

## ABSTRACT

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GEORGIA 1995-2004: HAS ANYTHING  
CHANGED?

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This study examines the relationship between the race of victim and combination of victim and offender races on a prosecutor's decision to seek the death penalty. The objective is to offer an updated look at the Georgia capital sentencing system between 1995 and 2004. In an older Georgia study based on data from the 1970s, race of victim was found to be of critical importance in capital case processing. Given the changes that have occurred in Georgia's death penalty system to address disparate sentencing along with the number of years that have gone by, an argument can be made that a more current investigation may yield new findings. Using data from the Atlanta Constitution Journal, a logistic regression analysis is conducted. Results reveal that although race of victim is still relevant to a prosecutor's decision to seek a death sentence, its influence has diminished.

RACE AND THE DEATH PENALTY IN GEORGIA 1995-2004: HAS ANYTHING  
CHANGED?

By

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# Dedication

To my family.

## Acknowledgements

I would like to express my sincerest gratitude to Dr. Ray Paternoster for his expertise and limitless patience during this process. I also thank Dr. Brian Johnson and Dr. Jean McGloin for their helpful commentary.

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## Chapter 1: Introduction

There is no such thing as a perfect social system. Criminologists and practitioners are all too familiar with the formidable challenge of evenhandedly administering justice in all circumstances. Overtime, the American criminal justice system has struggled to gain and maintain its legitimacy in the eyes of the public and to debate over the fairness of capital punishment is a quintessential example.

### Purpose of the Study

This thesis will examine whether the race of the victim and the combination of victim and offender races influence the decision made by a prosecutor to seek the death penalty in the state of Georgia. To meet this end, I control for a number of both legal and extralegal factors<sup>1</sup>. The purpose of my thesis is to extend past research by introducing an analysis of new data for the state of Georgia ranging from 1995-2004.

Thus far, the most comprehensive and insightful study conducted on race and capital sentencing is by Baldus, Woodworth and Pulaski (1990). Their research focused on the charging, conviction and sentencing processes in Georgia from 1970-1979. Given the decades that have gone by, it is quite possible that the results of the current investigation may not be the same as those found in the past by these scholars.

A legal argument could be made that since the late 1970s, Georgia has had more experience and time to adjust to legislation instituted to combat racially charged

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<sup>1</sup> *Extralegal factors* include such things as race, gender, and social class and are considered to be an illegitimate basis for decisions by criminal justice actors.

*Legal factors* include such things as type of crime, level of aggravation in a crime, and criminal history and are considered to be a legitimate basis for decisions made by criminal justice actors. They relate directly to the criminal behavior in question.

decision-making. In the previous study on Georgia, the researchers only had data up to three years after the new capital sentencing protocol was implemented in 1976. As it is, receiving a death sentence is a rare event and so the ability to evaluate outcomes in death cases over a period of only three years may be overly ambitious.

Particular attention will be paid to the argument that the dimension of racism has been merely transformed from its more overt form in the past into a more subjective or subtle form in our current time. For example, a practice specifically targeting Black offenders for execution is a more overt form of racism. Alternatively, disproportionately executing those that kill white victims could be viewed as a subtle or ‘repackaged’ form of racism because discrimination is indirect.

### Importance of the Study

An updated evaluation of Georgia’s death penalty is necessary to determine if legal prescriptions have created significant change in how death eligible cases are processed, especially when it comes to race. One would hope that in the many years since the last study conducted in Georgia, race no longer matters. It is not unreasonable to therefore infer that since our society has progressed and become much more socially diverse (e.g. religious pluralism, immigration, sexual orientation etc.) the affects of this changing landscape would translate into our legal system.

