

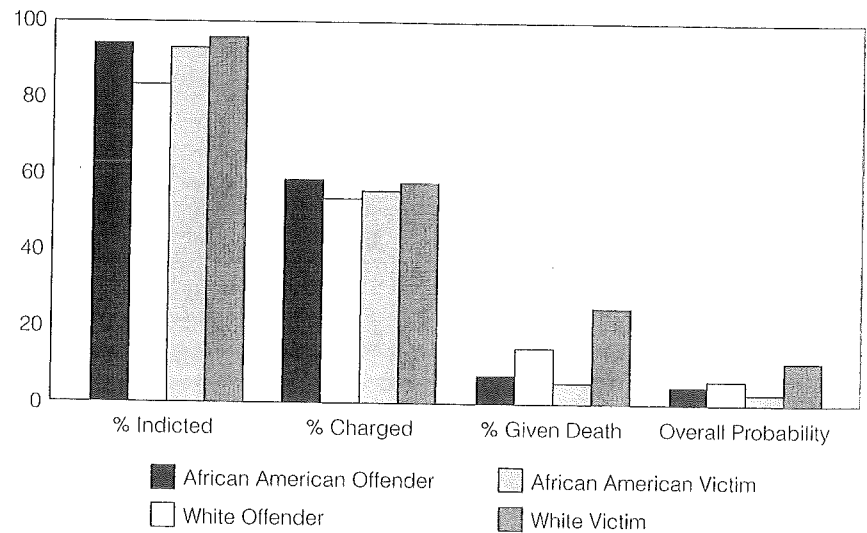


FIGURE 8.2 Death Penalty Decisions in North Carolina, by Race of Offender and Victim, 1930-1940

SOURCE: Data obtained from Harold Garfinkel, "Research Note on Inter- and Intra-Racial Homicides," *Social Forces* 28 (1949), Tables 2 and 3.

The importance of considering both the race of the offender and the race of the victim is further illustrated by the data presented in Figure 8.3. Garfinkel's analysis revealed that African Americans who killed whites were more likely than any of the other race-of-offender/race-of-victim groups to be indicted, charged with, or convicted of first-degree murder. Again, the differences were particularly pronounced at the trial stage of the process. Among offenders charged with first-degree murder, the rate of conviction for first-degree murder ranged from 43 percent for African Americans who killed whites, to 15 percent for whites who killed whites, to 5 percent for blacks who killed blacks, to 11 percent for whites who killed blacks. The overall probability of a death sentence for those convicted of first-degree murder revealed similar disparities. African Americans who killed whites had a substantially higher overall probability of a death sentence than any of the other race-of-offender/race-of-victim groups.

The results of Garfinkel's study suggest that there were pervasive racial differences in the administration of capital punishment in North Carolina during the 1930s. Although Garfinkel did not control for the possibility that the crimes committed by African Americans and the crimes committed against whites were more serious, and thus more likely to deserve the death penalty, the magnitude of the differences "cast[s] doubt on the possibility that legally relevant factors are responsible for these differences."⁹²

Studies of the use of capital punishment for the crime of rape also reveal overt and pervasive discrimination against African Americans in the administration

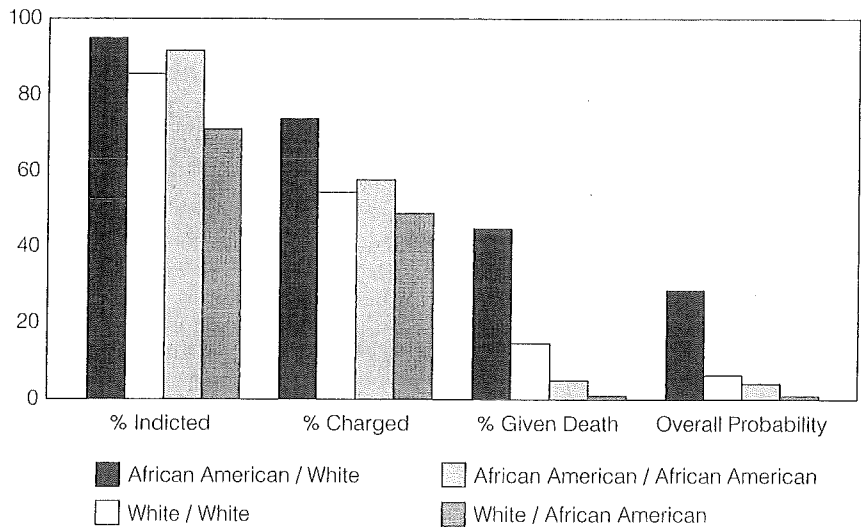


FIGURE 8.3 Death Penalty Process in North Carolina, by Race of Offender and Victim

