a racially

discriminatory manner. "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated," Blackmun wrote, "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."⁴

Governor Ryan and Justice Blackmun are not alone in their assessment of the system of capital punishment in the United States. Legal scholars, civil libertarians, and state and federal policy makers also have questioned the fairness of the process by which a small proportion of convicted murderers is sentenced to death and an even smaller proportion is eventually executed.⁵ As a lawyer who defends defendants charged with capital crimes put it, "You are dealing with a group of people who are in this situation not so much because of what they are but because of who they are. And who they are has a lot to do with the color of their skin and their socio-economic status."⁶ Echoing Justice Blackmun, other critics contend that "the most profound expression of racial discrimination in sentencing occurs in the use of capital punishment."⁷

As these comments demonstrate, controversy continues to swirl around the use of the death penalty in the United States. Although issues other than race and class animate this controversy, these issues clearly are central. The questions at hand and the positions taken by those on each side of the controversy mimic to some extent the issues that dominate discussions of the non-capital sentencing process. Supporters of capital punishment contend that the death penalty is administered in an even-handed manner on those who commit the most heinous murders. They also argue that the restrictions contained in death penalty statutes and the procedural safeguards inherent in the process preclude arbitrary and discriminatory decision making. Opponents contend that the capital sentencing process, which involves a series of highly discretionary charging, convicting, and sentencing decisions, is fraught with race- and class-based discrimination. Moreover, they argue that the appellate process is unlikely to uncover, much less remedy, these abuses.

LEARNING OBJECTIVES

In this chapter, we address the issue of racial disparity in the application of the death penalty. We begin with a discussion of Supreme Court decisions concerning the constitutionality of the death penalty. We follow this with a discussion of racial differences in attitudes toward capital punishment. We then present statistics on death sentences and executions and summarize the results of empirical studies examining the effect of race on the application of the death penalty. The next section discusses *McCleskey v. Kemp*,⁸ the Supreme Court case that directly addressed the question of racial discrimination in the imposition of the death penalty. We conclude with a discussion of recent calls for a moratorium on the death penalty and legislation intended to reform the capital sentencing process.

After you have read this chapter:

1. You should be able to discuss the implications of Supreme Court decisions concerning the constitutionality of the death penalty.

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2. You should understand that there are significant racial differences in attitudes toward capital punishment and you should be able to summarize and synthesize the results of empirical studies examining the effect of race on the application of the death penalty.
3. You should be able to explain the issues addressed in *McCleskey v. Kemp*, the Supreme Court case that directly confronted the question of racial discrimination in the imposition of the death penalty.
4. You should be able to evaluate the pros and cons of recent calls for a moratorium on the death penalty and legislation intended to reform the capital sentencing process.

THE CONSTITUTIONALITY OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." The determination of which punishments are cruel and unusual, and thus unconstitutional, has been left to the courts. According to the Supreme Court,

Punishments are cruel when they involve torture or lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.¹⁰

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.¹¹

Although the Supreme Court consistently has stated that punishments of torture violate the Eighth Amendment, the Court has never ruled that the death penalty itself is a cruel and an unusual punishment.

Furman v. Georgia

In 1972, the Supreme Court ruled in *Furman v. Georgia* that the death penalty, as it was being administered under then-existing statutes, was unconstitutional.¹² The 5-4 decision, in which nine separate opinions were written, did not hold that the death penalty per se violated the Constitution's ban on cruel and unusual punishment. Rather, the majority opinions focused on the procedures by which convicted defendants were selected for the death penalty. The justices ruled that because the statutes being challenged offered no guidance to juries charged with deciding whether to sentence convicted murderers or rapists to death, there was a substantial risk that the death penalty would be imposed in an arbitrary and discriminatory manner.

Although all of the majority justices were concerned about the arbitrary and capricious application of the death penalty, the nature of their concerns varied. Justices Brennan and Marshall wrote that the death penalty was inherently cruel and unusual punishment. Whereas Justice Brennan argued that the death penalty violated the concept of human dignity, Justice Marshall asserted that the death penalty served no legitimate penal purpose. These justices concluded that the death penalty would violate the Constitution under any circumstances.