### Overview

The first recorded execution took place in the Jamestown Colony of Virginia in 1608 (Edelman, 2006). Since that time, the discourse on capital punishment has oscillated between executions viewed as morally reprehensible (Mooney and Lee,

2000; Henderson, 2006) or executions as untenable given their inability to deter crime (Sellin, 1959; Bowers and Pierce, 1973; Zimring and Hawkins, 1986; Radelet and Akers, 1996; Bailey and Peterson, 1997; Dolling, et al., 2009). Overtime, the extant literature on the death penalty has expanded its focus to include disparate outcomes in sentencing (Blume, et al., 1997; Berk, et al., 2005). Legal challenges to the administration of capital punishment usually refer to Section 1 of the 14<sup>th</sup> amendment that states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

or the 8<sup>th</sup> amendment which guards against the following:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Three critical Supreme Court rulings have crafted the modern dialogue on capital punishment and race. The 1972 decision in *Furman v. Georgia* ushered in a new era when it was decided that while capital punishment *itself* may not be inherently unconstitutional, the arbitrary *process* that results in disparate outcomes is unconstitutional. At this time, the death penalty in the U.S was effectively rescinded on the condition that states would revamp their capital trial procedures in an effort to rid the system of unfettered discretion. In 1976, the *Gregg v. Georgia* decision reinstated the death penalty with the Supreme Court accepting the ‘Georgia model’ of capital sentencing procedure. In addition, the Court ruled on related cases *Proffitt v. Florida*, *Jurek v. Texas*, *Roberts v. Louisiana* and *Woodson V. North Carolina*. Finally, the 1987 ruling in *McClesky v. Kemp* was an important turning point in the

way that the federal system viewed claims of sentencing discrimination based on race.

This thesis will be broken down into several parts. Chapter 2 presents a background on the topic including why race is an important factor in justice research. This chapter also incorporates a synopsis of death penalty history through the experience of black Americans, key theoretical perspectives on the topic as well as the relevant Supreme Court rulings on executions and sentencing disparity. Chapter 3 is a literature review that outlines the body of research on race and capital sentencing as well as the role of the prosecutor in decision-making. Chapter 4 is dedicated to my research methods and data. Chapter 5 will present results and analysis of the data. Finally, Chapter 6 centers on a discussion of the findings, concluding thoughts on what the current study means for race and capital punishment as well as potential areas for future research.

## Chapter 2: Background

It is difficult to have a balanced discussion on the death penalty without referencing race. In 2003, Amnesty International published a report that highlighted an interesting fact: although whites account for less than 50% of homicide victims, nearly 80% of those executed since 1976 have been convicted for the murder of white victims (Amnesty International Report, 2003). Most recently, the Criminal Justice Project of the National Association for the Advancement of Colored People (NAACP) published updated figures further illustrating this disparity. **Table 1** shows the breakdown of offender-to-victim racial combination data for each execution in the U.S from 1976 through January 1, 2009.

Table 1  
Defendant-victim racial combination (Executions, 1976-2009)