SOURCE: Data obtained from Harold Garfinkel, "Research Note on Inter- and Intra-Racial Homicides," *Social Forces* 27 (1949), Tables 2 and 3.

era. These studies reveal that "the death penalty for rape was largely used for punishing blacks who had raped whites."⁹³ One analysis of sentences for rape in Florida from 1940 through 1964, for example, revealed that 54 percent of the African Americans convicted of raping whites received the death penalty, compared to only 5 percent of the whites convicted of raping whites. Moreover, none of the eight whites convicted of raping African Americans was sentenced to death.⁹⁴

Marvin E. Wolfgang and Marc Reidel's⁹⁵ study of the imposition of the death penalty for rape in 12 southern states from 1945 through 1965 uncovered a similar pattern. As shown in Table 8.3, they found that 13 percent of the African Americans, but only 2 percent of the whites, were sentenced to death. Further analysis revealed that cases in which African Americans were convicted of raping whites were 18 times more likely to receive a death penalty than were cases with any other racial combinations.

These differences did not disappear when Wolfgang and Reidel controlled for commission of a contemporaneous felony or for other factors associated with the imposition of the death penalty. According to the authors, "All the nonracial factors in each of the states analyzed 'wash out,' that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. The only variable of statistical significance that remains is race."⁹⁶

Critics of the pre-*Furman* research note that most researchers did not control for the defendant's prior criminal record, for the heinousness of the crime, or

TABLE 8.3 Race and the Death Penalty for Rape in the South, 1945-1965

	Sentenced to Death		Not Sentenced to Death	
	N	%	N	%
Race of offender				
African American	110	13	713	37
White	9	2	433	16
Race of offender/victim				
African American/white	113	36	204	14
All other combinations	19	2	902	19

SOURCE: Marvin E. Wolfgang and Marc Reidel, "Race, Judicial Discretion, and the Death Penalty," *American Academy* 407 (1973), pp. 119-133, p. 129, Tables 1 and 2.

for other predictors of sentence severity. Kleck, for example, although affirming that additional controls probably would not eliminate "the huge racial differentials in use of the death penalty" for rape, asserted that the more modest differences found for homicide might disappear if these legal factors were taken into consideration.⁹⁷

A handful of more methodologically sophisticated studies of capital sentencing in the *pre-Furman* era controlled for these legally relevant factors. An analysis of death penalty decisions in Georgia, for example, found that African American defendants and defendants who murdered whites received the death penalty more often than other equally culpable defendants.⁹⁸ These results were limited, however, to borderline cases in which the appropriate sentence (life in prison or death) was not obvious.

An examination of the capital sentencing process in *pre-Furman* Texas also found significant racial effects.⁹⁹ Paige H. Ralph and her colleagues controlled for legal and extralegal factors associated with sentence severity. They found that offenders who killed during a felony had a higher probability of receiving the death penalty, as did non-white offenders and offenders who killed whites. In fact, their analysis revealed that the race of the victim was the most important extralegal variable; those who killed whites were 25.2 percent more likely to be sentenced to death than those who killed non-whites. The authors concluded, "Overall we found a significant race-related bias in the death sentencing of non-Anglo-American murderers: the victim's race, along with legal factors taken together, emerged as the pivotal element in sentencing."¹⁰⁰

The results of these studies, then, reveal that the Supreme Court was correct in its assumption of the potential for racial discrimination in the application of the death penalty in the *pre-Furman* era. The death penalty for rape was primarily reserved for African Americans who victimized whites (for a discussion of gendered racism in capital sentencing, see Box 8.4). The evidence with respect to homicide, although less consistent, also suggests that African Americans and

Box 8.4 African-American Female Executions—Gendered Racism in Capital Sentencing

In an article published in *Criminal Justice Review* in 2008, David V. Baker contends that criminal justice researchers have largely ignored the use of capital punishment for African-American women. In an attempt to remedy this, Baker examines the "contextual peculiarities giving rise to Black female executions since the earliest periods of American history."¹⁰¹

Baker presents data that illustrate the situations that gave rise to the execution of African-American slave women during the colonial and antebellum periods. He notes that "slave women mostly strangled, clubbed, stabbed, burned, shot, poisoned, or hacked to death their White masters, mistresses, overseers, and even their owner's children."¹⁰² These crimes were prompted by mistreatment, including sexual abuse, at the hands of their owners. According to Baker, "The historical record makes clear that slave women fought back viciously against the sexualized brutality of White masters," either by killing their owners or members of their owner's family or by intentionally aborting pregnancies that resulted from sexual abuse by their owners. Slave women often were assisted by slave men or, occasionally, by white coconspirators. However, Baker notes that slave women were given harsher punishments than slave men; they were often burned at the stake while their male coconspirators were hanged.

particularly African Americans who murdered whites, were sentenced to death at a disproportionately high rate. We now turn to an examination of the capital sentencing process in the post-Gregg period.