The other three justices in the majority concluded that capital punishment, if it was then being administered in the United States was unconstitutional. These justices asserted that the death penalty violated both the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's requirement of equal protection under the law. Justice Douglas stated that the procedures used in administering the death penalty were "pregnant with discrimination." Justice Stewart focused on the fact that the death penalty was "so wantonly and so freakishly imposed." Justice White found "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

The central issue in the *Furman* case was the meaning of the Eighth Amendment's prohibition of cruel and unusual punishment, but the issue of racial discrimination in the administration of the death penalty was raised by three of the five justices in the majority. Justices Douglas and Marshall cited evidence of discrimination against defendants who were poor, powerless, or African American. Marshall, for example, noted that giving juries "untrammelled discretion" to impose a sentence of death was "an open invitation to discrimination."¹⁴ Justice Stewart, although asserting that "racial discrimination has not been proved," stated that Douglas and Marshall "have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."¹⁵

The Impact of *Furman* The impact of the *Furman* decision was dramatic. The Court's ruling "emptied death rows across the country" and "brought the process that fed them to a stop."¹⁶ Many commentators argued that *Furman* reflected the Supreme Court's deep-seated concerns about the fairness of the death penalty process; they predicted that the Court's next step would be the abolition of capital punishment. However, the Court defied these predictions by deciding to regulate capital punishment rather than to abolish it.

Also as a result of the *Furman* decision, the death penalty statutes in 39 states were invalidated. Most of these states responded to *Furman* by adopting new statutes designed to narrow discretion and thus avoid the problems of arbitrariness and discrimination identified by the justices in the majority. These statutes were of two types. Some required the judge or jury to impose the death penalty if a defendant was convicted of first-degree murder. Others permitted the judge or jury to impose the death penalty on defendants convicted of certain crimes, depending on the presence or absence of aggravating and mitigating circumstances. These "guided-discretion" statutes usually also required a bifurcated trial in which the jury first decided guilt or innocence and then decided whether to impose the death penalty. They also provided for automatic appellate review of all death sentences.

Post-Furman Decisions

The Supreme Court ruled on the constitutionality of the new death penalty statutes in 1976. The Court held that the mandatory death penalty statutes enacted by North Carolina and Louisiana were unconstitutional,¹⁷ both because they provided no opportunity for the consideration of mitigating circumstances and because the jury's power to determine the degree of the crime (conviction for first-degree murder or for a lesser included offense) opened the door to the type of "arbitrary and wanton jury discretion"¹⁸ condemned in *Furman*. The justices stated that the central problem of the mandatory statutes was their treatment of all defendants "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."¹⁹

By contrast, the Supreme Court ruled that the guided discretion death penalty statutes adopted by Georgia, Florida, and Texas did not violate the Eighth Amendment's prohibition of cruel and unusual punishment.²⁰ In *Gregg v. Georgia*, the Court held that Georgia's statute—which required the jury to consider and weigh 10 specified aggravating circumstances (see Box 8.1), allowed the jury to consider mitigating circumstances, and provided for automatic appellate review—channeled the jury's discretion and thereby reduced the likelihood that the jury would impose arbitrary or discriminatory sentences.²¹ According to the Court,

No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.²²

Since 1976, the Supreme Court has handed down additional decisions on the constitutionality of the death penalty. With the exception of *McCleskey v. Kemp*, which we address later, these decisions do not focus on the question of racial discrimination in the application of the death penalty. The Court has ruled that the death penalty cannot be imposed on a defendant convicted of the rape of either an adult²³ or a child,²⁴ and that the death penalty can be imposed on an offender convicted of felony murder if the offender played a major role in the crime and displayed "reckless indifference to the value of human life."²⁵ In 2002, the Court ruled that the execution of someone who is mentally handicapped is cruel and unusual punishment in violation of the Eighth Amendment,²⁶ and in 2005, the Court ruled 5-4 that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were younger than 18 years of age when their crimes were committed.²⁷ In 2008, the Court took up the issue of lethal injection, ruling that Kentucky's three-drug protocol for administering lethal injection did not amount to cruel and unusual punishment under the Eighth Amendment.²⁸ The Court expanded on this decision in 2015, ruling 5-4 that Oklahoma's use of the drug midazolam, which critics charged created an unacceptable risk of severe pain, did not violate the Constitution.²⁹ In 2016, the Court considered the constitutionality of Florida's death penalty