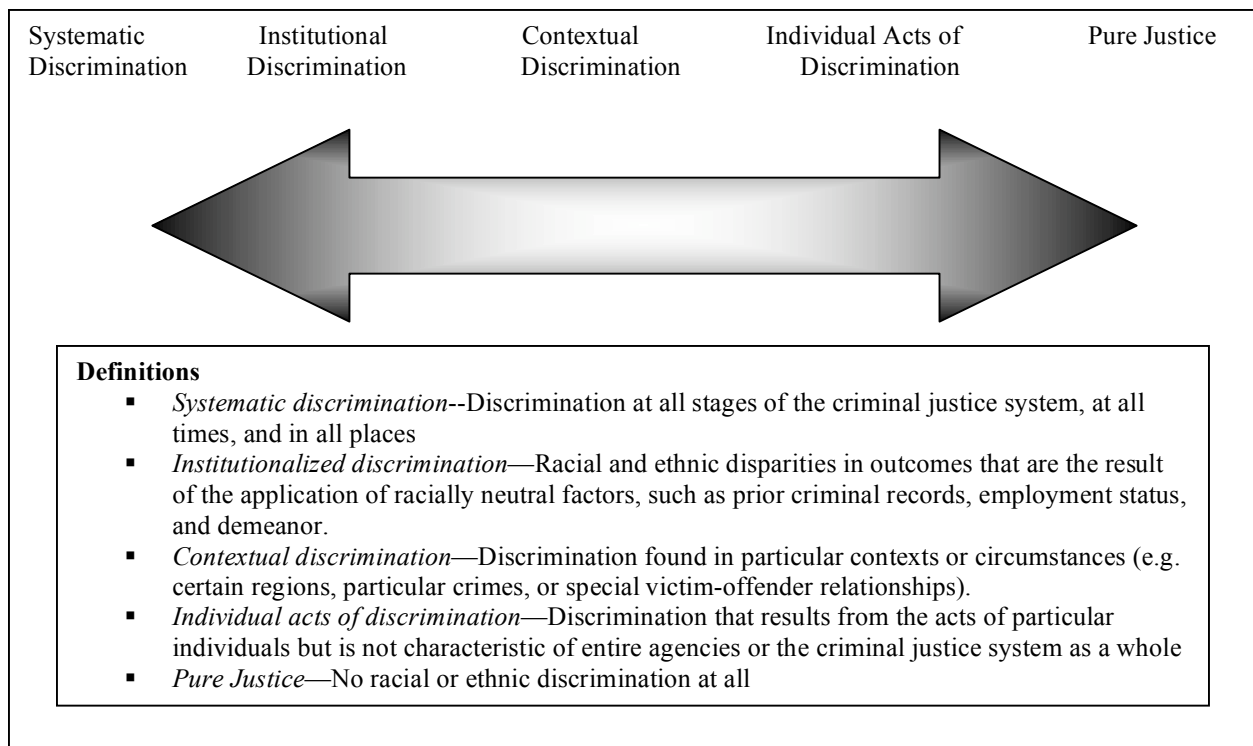
	White Victim	Black Victim	Latino/a Victim	Asian Victim	N.A. Victim
White Defendant	602 (52.99%)	15 (1.32%)	13 (1.14%)	4 (0.35%)	0 (0%)
Black Defendant	236 (20.77%)	125 (11.00%)	15 (1.32%)	10 (0.88%)	0 (0%)
Latino/a Defendant	38 (3.35%)	2 (.18%)	33 (2.90%)	2 (0.18%)	0 (0%)
Asian Defendant	2 (0.18%)	0 (0%)	0 (0%)	5 (0.44%)	0 (0%)
Native American Defendant	13 (1.14%)	0 (0%)	0 (0%)	0 (0%)	2 (0.18%)
<b>TOTAL:</b>	<b>891 (78.43%)</b>	<b>142 (12.50%)</b>	<b>61 (5.37%)</b>	<b>21 (1.85%)</b>	<b>2 (0.18%)</b>

Note: In addition, there were 19 defendants executed for the murders of multiple victims of different races. Of those, 11 defendants were white, 5 black and 3 Latino. (1.67%)

**Source:** *Death Row U.S.A (Winter 2009)*, A quarterly report by the Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc.<sup>1</sup>

Discrimination and disparity are among the most important questions that arise concerning race and the justice system. Walker et al. (2007) defines disparity as “a difference but one that does not necessarily involve discrimination...a difference that can be explained by legitimate factors” (18). On the other hand, discrimination is “a difference based on *differential treatment* of groups without reference to an individual’s behavior or qualifications” (18). **Figure 1** displays the discrimination-disparity continuum ranging from one extreme of systematic discrimination to another of pure justice where no discrimination is purported to exist.

**Figure 1**  
Discrimination-Disparity Continuum (Walker, et al., 2007)



On its face, **Table 1** clearly shows that black victim cases are underrepresented and white victim cases are overrepresented based on their

percentage in the total number of murder cases. However, one must not automatically dismiss the possibility that legally justifiable reasons exist for why there are significantly higher levels of executions for those that kill white victims. One plausible explanation is that white victims' cases may display higher levels of aggravation thus increasing the likelihood of a death sentence. On the other hand, it may be true that discrimination occurs and justice actors specifically target individuals that kill white victims for execution. The point of the matter is that we cannot be sure just by looking at the raw data because there is a fundamental difference between disparity and discrimination. These numbers invite deeper exploration into the nature of the relationship between race and capital sentencing.

### Why Race?

I have decided to use race as my key independent variable because research has suggested that race plays a role in determining who is more likely to receive the death penalty (Paternoster and Brame, 2008; Paternoster, et al., 2004; Phillips, 2008; Baldus et al., 1990; Bowers and Pierce, 1980). The ability of the criminal justice system to act impartially is called into question when extralegal factors help to explain case processing. A justice system that discriminates based on race cannot uphold the good faith claim that it equally represents and protects the rights of all those subject to its laws. This infringes on its claim to be a legitimate social institution. As one author puts it, "a comparatively excessive death sentence offends basic constitutional notions of justice" (Baldus, 1986:137). There also exists the risk of alienating minority groups by reinforcing the long-held perception that the government and its laws were created for the benefit of the majority. Finally, if the

“death worthiness” of an individual is partially determined by skin color, it means that the American legal system is not as far removed from its disgraceful racial past, as we would like to believe.