Post-Gregg Studies

In *Gregg v. Georgia*, the Supreme Court upheld Georgia's guided discretion death penalty statute and stated that "the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here."¹⁰³ The Court, in essence, predicted that race would not affect the capital sentencing process in Georgia or in other states with similar statutes. Critics of the Court's ruling were less optimistic. Wolfgang and Reidel, for example, noted that the post-*Furman* statutes narrowed but did not eliminate discretion. They suggested that "it is unlikely that the death penalty will be applied with greater equity when substantial discretion remains in these post-*Furman* statutes."¹⁰⁴

Other commentators predicted that the guided discretion statutes would simply shift discretion, and thus the potential for discrimination, to earlier stages in the capital sentencing process. They suggested that discretion would be transferred to charging decisions made by the grand jury and the prosecutor. Thus, according to Bowers and Glenn L. Pierce, "under post-*Furman* capital statutes, the extent of arbitrariness and discrimination, if not their distribution over stages of the criminal justice process, might be expected to remain essentially unchanged."

There also is the possibility that the "guidance" provided under guided discretion statutes does not sufficiently narrow the discretion inherent in the death

penalty process. If a state's capital sentencing statute identifies a long list of broad aggravating circumstances that justify imposition of the death penalty, such that virtually any first-degree murder case would be eligible for the death penalty, the statute would provide little, if any, guidance regarding the types of cases for which the death penalty would be appropriate. For example, the Arizona statute (A.R. S. 13-751), which specifies that the death penalty can be imposed only if there is at least one statutorily defined aggravating circumstance (and no mitigating circumstances sufficiently substantial to call for leniency), lists 14 aggravating circumstances. Included are: whether the defendant was convicted of a contemporaneous serious offense, whether the defendant created a grave risk of death to others; whether the defendant committed the offense as consideration for the receipt of anything of pecuniary value; and whether the defendant committed the offense in an especially heinous, cruel, or depraved manner.

To determine whether the Arizona statute genuinely narrowed the class of persons eligible for the death penalty, Spohn and Kaiser examined all first-degree murder cases in Maricopa County (Phoenix) from 2002 to 2012.¹⁰⁵ They found that there was at least one aggravating circumstance in 856 (98.8 percent) of the 866 cases filed during that time period. More than three-fourths of the cases involved commission of a contemporaneous felony, 40 percent involved either a murder committed in an especially heinous, cruel, or depraved manner or a murder for pecuniary gain, and a third involved risk of death to another person or persons. Almost all of the first-degree murder cases, in other words, were death-eligible under the Arizona statute. They also found that prosecutors filed a notice of intent to seek death in only 25 percent of these cases. Given that all of the cases were death-eligible, prosecutors had substantial discretion in deciding whether to seek death or not.

There is additional evidence in support of the argument that the guided discretion statutes did not eliminate arbitrariness and capriciousness in capital sentencing. (See also Box 8.5.) Studies conducted during the past three decades document substantial discrimination in the application of the death penalty under post-*Furman* statutes. In fact, a 1990 report by the U.S. General Accounting Office (GAO) concluded that there was "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision."¹⁰⁶

The GAO evaluated the results of 28 post-*Gregg* empirical studies of the capital sentencing process. They found that the race of the victim had a statistically significant effect in 23 of the 28 studies; those who murdered whites were more likely to be charged with capital murder and to be sentenced to death than those who murdered African Americans. The authors of the report noted that the race of the victim affected decisions made at all stages of the criminal justice process. They concluded that these differences could not be explained by the defendant's prior criminal record, by the heinousness of the crime, or by other legally relevant variables.