Box 8.1 Georgia's Guided Discretion Death Penalty Statute

Under Georgia law, if the jury finds at least one of the following aggravating circumstances it may, but need not, recommend death:³⁰

1. The offense was committed by a person with a prior record of conviction for a capital felony or by a person who has a substantial history of serious assaultive criminal convictions.
2. The offense was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or burglary, or arson in the first degree.
3. The offender knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
4. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
5. The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor during or because of the exercise of his official duty.
6. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
7. The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
8. The offense was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties.
9. The offense was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
10. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

procedures; in that state, the jury made the sentencing recommendation but the judge decided whether the death penalty should be imposed. The Court ruled that the Sixth Amendment requires that the jury determine whether there are aggravating factors that justify imposition of the death penalty.³¹ In recent years the Supreme Court has also overturned a number of death sentences due to ineffective assistance of counsel.³²

ATTITUDES TOWARD CAPITAL PUNISHMENT

In *Gregg v. Georgia*, the seven justices in the majority noted that both the public and state legislatures had endorsed the death penalty for murder. The Court stated that "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." Public opinion

data indicate that the Court was correct in its assessment of the level of support for the death penalty. In 1976, the year that *Gregg* was decided, 66 percent of the respondents to a nationwide poll said that they favored the death penalty for persons convicted of murder.³³ By 1997, three-fourths of those polled voiced support for the death penalty. Although the exoneration of death row inmates and subsequent decisions to impose a moratorium on executions (discussed later) led to a decline in support, in October 2014, 63 percent of Americans still reported that they favored the death penalty for people convicted of murder.³⁴

The reliability of these figures has not gone unchallenged. In fact, Supreme Court justices themselves have raised questions about the reliability and meaning of public opinion data derived from standard "do you favor or oppose?" polling questions. Justice Marshall observed in his concurring opinion in *Furman* that Americans were not fully informed about the ways in which the death penalty was used or about its potential for abuse. According to Marshall, the public did not realize that the death penalty was imposed in an arbitrary manner or that "the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society."³⁵ Marshall suggested that public opinion data demonstrating widespread support for the death penalty should therefore be given little weight in determining whether capital punishment is consistent with "evolving standards of decency." In what has become known as the "Marshall Hypothesis,"³⁶ he stated that "the average citizen" who knew "all the facts presently available regarding capital punishment would . . . find it shocking to his conscience and sense of justice."³⁷

Researchers also have raised questions about the poll results,³⁸ suggesting that support for the death penalty is not absolute but depends on things such as the circumstances of the case, the character of the defendant, or the alternative punishments that are available. William Bowers, for example, challenged the conclusion that "Americans solidly support the death penalty" and suggested that the poll results have been misinterpreted.³⁹ He argued that instead of reflecting a "deep-seated or strongly held commitment to capital punishment," expressing public support for the death penalty "is actually a reflection of the public's desire for a genuinely harsh but meaningful punishment for convicted murderers."⁴⁰

In support of this proposition, Bowers presented evidence from surveys of citizens in a number of states and from interviews with capital jurors in three states. He found that support for the death penalty plummeted when respondents were given an alternative of life in prison without parole plus restitution to the victim's family; moreover, a majority of the respondents in every state preferred this alternative to the death penalty. Bowers also found that about three-quarters of the respondents and 80 percent of jurors in capital cases agreed that "the death penalty is too arbitrary because some people are executed and others are sent to prison for the very same crimes." Bowers concluded that the results of his study "could have the critical effect of changing the perspectives of legislators, judges, the media, and the public on how people think about capital punishment."⁴¹