My interest in race stems from the fact that it has always been a contentious feature in the study of crime, justice and social problems in general. The claim of racial injustice is a serious accusation that, when confirmed, contravenes the principle of living in a ‘melting pot’ society where everyone, regardless of race, culture or ethnicity, is considered to be a valued piece of a single fabric. In cases where such assertions are debunked, the lingering resentment directed at those who opt to ‘play the race card’ attests to the potency of using race to explain differing treatment or experiences. In either case, race and any injustice attached to it have a way of riling up passions that are not easily quelled.

It is not a novel argument that the legal system has perpetuated the belief that the lives of whites are worth more than those of blacks. For instance, historic laws that dictated black men would receive an automatic death sentence for the rape of a white woman but mentioned no such punishment for the rape of a black woman are indisputable (Wriggins, 1983)<sup>2</sup>. In modern times, common rhetoric includes the claims that instances of police brutality and profiling are most often made by Blacks in disadvantaged communities. The argument follows that law enforcement is more likely to view whites as a group to be protected but blacks are to be contained and surveilled (Kennedy, 1997).

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<sup>2</sup> The author briefly discusses the Penal Codes of states including Georgia (1816), Pennsylvania (1700) and Virginia (1819), which outlined that death be the punishment for a slave or free person of color that raped a white woman. However, white men convicted of raping a black woman could be fined or imprisoned at the discretion of the court.



On the other hand, there is a new and emerging outlook about race relations that suggests we have entered into a 'post racial' America. From this perspective, the increasing number of successful minority groups in the arena of television, journalism, professional sports, politics and higher education suggests that race is no longer a barrier to success or a factor in decision making (Wise, 2009). As a result, Blacks (or other minority groups) are no longer justified in using race as an excuse for their disadvantage.

In short, there are alternative views on the enduring consequence of race. Some feel that it still matters a great deal, especially within the law, while others feel that we have moved beyond that reality. Evaluating race effects and the justice system is a useful strategy to either prove or disprove claims of racial injustice and/or determine whether the safeguards we have set up to get rid of racial injustice, especially within capital punishment, are actually working.

Moreover, the decision to use race as the key independent variable for this investigation did not come about without considering the complex literature on this topic. Traditionally, race has referred to biological differences between individuals including skin color, color and texture of hair and facial features (Walker et al, 2007). Overtime, our society has come to realize that clear-cut distinctions based on race are nearly impossible to make. For example, how do we categorize mixed race people and their experiences? Race is best described as a label or "social construct" instead of a naturally occurring characteristic that distinguishes between individuals or groups (Rodriguez, 2000). Despite its social construction, we continue to give race real currency in our everyday interactions.

Finally, I decided against using ethnicity in this investigation. Ethnicity refers to “differences between groups of people based on cultural customs, such as language, religion, foodways, family patterns, and other characteristics” (Walker, et al.2007: 10). Ethnicity is a complicated construct because of its broad and overlapping nature. For example, Hispanic is an ethnic designation that could include members from any racial category so it is difficult to offer meaningful insight into how one’s “ethnic origin” subjects them to particular kinds of treatment. A more practical reason for excluding ethnicity from this study is that the dataset did not have enough cases on Hispanic or Asian groups to offer meaningful evaluation. Instead, I only analyzed cases that included solely black and white defendants and victims.

### Why Georgia?

Georgia is central to this investigation because I was able to obtain rich data that provided information on death eligible cases for the years 1995-2004. Furthermore, Georgia is the ideal setting for such an inquiry because this state has been the historic battleground upon which legal contestation regarding the death penalty has been fought. Prior to 1972 when the application of the death penalty had been ruled unconstitutional, Georgia had carried out the most executions in the twentieth century (Bright, 2006). Since then, Georgia has consistently been ranked as one of the top execution sites in the country (Death Penalty Information Center)<sup>3</sup>. All of these factors lead me to conclude that Georgia acts as an ideal ‘litmus test’ for whether much has changed when it comes to investigating the relationship between race and the death penalty.