With respect to the effect of the race of the defendant, the GAO report concluded that the evidence was "equivocal."¹⁰⁷ The report noted that about half of the studies found that the race of the defendant affected the likelihood of being

Box 8.5 Discrimination in the Georgia Courts: The Case of Wilburn Dobbs

Statistical evidence of racial disparities in the use of the death penalty, although important, cannot illustrate the myriad ways in which racial sentiments influence the capital sentencing process. Consider the case of Wilburn Dobbs, an African American on death row in Georgia for the murder of a white man.¹⁰⁸ The judge trying his case referred to him in court as "colored" and "colored boy," and two of the jurors who sentenced him to death admitted after trial that they used the racial epithet "nigger." Moreover, the court-appointed lawyer assigned to his case, who also referred to Dobbs as "colored," stated on the morning of trial that he was "not prepared to go to trial" and that he was "in a better position to prosecute the case than defend it." He also testified before the federal court hearing Dobbs's appeal that he believed that African Americans were uneducated and less intelligent than whites and admitted that he used the word "nigger" jokingly.¹⁰⁹

The federal courts that heard Dobbs's appeals ruled that neither the racial attitudes of the trial judge or the defense attorney nor the racial prejudice of the jurors required that Dobbs's death sentence be set aside. The Court of Appeals, for instance, noted that although several of the jurors made statements reflecting racial prejudice, none of them "viewed blacks as more prone to violence than whites or as morally inferior to whites."¹¹⁰

The Court's reasoning in this case led Stephen Bright to conclude that "racial discrimination which would not be acceptable in any other area of American life today is tolerated in criminal courts."¹¹¹

charged with a capital crime or receiving the death penalty; most, but not all, of these studies found that African Americans were more likely than whites to be sentenced to death. The authors of the report also stated that although some studies found that African Americans who murdered whites faced the highest odds of receiving the death penalty, "the extent to which the finding was influenced by race of victim rather than race of defendant was unclear."¹¹²

A more recent review of research on the capital sentencing process reached a somewhat different conclusion. David C. Baldus and George Woodworth reviewed post-*Furman* research, concluding that there was no systematic evidence of discrimination against black defendants.¹¹³ The authors suggested three possible explanations for this change from the pre-*Furman* period. First, the change might reflect the fact that prosecutors are striving for equal treatment.¹¹⁴ Alternatively, it might reflect greater racial diversity among judges, prosecutors, and defense attorneys and/or the fact that defendants facing capital charges are provided with more competent defense attorneys than they were in the past. Consistent with the results of the GAO report, Baldus and Woodworth reported that a number of the studies they reviewed continued to find a race-of-victim effect. They concluded that "while the discriminatory application of the death penalty continues to occur in some places, it does not appear to be inherent to the system; in other words, it is not an inevitable feature of all American death-sentencing systems."¹¹⁵

A comprehensive review of the post-*Gregg* research is beyond the scope of this book.¹¹⁶ Instead, we summarize the results of four studies. The first, a study

of the capital sentencing process in Georgia,¹¹⁷ is one of the most sophisticated studies conducted to date. It also figured prominently in the Supreme Court's decision in *McCleskey v. Kemp*. The second is a study of capital sentencing patterns in eight states,¹¹⁸ the third is a study of death sentencing for California homicides during the 1990s,¹¹⁹ and the fourth is a study of the effects of race and gender on capital sentencing in Kentucky.¹²⁰ We then discuss recent research on the federal capital sentencing process. We end this section by summarizing the results of a study of race and the probability of execution in the post-Gregg period.

Race and the Death Penalty in Georgia David Baldus and his colleagues analyzed the effect of race on the outcomes of more than 600 homicide cases in Georgia from 1973 through 1979.¹²¹ Their examination of the raw data revealed that the likelihood of receiving a death sentence varied by both the race of the offender and the race of the victim. The first column of Table 8.4 shows that 35 percent of the African Americans charged with killing whites were sentenced to death, compared with only 22 percent of the whites who killed whites, 6 percent of the whites who killed African Americans, and 6 percent of the African Americans who killed other African Americans.

Baldus and his coauthors also discovered that the race of the victim played an important role in both the prosecutor's decision to seek the death penalty and the jury's decision to impose the death penalty (see columns 2 and 3, Table 8.4). The victim's race was a particularly strong predictor of the prosecutor's decision to seek or waive the death penalty. In fact, Georgia prosecutors were nearly four times more likely to request the death penalty for African-American offenders convicted of killing whites than for African-American offenders convicted of killing African Americans. The effect of the race of the victim was less pronounced when the offender was white; prosecutors sought the death penalty in 38 percent of the cases with white offenders and white victims but only 21 percent of the cases with white offenders and black victims.