Consistent with Bowers's results, recent public opinion polls reveal that most Americans believe that innocent people are sometimes convicted of murder. These polls also suggest that respondents' beliefs about the likelihood of wrongful

convictions affect their views of the death penalty. A National Omnibus Poll conducted by RT Strategies in 2007 for the Death Penalty Information Center found that 87 percent of the respondents believed that innocent people have been executed.⁴² Of those who stated that they believed this, 55 percent said that it had negatively affected their view of the death penalty. Respondents who favored the death penalty were given a list of factors and asked whether each one, if proven true, might lessen their support for the death penalty. As shown in Table 8.1, 27 percent of the respondents stated that knowing that innocent people had been executed would reduce their support for the death penalty. A similar percentage said that knowing the fact that the appeals process takes too long and that too few are executed would reduce their support. Twenty-two percent of the respondents stated that their level of support would be reduced by a finding that receiving the death penalty depended on race, social class, and geography or by information regarding the high cost of administering the death penalty. The results of the survey led the authors of the report to conclude that “the public is losing confidence in the death penalty” and that Americans “are deeply concerned about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purpose.”⁴³

It is also clear that there are significant racial differences in support for the death penalty. A 2007 Gallup poll, for example, found that 70 percent of whites but only 40 percent of African Americans expressed support for the death penalty.⁴⁴ In fact, as shown in Figure 8.1, since 1972, the percentage of respondents who report that they support the death penalty has been consistently higher among whites than among African Americans. Other research shows that whereas 35.9 percent of whites surveyed in 2000 stated that they strongly favored the death penalty for persons convicted of murder, 34.2 percent of African Americans reported that they were strongly opposed to the use of the death penalty.⁴⁵ Behen

TABLE 8.1 Factors Related to Reduction in Support for the Death Penalty

Percent of respondents favoring the death penalty who said that the factor, if proven true, would reduce their support for the death penalty	%
Execution of innocent people	27
It takes too long to go through the whole appeals process in death penalty cases and only a few of those sentenced to death are actually executed	26
Receiving the death penalty often depends on race, economics, and geography	22
The high cost of the death penalty	22
Exonerations of those wrongfully convicted	21
Sentence of life without parole	12
Religious leaders' opposition	11

SOURCE: Adapted from Richard C. Dieter, *A Crisis in Confidence: Americans' Doubts About the Death Penalty* (Washington, DC: Death Penalty Information Center, 2007), p. 8.

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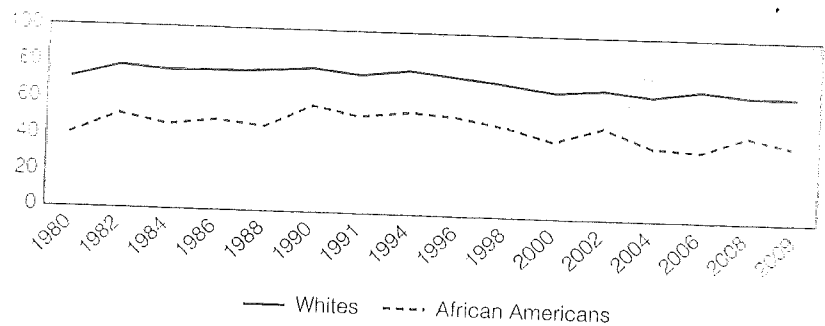


FIGURE 8.1 African American and White Attitudes Toward Capital Punishment for People Convicted of Murder, 1980–2009

SOURCE: Data from Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Tables 2.50 and 2.52

about the fairness of the death penalty and estimates of the number of innocent people convicted of murder also vary by race and ethnicity. Fifty-nine percent of whites but only 32 percent of African Americans stated that they believed the death penalty was applied fairly.⁴⁶ African-American respondents estimated that 22 of every 100 persons convicted of murder were innocent. In contrast, the estimate was 15 of every 100 for Hispanic respondents, and 10 of every 100 for white respondents.⁴⁷

Researchers have advanced a number of explanations to account for these consistent racial differences. Some attribute African-American opposition to perceptions of racial bias in the application of the death penalty.⁴⁸ Others contend that white support is associated with racial prejudice.⁴⁹ One study, for example, found that antipathy to African Americans (which was measured by two items asking respondents to indicate their attitudes toward living in a majority-African American neighborhood or having a family member marry an African American) and belief in racial stereotypes (believing that African Americans are lazy, unintelligent, violent, and poor) predicted white respondents' support for the death penalty.⁵⁰ As the authors noted, "Simply put, many White people are both prejudiced against Blacks and are more likely to favor capital punishment."⁵¹ The authors concluded that their finding of an association between racial prejudice and support for the death penalty suggests "that public sentiment may be an unacceptable indicator of contemporary standards of appropriate punishment for persons convicted of homicide."⁵²