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<sup>3</sup> The death penalty was officially re-enacted in Georgia on March 28<sup>th</sup>, 1973. The first execution after that event did not take place in Georgia until 1983 (Death Penalty Information Centre).

## Capital Punishment and the Black Experience

It has been said that the 1960s and 1970s were “the most turbulent in all of American criminal justice history” (Walker, 1998:180). The term “social revolution” is the most accurate in describing these decades. Although the Vietnam War demonstrations, women’s rights protests and Motown pop culture were in full effect, one issue remained at the forefront of the American experience during this era: race.

Racial inequality in the U.S was met with strong opposition with the growth of the civil rights movement. Mississippi, Alabama and Georgia represented target locations of the movement given the acute contentious relationship between blacks and whites in the Deep South. Activists such as Martin Luther King Jr. and Medgar Evers advocated against the informally sanctioned mistreatment of blacks within their communities. Civil rights leaders were also dedicated to addressing what Black Panther Party affiliate Stokely Carmichael coined as ‘institutional racism’ (Carmichael, 2005).

One such sphere in which Black grievances were strongly felt was the legal system. For centuries, blacks in America were vulnerable to a kind of rogue justice at the hands of slave patrols and lynch mobs. In 1704, the colony of Carolina enacted the south’s first Patrol Act. The act stipulated that patrols were to prevent any type of congregating among blacks by immediately dispersing of them and searching their homes and possessions at will (Reichel, 1988). It appears that slave patrolling was not just about catching runaway slaves but also to prevent any type of gathering of blacks because of the threat of a potential uprising. In contrast to the modern police that

developed from the Anglo Saxon model in the early 1830s, police in the South were organized for the specific purpose of regulating the black population (Dulaney, 1996).

The relationship between blacks and the justice system, from its inception, has been characterized by bitterness and suspicion to say the least. In 1857, as Chief Justice of the Supreme Court, Roger Taney demonstrated how the justice system felt toward blacks when he emphatically stated in a majority opinion that blacks were “so far inferior that they had no rights, which the white man was bound to respect” and “of an inferior order, altogether unfit to associate with the white race.”<sup>4</sup> Blacks were subjected to “Slave Codes” which were laws instituted to manage the ever growing slave population (Ogletree and Sarat, 2006). For example, a black person that had hit a white person even in self-defense could face execution. Also, whatever possessions a slave had were considered the property of their enslavers. With the formal end of slavery and the advent of the era of Reconstruction, the resulting hostility and violence between blacks and whites continued. White Americans, particularly in the South, resented the new freedom of blacks and perceived a loss of privilege that they once had. In an effort to replicate the forces of slavery, “Black Codes” were instituted to help whites maintain their dominant social, economic and political leverage (Ogletree and Sarat, 2006).

Black Codes were strict laws stipulating that black men were, for example, required to remove their hats in the presence of a white man and required to have a license to carry a knife or gun, unlike a white person (Ogletree and Sarat, 2006). The number of reported lynchings escalated after Reconstruction, presumably as a way for

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<sup>4</sup> Dred Scott v. Sanford, 60 U.S. 393, 407 (1857). The majority opinion ruled that all blacks whether slave or free were not and could never become citizens of the United States.

whites to express their anger with the changing social system (Ogletree and Sarat, 2006). Kennedy (1997) notes that between 1882 and 1968, at least 4,743 lynchings were recorded in the United States and 72% were inflicted on blacks. The states with the ranked top five worst records for lynching were Mississippi, Georgia, Texas, Louisiana and Alabama. With the migration of Blacks from the South to the North, the dynamic of race relations changed. Blacks were in a better position to find jobs, education and, most importantly, become better organized politically and socially.

The Jim Crow Era opened the door to another form of racial practices aimed at legally restricting the civil rights of blacks. Jim Crow emphasized segregation of the races from buses, bathrooms, movie houses and schools (Ogletree and Sarat, 2006). Jim Crow laws were different from Black Codes because they sprung from different circumstances, the former coming well after Reconstruction. Jim Crow did not provide for the rampant use of execution as punishment as did much of the Black Codes. While the outward display of harsh punishment became much less common than the extreme cases of castrations and lynchings that had dominated the preceding decades, the status quo remained (Ogletree and Sarat, 2006). For most of history, blacks have been the majority of those executed by the government. Race cannot be separated from the history of capital punishment.