The authors of this study then controlled for more than 200 variables that might explain these disparities; they included detailed information on the defendant's background and prior criminal record, information concerning the circumstances and the heinousness of the crime, and measures of the strength of

TABLE 8.4 Death Penalty Decisions in Post-Gregg Georgia

	Overall Death Sentencing Rate	Prosecutor's Decision To Seek Death Penalty	Jury's Decision To Impose Death Penalty
Offender and Victim Race			
Black/Black	0.35 (45/130)	0.58 (72/125)	0.58 (45/77)
White/Black	0.22 (51/230)	0.38 (85/224)	0.56 (51/91)
Black/White	0.06 (17/232)	0.15 (34/231)	0.40 (14/35)
White/White	0.14 (2/14)	0.21 (3/14)	0.67 (2/3)

SOURCE: David C. Baldus, George G. Woodworth, and Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty* (Boston: Northeastern University Press, 1990), Tables 30 and 34.

evidence against the defendant. They found that inclusion of these controls did not eliminate the racial differences. Although the race of the offender was only a weak predictor of death penalty decisions once these legal factors were taken into consideration, the race of the victim continued to exert a strong effect on both the prosecutor's decision to seek the death penalty and the jury's decision to impose the death penalty. In fact those who killed whites were more than four times as likely to be sentenced to death as those who killed African Americans.

Further analysis revealed that the effects of race were not uniform across the range of homicide cases included in the analysis. Not surprisingly, race had little effect on decision making in the least aggravated cases, in which virtually no one received the death penalty, or in the most heinous cases, in which a high percentage of murderers, regardless of their race or the race of their victims, were sentenced to death. Rather, race played a role primarily in the mid-range of cases where decision makers could decide either to sentence the offender to life in prison or to impose the death penalty. In these types of cases, the death-sentencing rate for those who killed whites was 34 percent compared with only 14 percent for those who killed African Americans.

These findings led Baldus and his colleagues to conclude that the race of the victim was "a potent influence in the system"¹²² and that the state of Georgia was operating a "dual system" for processing homicide cases. According to the authors, "Georgia juries appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases; and, as compared to white victim cases, the level of aggravation in black victim cases must be substantially greater before the prosecutor will even seek a death sentence."¹²³

Anthony Amsterdam's¹²⁴ analysis was even blunter. Noting that 9 of the 11 murderers executed in Georgia between 1973 and 1988 were African American and that 10 of the 11 had killed white victims, Amsterdam asked, "Can there be the slightest doubt that this revolting record is the product of some sort of racial bias rather than a pure fluke?"¹²⁵

Some commentators would be inclined to answer this question in the affirmative. They would argue that the statistics included in the Baldus study are not representative of death penalty decisions in the United States as a whole; rather, they are peculiar to southern states such as Georgia, Texas, Florida, and Mississippi. A study by Samuel R. Gross and Robert Mauro addressed this possibility.

Death Penalty Decisions in Eight States Gross and Mauro examined death penalty decisions in the post-*Gregg* era (1976–1980) in eight states—Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia. They found that the risk of a death sentence was much lower for defendants charged with killing African Americans than for defendants charged with killing whites in each of the eight states included in their study. In Georgia and Mississippi, for example, those who killed whites were nearly 10 times as likely to be sentenced to death as those who killed African Americans. The ratios for the other states included in the study were 8:1 (Florida), 7:1 (Arkansas), 6:1 (Illinois, Oklahoma, and North Carolina), and 5:1 (Virginia).

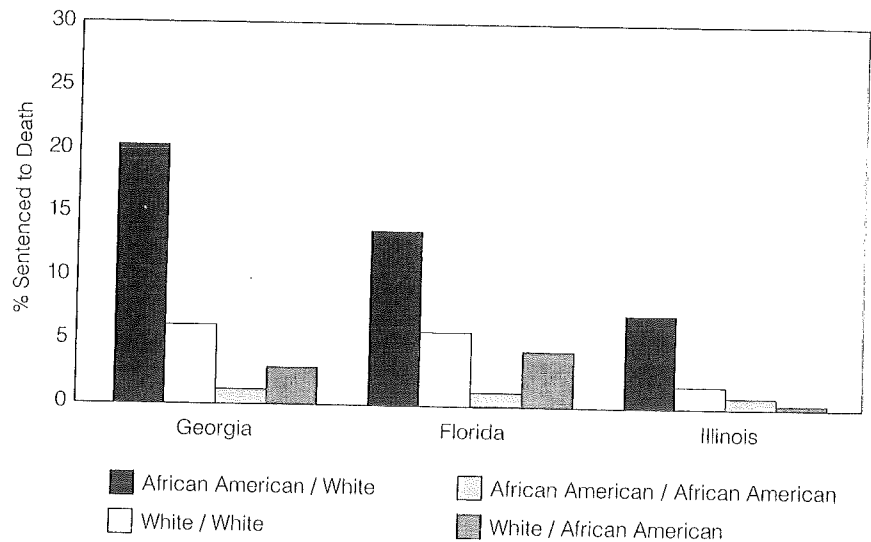


FIGURE 8.4 Death Sentence Rates in Post-*Furman* Era, by Race of Offender and Victim

SOURCE: Data obtained from Samuel R. Gross and Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* (Boston: Northeastern University Press, 1989).