A more recent study by James D. Unnever and Francis T. Cullen similarly found that one-third of the racial difference in support for the death penalty could be explained by "white racism."⁵³ The authors also noted that the fact that substantial differences remained even after white racism was taken into account suggests that "African Americans may have a distinct history with the death penalty" that encompasses both the epidemic of lynching that occurred throughout the South in the early 1900s and the discriminatory use of the death penalty for crimes such as rape.⁵⁴ Unnever and Cullen's findings suggest that when policy makers justify their support for the death penalty by referencing "the will of the

people," they are ignoring a "discomforting reality." That is, "that strong or high levels of support for capital punishment are largely rooted in the views of the segment of the public holding racist views toward African Americans."⁵⁵

There also is evidence of geographic variation in support for the death penalty and that these variations can be explained by features of the social context, such as the homicide rate, the political climate, and the size of the minority population. Eric Baumer and his colleagues found that support for the death penalty in 268 jurisdictions ranged from less than 50 percent to more than 90 percent. As they noted, this finding of geographic variation in support for the death penalty "challenges conventional wisdom and popular portrayals that support for capital punishment in the United States is universally high."⁵⁷ They also found that support for the death penalty was higher among respondents who lived in areas with high homicide rates, people who lived in politically conservative jurisdictions, and respondents who lived in areas with higher percentages of African Americans in the population. Community contextual characteristics, in other words, shaped citizens' attitudes toward the death penalty. This suggests that attitudes toward capital punishment are determined not only by individual characteristics, including race and ethnicity, but also by the characteristics of the communities in which people live.

RACE AND THE DEATH PENALTY: THE EMPIRICAL EVIDENCE

The Supreme Court's decisions regarding the constitutionality of the death penalty have been guided by a number of assumptions. In the *Furman* decision, five justices in the majority assumed that the absence of guidelines and procedural rules in then-existing death penalty statutes opened the door to arbitrary, capricious, and discriminatory decision making. In *Gregg*, the Court affirmed guided discretion statutes on their face and assumed that the statutes would eliminate the problems condemned in *Furman*. The Court assumed that racial discrimination was a potential problem under the statutes struck down in *Furman*, but would not be a problem under the statutes approved in *Gregg* and the companion cases.

In this section, we address the validity of these assumptions. We begin by presenting statistics on the application of the death penalty. We then discuss the results of pre-*Furman* and post-*Furman* studies investigating the relationship between race and the death penalty. We also examine recent research on the federal capital sentencing process.

Statistical Evidence of Racial Disparity

There is clear evidence of racial disparity in the application of the death penalty. Despite the fact that African Americans make up only 13 percent of the population, they have been a much larger proportion of offenders sentenced to death and executed, both historically and during the post-*Gregg* era. There

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is compelling evidence that those who murder whites, and particularly African Americans who murder whites, are sentenced to death and executed at disproportionately high rates. For example, the state of Georgia, which generated both *Furman* and *Gregg*, carried out 18 executions between 1976 and 1994. Twelve of those executed were African Americans; 6 of the 12 were sentenced to death by all-white juries. Sixteen of the 18 persons executed had killed whites.⁵⁸

The pattern found in Georgia casts doubt on the Supreme Court's assertion in *Gregg* that the disparities that prompted their decision in *Furman* will not be present "to any significant degree"⁵⁹ under the guided discretion procedures. Other evidence also calls this into question. Consider the following statistics:

- Of the 3,002 people under sentence of death in the United States in April 2015, 1,251 (41.7 percent) were African Americans, 386 (12.9 percent) were Hispanics, and 1,284 (42.8 percent) were whites.⁶⁰
- Of the 56 females on death row in 2013, 14 (25 percent) were African American.⁶¹
- In 2015, African Americans made up approximately half of the death row populations in Alabama, Arkansas, Georgia, Mississippi, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, and Texas; they constituted nearly two-thirds (or more) of those on death row in Delaware, Louisiana, and Pennsylvania. In California, 453 of the 746 individuals on death row were either African American or Hispanic; in Texas, 190 of the 271 persons under sentence of death were African American or Hispanic.⁶²
- In 2015, 28 of the 61 offenders under sentences of death imposed by the federal courts were African American, 24 were white, 7 were Hispanic, 1 was Asian American, and 1 was Native American.⁶³
- Of the 1,404 prisoners executed from 1976 through 2015, 782 (56 percent) were white, 487 (35 percent) were African American, 112 (8 percent) were Hispanic, and 23 (2 percent) were Native American or Asian.⁶⁴
- Of the 2,060 victims of those executed from 1977 through 2015, 1,562 (76 percent) were white, 313 (15 percent) were African American, 140 (7 percent) were Hispanic, and 45 (2 percent) were Native American or Asian. During this period, approximately 50 percent of all murder victims were African Americans.⁶⁵
- From 1977 through 2015, 52 percent of the prisoners executed were white; convicted of killing other whites, 20 percent were African Americans convicted of killing whites, 12 percent were African Americans convicted of killing other African Americans, and only 1.4 percent were whites convicted of killing African Americans.⁶⁶
- Among those executed from 1930 through 1972 for the crime of rape, 89 percent (405 of the 455) were African Americans.⁶⁷ During this period, Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia executed 66 African-American men, but not a single white man for the crime of rape.⁶⁸

- Among those sentenced to death for rape in North Carolina from 1909 to 1954, 56 percent of the African Americans, but only 43 percent of the whites, were eventually executed.⁶⁹
- Twenty percent of the whites, but only 11 percent of the African Americans, sentenced to death for first-degree murder in Pennsylvania between 1914 and 1958 had their sentences commuted to life in prison.⁷⁰

These statistics clearly indicate that African Americans have been sentenced to death and executed “in numbers far out of proportion to their numbers in the population.”⁷¹ They document racial disparity in the application of the death penalty, both prior to *Furman* and following *Gregg*.⁷² As we have noted frequently throughout this book, however, disparities in the treatment of racial minorities and whites do not necessarily constitute evidence of racial discrimination. Racial minorities may be sentenced to death at a disproportionately high rate, not because of discrimination in the application of the death penalty, but because they are more likely than whites to commit homicide, the crime most frequently punished by death. As illustrated by the hypothetical examples presented in Box 8.2, the appropriate comparison is not the number of African Americans and whites sentenced to death during a given year or over time. Rather, the appropriate comparison is the percentage of death-eligible homicides involving African Americans and whites that result in a death sentence.

The problem with the hypothetical examples presented in Box 8.2 is that there are no national data on the number of death-eligible homicides or on the race of those who commit or who are arrested for such crimes. Gary Kleck

Box 8.2 Discrimination in the Application of the Death Penalty: A Hypothetical Example

Example 1

- 210 death-eligible homicides with African-American offenders: 70 offenders (30 percent) receive the death penalty.
- 150 death-eligible homicides with white offenders: 50 offenders (30 percent) receive the death penalty.
- Conclusion: No evidence of discrimination, despite the fact that a disproportionate number of African Americans are sentenced to death.

Example 2

- 210 death-eligible homicides with African-American offenders: 90 offenders (43 percent) receive the death penalty.
- 150 death-eligible homicides with white offenders: 30 offenders (20 percent) receive the death penalty.
- Conclusion: Possibility of discrimination because African Americans are more than twice as likely to be sentenced to death.

noting that most homicides are intraracial, used the number of African-American and white homicide *victims* as a surrogate measure.⁷³ He created an indicator of "execution risk" by dividing the number of executions (for murder) of persons of a given race in a given year by the number of homicide victims of that race who died in the previous year.⁷⁴ Using data from 1930 through 1967, Kleck found that the risk of execution was somewhat greater for whites (10.43 executions per 1,000 homicides) than for African Americans (9.72 executions per 1,000 homicides) for the United States as a whole, but that African Americans faced a greater likelihood of execution than whites in the South (10.47 for African Americans vs. 8.39 for whites).⁷⁵ He concluded that the death penalty "has not generally been imposed for murder in a fashion discriminatory toward blacks, except in the South."⁷⁶

None of the statistics cited here, including the execution rates calculated by Kleck, prove that the death penalty has been imposed in a racially discriminatory manner, in the South or elsewhere, either before the *Furman* decision or after the *Gregg* decision. As we pointed out earlier, conclusions of racial discrimination in sentencing rest on evidence indicating that African Americans are sentenced more harshly than whites after other legally relevant predictors of sentence severity are taken into account.