### Conflict and Racial Threat Perspectives

In general, race and its relation to the justice system can be understood through the lens of several theories. An example is conflict theory, which is a branch of critical criminology and fundamentally recognizes crime as a social construction (Quinney, 1970). In other words, what our society has come to perceive as ‘criminal

behavior' does not have its origin in a higher moral order. Instead, our understanding of crime comes about because of how we are raised and is essentially based on what society *deems* criminal through its laws. Conflict theory posits that law is created through conflict and "competition over money status and power" (Vold et al., 2002: 227). The state "does not represent common interests, but instead represents the interests of those with sufficient power to control its operation" (228). Put in another way, those in power define what behaviors are criminal and what actions should be punished most harshly, usually to the disadvantage of those who lack power.

This theory appropriately depicts the plight of lower class Blacks in the criminal justice system. For example, crack cocaine is merely a different form of powder cocaine but the average sentences for crack cocaine possession are substantially higher than for powder cocaine, 100:1 (Walker et al., 2007). Blacks are the highest percentage of users of crack cocaine. As a result, predominantly poor blacks end up with longer prison sentences compared to others (largely middle to upper class whites) that use cocaine.

Using the language of conflict theorists, it could be said that crack cocaine laws are an attempt by those in power (middle to upper-class whites) to criminalize the behavior of the powerless (lower class blacks) in order to maintain their position of dominance. In essence, the state and its laws are created for the subjugation of those who do not have the resources or power to create laws and change their social position.

Racial threat theory engenders a similar conflict approach but directly addresses the interplay of power and race. In his seminal work, Blalock (1967)

essentially argues that inter-group competition creates hostility between the dominant and minority groups. The dominant white group may initially tolerate a minority group in small numbers, but as the minority group grows in size and influence these changes create a perceived threat to the dominant group. The effect of this perceived threat is the creation and support of policies with a purpose of eradicating this threat whether directly or indirectly.

### Laissez-Faire and Colorblind Racism Perspective

Bobo and Smith (1998) state, “the underlying racial hierarchy in the U.S has not been fundamentally changed” (184). Furthermore, “white-dominated society and institutions have never intended full inclusion for blacks and do not show any real desire to bring it about” (184). These authors advance the position of ‘laissez-faire’ racism as the new form of racism where “blacks are blamed as the cultural architects of their own disadvantaged status” (212) instead of the political, judicial and economic structures that have remained relatively unchanged.

In *Racism without Racists*, Bonilla-Silva (2006) prods deeper into the transformation of overt racism into a ‘colorblind’ phenomenon. He describes colorblind racism as “a racial ideology which propagates the myth that race has all but disappeared as a factor shaping the life chances of all Americans” (208). In addition, this new form of racism is a “racial ideology which explains contemporary racial inequality as the outcome of non-racial dynamics” (2) such as market dynamics, naturally occurring phenomenon or cultural limitations. Colorblind racism takes a cue from conflict theory in that “ideologies of the powerful are central in the production and reinforcement of the status quo” (26) and “aids in the maintenance of

white privilege without fanfare” (3). Bonilla-Silva finds that this modern racism “thrives off the ugliness of the past” (211) in a reference to Jim Crow laws and slavery where blacks were clearly the victims of racist laws, policies, and practices.

### Legal Precedents

#### *Furman v. Georgia*

*When the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.*

*-Justice Brennan [Furman v. Georgia, 408 U.S. 238 (1972).]*

Starting in the 1970s, the legal system found it impossible to ignore the connection between race and the death penalty in a set of important rulings. The murder of William Micke led the nation’s highest Court to reconsider arguments of the 8<sup>th</sup> and 14<sup>th</sup> amendment’s applicability to capital punishment. The words of Justice Brennan summarized the 5-4 majority opinion of the Court which felt strongly that capital sentencing procedures were severely flawed in how they were administered. The defendant, William Henry Furman, was a black male of low IQ found guilty of killing white homeowner William Micke in a botched home burglary. The Supreme Court agreed with Furman when it found that as currently practiced, the death penalty in the U.S was cruel and unusual and thus in violation of the 8<sup>th</sup> amendment.