The authors also discovered that African Americans who killed whites faced the greatest odds of a death sentence. Figure 8.4 presents the percentages of death sentences by race of suspect and race of victim for the three states with the largest number of death-eligible cases. In Georgia, 20.1 percent of the African Americans who killed whites were sentenced to death, compared with only 5.7 percent of the whites who killed whites, 2.9 percent of the whites who killed African Americans, and less than 1 percent (0.8 percent) of the African Americans who killed African Americans. There were similar disparities in Florida and Illinois. In fact, in these three states only 32 of the 4,731 cases with African-American defendants and African-American victims resulted in a death sentence, compared with 82 of the 621 cases involving African-American defendants and white victims.

These racial disparities did not disappear when Gross and Mauro controlled for other legally relevant predictors of sentence severity. According to the authors, the major factual finding of this study is simple: there has been racial discrimination in the imposition of the death penalty under post-*Furman* statutes in the eight states that we examined. The discrimination is based on the race of the victim, and it is a remarkably stable and consistent phenomenon . . . The data show "a clear pattern, unexplainable on grounds other than race."¹²⁷

Like the Baldus study, then, this study of the capital sentencing process in eight states showed that the race of the victim was a powerful predictor of death sentences.

Race and the Death Penalty in California The two studies described previously provide compelling evidence of victim-based racial discrimination in the use of the death penalty in the years immediately following the *Gregg*

decision. Recent research in states such as Maryland,¹²⁸ North Carolina,¹²⁹ Virginia,¹³⁰ Ohio,¹³¹ and California¹³² provides equally compelling evidence of racial disparities in the capital sentencing process during the 1990s and early 2000s.

Research conducted in California illustrates this more recent trend. In 2000, California had the largest death row population in the United States, with 64 inmates under sentence of death.¹³³ Of those inmates on death row, 39 percent were white, 36 percent were African American, 20 percent were Hispanic, 3 percent were Asian, and 2 percent were Native American.

To determine whether these figures reflected racial/ethnic bias in the imposition of the death penalty in California, Pierce and Radelet examined the characteristics of all offenders sentenced to death in the state from 1990 through 2000 (for homicides committed from 1990 to 1999). They found that offenders who killed whites were 3.7 times more likely to be sentenced to death than offenders who killed African Americans; those who killed whites were 4.7 times more likely to be sentenced to death than those who killed Hispanics.¹³⁴ To address the possibility that these differences were because the murders of whites were more aggravated or more heinous than the murders of non-whites, the authors divided the homicides in their sample into three categories: those with no aggravating circumstances, those with one aggravating circumstance, and those with two aggravating circumstances. As the authors noted, "If homicides that victimized whites are indeed more aggravated than other homicides, death sentencing rates will be similar across each category of victim's race/ethnicity for each level of aggression."¹³⁵

The results presented in Table 8.5 do not support the hypothesis that those who kill whites are sentenced to death more often because their crimes are more heinous. Although the death sentencing rate increased for each of the three groups as the number of aggravating circumstances increased, for each level of aggravation, those who killed whites were substantially more likely than those who killed African Americans or Hispanics to be sentenced to death. These findings were confirmed by the results of a multivariate analysis, which simultaneously controlled for the number of aggravating circumstances, the race/ethnicity of the victim, and the population density and racial makeup of the county in which the crime occurred. The authors found that those who killed African Americans or Hispanics were significantly less likely than those who killed whites to be sentenced to death. They concluded that "the data clearly show that the race and ethnicity of homicide victims is associated with the imposition of the death penalty."¹³⁶

Race and the Death Penalty in Kentucky Vito and his colleagues used data on death eligible homicide cases from 2000 to 2010 in Kentucky, focusing on the prosecutor's decisions to seek the death penalty and to offer a plea bargain after filing a notice of intent to seek death.¹³⁷ They controlled for the statutory aggravating circumstances, the race of the offender, the race of the victim, the sex of the offender, and the sex of the victim. They found that prosecutors were more than three times more likely to seek the death penalty if the victim was

TABLE 8.5 Race and the Death Penalty in California, Controlling for Aggravating Circumstances

	Death Sentence Rate per 100 Offenders	Ratio of White Victim Rate/Other Victim Rate
No Aggravating Circumstances		
White Victim	0.775	—
African-American Victim	0.102	7.60
Hispanic Victim	0.070	11.07
One Aggravating Circumstance		
White Victim	4.560	—
African-American Victim	1.999	2.28
Hispanic Victim	1.583	2.88
Two Aggravating Circumstances		
White Victim	24.286	—
African-American Victim	12.162	2.00
Hispanic Victim	14.773	1.64

SOURCE: Glenn L. Pierce and Michael L. Radelet, "The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999," *Santa Clara Law Review* 46 (2005), Table 6.

female. There were, however, no differences in the likelihood that the prosecutor would seek the death penalty if the victim was white and the offender was African American.