Even if it can be shown that African Americans face a greater risk of execution than whites, we cannot necessarily conclude that this reflects racial prejudice or racial discrimination. The difference might be the result of legitimate legal factors—the heinousness of the crime or the prior criminal record of the offender, for example—that juries and judges consider in determining whether to sentence the offender to death. If African Americans are sentenced to death at a higher rate than whites because they commit more heinous murders than whites or because they are more likely than whites to have a prior conviction for murder, then we cannot conclude that criminal justice officials or juries are making racially discriminatory death penalty decisions.

The data presented in Table 8.2 provide some evidence in support of this possibility. Among prisoners under sentence of death in 2013, African Americans were more likely than either Hispanics or whites to have a prior felony conviction. African Americans and Hispanics also were more likely than whites to have been

TABLE 8.2 Criminal History Profile of Prisoners under Sentence of Death in the United States, 2013

	Race of Prisoner		
	African American	Hispanic	White
Prior felony conviction (%)	72.6	64.8	63.9
Prior homicide conviction (%)	9.6	6.6	9.8
On parole at the time of capital offense (%)	18.5	18.3	14.3

SOURCE: Department of Justice, Bureau of Justice Statistics, *Capital Punishment 2013—Statistical Tables* (Washington, DC: U.S. Government Printing Office, 2014), Table 8.

on parole when they were arrested for the capital offense. There were, on the other hand, very few differences in the proportions of whites and African Americans who had a prior homicide conviction.

Just as the presence of racial disparity does not necessarily signal the existence of racial discrimination, the absence of disparity does not necessarily indicate the absence of discrimination. Even if it can be shown that African Americans generally face the same risk of execution as whites, we cannot conclude that the capital sentencing process operates in a racially neutral manner. Assume, for example, that the crimes for which African Americans are sentenced to death are less serious than those for which whites are sentenced to death. If this is the case, apparent equality of treatment may be masking race-linked assessments of crime seriousness. Moreover, as we noted in our discussion of the non-capital sentencing process, it is important to consider not only the race of the offender but the race of the victim as well. If African Americans who murder whites are sentenced to death at a disproportionately high rate, but African Americans who murder other African Americans are sentenced to death at a disproportionately low rate, the overall finding of "no difference" in the death sentence rates for African-American and white offenders may be masking significant differences based on the race of the victim. As Guy Johnson wrote in 1941,

If caste values and attitudes mean anything at all, they mean that offenses by or against Negroes will be defined not so much in terms of their intrinsic seriousness as in terms of their importance in the eyes of the dominant group. Obviously, the murder of a white person by a Negro and the murder of a Negro by a Negro are not at all the same kind of murder from the standpoint of the upper caste's scale of values . . . instead of two categories of offenders, Negro and white, we really need four offender-victim categories, and they would probably rank in seriousness from high to low as follows: (1) Negro versus white, (2) white versus white, (3) Negro versus Negro, and white versus Negro.⁷⁷

Evidence in support of Johnson's rankings is presented in Box 8.3, which focuses on the "anomalous" cases in which whites have been executed for crimes against African Americans. According to Michael L. Radelet, "the scandalous paucity of these cases, representing less than two-tenths of 1 percent of known executions, lends further support to the evidence that the death penalty in this country has been discriminatorily applied."⁷⁸

There is now a substantial body of research investigating the relationship between race and the death penalty. Most, but not all, of the research tests for both race-of-defendant and race-of-victim effects. Some of these studies are methodologically sophisticated, both in terms of the type of statistical analysis used and the number of variables that are taken into consideration in the analysis. Other studies use less sophisticated statistical techniques and include fewer control variables.

We summarize the results of these studies—presenting the results of the pre-*Furman* studies first and then the results of the post-*Gregg* studies. Our purpose