The important nuance the Court emphasized was that the death penalty itself was not unconstitutional but rather the *procedures* in place to determine who would receive this penalty. Addressed by the Court was the fact that juries were given unguided discretion in their decision to convict in capital cases. It was found that a



lack of standards resulted in the death penalty being applied in an arbitrary and capricious fashion, thus making it unconstitutional. Each of the nine justices of the Court wrote a separate opinion, making *Furman v. Georgia* the longest written opinion in the Court's history (Hass and Inciardi, 1988). The controlling majority opinion of the Court, or "holding", was the one quoted above but there were notable departures made by concurring Justices Brennan and Marshall.

During their tenure in the Supreme Court, both Justices voted against the death penalty in every single case that came before them (Mello, 1996). Brennan and Marshall held a firm belief that capital punishment itself was unconstitutional and went against contemporary moral conscience. As Brennan notes, "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity" (*Furman v Georgia*, 1972) For these men, law was as a "vehicle for advancing common good" and were convinced that "...abolishing the death penalty, rather than upholding it, best served the legitimate needs or goals of our society" (Mello, 1996:143). While both justices voted in affirmation of striking down the death penalty in the *Furman* case, these insights make clear that their reasons for reaching this decision were fundamentally different from the majority.<sup>5</sup>

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<sup>5</sup> In another concurring opinion, Justice Douglas argued that it was possible for a law to be nondiscriminatory on its face but applied in a discriminatory manner thereby violating the Equal Protection Clause of the Fourteenth Amendment. In his finding, the existing state statutes for the death penalty in Georgia were "pregnant with discrimination". As a result, death penalty itself was unconstitutional because it was "not compatible with the equal protection of the laws that is implicit in the ban on cruel and unusual punishments". Also with the majority, Justice White focused more on the infrequency with which the death penalty was imposed. His main concern was that even for the most violent crime, such as murder, there was "no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." Finally, Justice Stewart supported the reasoning of the majority by describing the randomness of receiving a death sentence as being much like getting struck by lightning. Although he was not convinced that racial discrimination

In addition, Marshall 's opinion was unique, and most relevant to the current study, given that he directly addressed the issue of race. To reiterate, the controlling opinion of the Court did not specifically recognize the question of racial disparity in capital sentencing but rather the wide range of discretion in recommending the death penalty. However, Justice Marshall made a point of centering on race being unjustly used as an extra-legal factor in sentencing decisions. When the ruling of the Court was conferred in 1972, *Furman v. Georgia* symbolized the justice systems acknowledgement of a 'dual' or two-tiered justice system; that is, a system where laws were applied differently in similar contexts. When *Furman* was decided, there were about 560 inmates on death row in the country (Melusky and Pesto, 2003). Prior to *Furman*, the Supreme Court had been given some headway when the California Supreme Court ruled that under the state's constitution, the death penalty was "cruel and unusual" punishment (California v. Anderson, 1972).

Theories regarding how the social and political times coalesced in leading to the *Furman* decision could easily form the basis of another study. One reason often mentioned is the "heightened awareness" of race discrimination within the justice system as a result of the influential civil rights movement (Walker, 1998: 190). The *Sourcebook of Criminal Justice Statistics* shows that between 1930 and 1967, more than half of those executed were Black. Data also showed that 90 percent of individuals executed by the state for rape during this time were Black. Interestingly, almost all of those Blacks were from the Southern states (Bureau of Justice Statistics, 1993).

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had been proven in *Furman*, he found it impossible to "tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Indeed, the *Furman* ruling changed the discourse on capital punishment in a profound way. With *Furman*, the death penalty had been completely taken off the table as an option for punishment. Nevertheless, some have been highly critical of the *Furman* ruling given that it failed to center on “race as the elephant in the room” (Ogletree, 2006: 63). Although the federal government did not revise its death penalty procedures until 1994, 35 states immediately worked to change (or create if they did not previously have them) their procedural directives for handing down a capital death sentence (Melusky and Pesto, 2003). The implementation of new standards followed one of two models. The *North Carolina model* was the more extreme option in an effort to limit discretion because it called for mandatory death sentences for certain types of crimes. On the other hand, the *Georgia model* had a more flexible quality of “guided discretion” (Edelman, 2006:9).