When the authors examined the prosecutor's decision to offer a plea bargain following a notice of intent to seek death, they found that cases involving African-American defendants and white victims were about half as likely to result in a plea offer than cases involving other offender race/victim race combinations. Moreover, African Americans convicted of murdering whites who were not offered a plea deal were more likely than all other offenders to be sentenced to life without the possibility of parole, the most punitive punishment after a death sentence.

Race and the Probability of Execution The research discussed thus far focused on the likelihood that a defendant would be charged with a capital crime and, if so, the probability of a death sentence. In an article entitled, "Who Survives on Death Row?" David Jacobs and his colleagues addressed a different question—that is, what factors affect whether an offender who has been sentenced to death will be executed?¹³⁸

This is an important question, given that only about 10 percent of offenders on death row ultimately are executed. Most death-sentenced offenders eventually are resentenced to life in prison or some other sentence as a result of a successful appeal, are pardoned as a result of a clemency proceeding, are freed as a result of

of evidence of their innocence, or die of natural causes while on death row. Yet there is very little research designed to identify the individual and contextual factors that determine who, among all those sentenced to death, ultimately will be executed. As Jacobs and his colleagues noted, "whether victim race continues to explain the fate of condemned prisoners after they have been sentenced remains a complete mystery."¹³⁹

The authors of this study used data on offenders sentenced to death from 1973 to 2002 to examine the ways in which "offender attributes and the political and social context of the states affect post-sentencing execution likelihood." When they examined the characteristics of those who were executed, they found that 55.5 percent were white, 34.9 percent were African American, and 9.7 percent were Hispanic; among cases for which the race of the victim was known, 80.3 percent of the offenders who were executed had white victims and only 19.7 percent had non-white victims.¹⁴⁰

The results of the authors' multivariate analysis revealed that African Americans who killed whites had significantly greater odds of execution than did other death-sentenced offenders and that Hispanics also faced a somewhat higher probability of execution if their victims were white. The authors concluded that "the post-sentencing capital punishment process continues to place greater value on white lives" and that "despite efforts to transcend an unfortunate racial past, residues of this fierce discrimination evidently still linger, at least when the most morally critical decision about punishment is decided."¹⁴¹

Race and the Death Penalty in the Post-Gregg Era The results of the death penalty studies conducted in the post-*Gregg* era provide compelling evidence that the issues raised by the Supreme Court in *Furman* have not been resolved. The Supreme Court's assurances in *Gregg* notwithstanding, racial discrimination in the capital sentencing process did not disappear as a result of the guided-discretion statutes enacted in the wake of the *Furman* decision. Methodologically sophisticated studies conducted in southern and non-southern jurisdictions, and in the 1990s and 2000s as well as in the 1970s and 1980s, consistently conclude that the race of the victim affects death sentencing decisions. Many of these studies also conclude that the race of the defendant, or the racial makeup of the offender/victim pair, influences the capital sentencing process.

According to Austin Sarat, professor of jurisprudence and political science at Amherst College, "the post-*Furman* effort to rationalize death sentences has utterly failed; it has been replaced by a policy that favors execution while trimming away procedural protection for capital defendants. This situation only exacerbates the incompatibility of capital punishment and legality."¹⁴² Scott W. Howe, a professor of criminal law at Chapman University School of Law, similarly contends that widespread evidence of racial disparity in capital sentencing undermines "confidence in the neutrality of capital selection nationwide. . . . The studies, considered as a group, imply racial discrimination."¹⁴³ (See Box 8.6 for a discussion of the effect of the race and gender of the victim on the capital sentencing process.)

Box 8.6 The Death Penalty and the Race and Gender of the Victim: Are Those Who Kill White Women Singled Out for Harsher Treatment?

Research on the application of the death penalty reveals that those who kill whites are more likely than those who kill African Americans to be sentenced to death. There also is evidence that those who kill females are more likely than those who kill males to receive the death penalty. This raises the question, Are those who kill white women sentenced to death at a disproportionately high rate?

To answer this question, Marian R. Williams and Jefferson E. Holcomb analyzed data on homicides in Ohio for the years 1981 to 1994.¹⁴⁴ When they looked at the raw data, they found that white females made up only 15 percent of all homicide victims but 35 percent of all death sentences. Cases in which the offender was a white male and the victim was a white female made up 12 percent of all homicides but 28 percent of all death sentences; cases in which the offender was an African-American male and the victim was a white female made up 2 percent of all homicide cases but 8 percent of death sentences.¹⁴⁵

Multivariate analysis confirmed these findings. The authors controlled for the race, gender, and age of the victim and the offender; whether a gun was used; whether the victim and offender were strangers; whether the homicide involved another felony or multiple victims; and the location of the crime. They found that homicides with female victims were more than twice as likely as those with male victims to result in a death sentence and that homicides with white victims were about one and a half times more likely as those with African-American victims to result in a death sentence. Further analysis revealed that offenders who victimized white females had significantly higher odds of being sentenced to death than offenders who victimized African-American females, African-American males, or white males.¹⁴⁶

Williams and Holcomb concluded that the results of their study, which they acknowledged provided only a preliminary test of their hypothesis, suggested "that the central factor in understanding existing racial disparity in death sentences may be the severity with which those who kill White females are treated relative to other gender-race victim combinations."¹⁴⁷ This suggests that criminal justice officials and jurors who make death penalty decisions believe that homicides involving white women are especially heinous and that those people who kill white women are therefore more deserving of death sentences than those who kill men or women of color.

Race and the Federal Capital Sentencing Process

As noted earlier, state legislatures moved quickly to revise their death penalties in the wake of the 1972 *Furman* decision. The federal government, however, did not do so until 1988, when passage of the Anti-Drug Abuse Act made the death penalty available for certain serious drug-related offenses. The number of federal offenses for which the death penalty is an option increased substantially as a result of legislation passed during the mid-1990s. The Federal Death Act of 1994 added over 40 federal offenses to the list of capital crimes. The Antiterrorism and Effective Death Penalty Act of 1996 added an additional 12 offenses.¹⁴⁸

The Department of Justice has adopted a set of standards and procedures—commonly known as the “death penalty protocol”—to govern death penalty decisions in federal cases. According to this protocol, a U.S. attorney cannot seek the death penalty without prior written authorization from the attorney general. The steps in the capital case review process are as follows:¹⁴⁹

- U.S. attorneys are required to submit all cases involving a charge for which the death penalty is a legally authorized sanction, regardless of whether the attorney recommends seeking the death penalty, to the Capital Case Unit of the Criminal Division for review.
- The Capital Case Unit reviews the case and prepares an initial analysis and recommendation regarding the death penalty.
- The case is forwarded to the attorney general’s Capital Case Review Committee, which is composed of senior U.S. Justice Department lawyers—the members of the committee meet with the U.S. attorney and defense counsel responsible for the case, review documents submitted by all parties, and make a recommendation to the attorney general.
- The attorney general makes the final decision regarding whether to seek the death penalty.

According to the U.S. Department of Justice, these procedures are designed to ensure that the federal capital sentencing process is fair and equitable: “Both the legal rules and the administrative procedures that currently govern federal capital cases incorporate extensive safeguards against any influence of racial or ethnic bias or prejudice.”¹⁵⁰

The U.S. Department of Justice has conducted two studies of the federal capital sentencing process. The first study, which was released in 2000, revealed that from 1995 to 2000, U.S. attorneys forwarded for review 682 death-eligible cases. Eighty percent of the defendants in these cases were racial minorities: 324 (48 percent) were African American; 195 (29 percent) were Hispanic; and 29 (4 percent) were Native American, Asian, and other races.¹⁵¹ This study also revealed, however, that participants in the review process were less likely to recommend (or to seek) the death penalty if the defendant was a racial minority. As shown in Table 8.6, U.S. attorneys recommended the death penalty in 36 percent of the cases involving white defendants, compared with 25 percent of those involving African-American defendants and 20 percent of those involving Hispanic defendants. There was a similar pattern of results for the Capital Case Unit recommendation (to the attorney general) to request the death penalty, the attorney general’s decision to authorize the U.S. attorney to file a notice of intent to seek the death penalty, and the U.S. Department of Justice’s final decision to seek the death penalty.

The data presented in Table 8.6 demonstrate that although the U.S. Justice Department’s study did not find racial bias in the decisions that followed the U.S. attorney’s initial decision to submit the case for review, it did find that significant majority of the cases that were submitted for review involved African American and Hispanic defendants. The attorney general at the time, Janet Ren