The Georgia model made a defendant eligible for the death penalty if the person was convicted of common-law murder defined as “the unlawful killing with malice aforethought”, and if the sentencing jury found at least one of ten possible aggravating factors listed in **Table 2** (Baldus, et al., 1990). Another important aspect of this model was that it separated a capital trial into two stages. This new bifurcated system essentially meant that the guilt phase and sentencing phase of a trial would be considered separately although by the same jury (Edelman, 2006).

During the sentencing phase, juries are offered mitigating factors as evidence in reaching a decision and the offender is not limited by the types of mitigating factors that can be used. The more typical mitigating factors include: (1) whether or not the defendant acted under extreme duress or domination of another person (2)

whether at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, or the affects of intoxication (3) the age of the defendant at the time of the crime (4) whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his or her conduct; (5) any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime (Edelman, 2006).

**Table 2:**  
Georgia Guided Discretion Death Penalty Statute

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1. the offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
2. the offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;
3. the offender by his act of murder, armed robbery, or kidnapping 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 of murder, rape, armed robbery, or kidnapping 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 of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;
9. the offense of murder was committed by a person in, or who has escaped from, the lawful custody in a place of lawful confinement; and
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

*Source:* 1973 Ga. Laws 74, § 3 (referencing GA. CODE ANN. § 27-2534.1 (1973)).

A benefit of the bifurcated system found in the Georgia model was that it helped to avoid a situation where the accused could incriminate themselves by trying to prove their innocence (guilt phase) while simultaneously trying to include mitigating circumstances for why they should be given life imprisonment instead of death (sentencing phase) if convicted (*Crampton v. Ohio*, 1970). By creating a system where these stages were separated, a jury would be better able to sift through the convoluted process of rendering verdicts that were both informed and fair to the defendant.

Moreover, the Georgia model also sanctioned the addition of an appellate review for all capital death sentences (Nakell and Hardy, 1987). This important requirement meant that the Georgia Supreme Court would have to look at every single death case and decide whether the decision to execute had been made in a discriminatory or standard-less fashion. With this automatic appeal process, the appellate Court now had a responsibility to “review the record and determine whether the evidence supports the jury’s finding of a statutorily designated aggravating circumstance” (Baldus, 1990:25). The Court was also expected to determine whether the death sentence was excessive and disproportionate when compared to other cases of similar quality when it came to the type of crime and the characteristics of the defendant (Liebman, 2007). To meet this end, Georgia Supreme Court judges would be supplied with a report from the trial judge in the form of a questionnaire. The questionnaire would contain six questions that help to disclose whether factors such as race played a role in sentencing.

In the aftermath of *Furman*, we witnessed an almost frenzied effort on the part of the states to overhaul their capital sentencing structures. It seemed as though legislatures and legal actors alike were all too eager to return to the business of execution. Whether or not the Court would accept these revised efforts would be determined until four years later. *Gregg v. Georgia* led the ‘quintet’ of consolidated cases that the U.S Supreme Court decided upon on July 2, 1976. Once again, the Supreme Court would tackle the constitutionality of the administration of the death penalty, but this time its conclusions would be vastly different from that of *Furman*. *Gregg v. Georgia* was another watershed moment in the history of capital punishment.

*Gregg v. Georgia*

*While some jury discretion still exists, the discretion to be exercised is controlled by player and objective standards so as to produce and so far as possible non-discriminatory application.*

*-Justice Stewart [Gregg v. Georgia, 428 U.S. 153 (1976).]*

On November 21, 1973 Troy Gregg murdered and robbed Fred Edward Simmons and Bob Durwood Moore in Gwinnett County, Georgia. At his trial, the jury found him guilty of two counts of murder and robbery and subsequently sentenced him to death for each count (*Gregg v. Georgia*). In appealing his case, Gregg argued that the penalty of death under the Georgia statute was cruel and unusual according to the 8<sup>th</sup> and 14<sup>th</sup> amendments.

In a 7-2 decision, the Court ruled that the death penalty did not violate the 8<sup>th</sup> and 14<sup>th</sup> amendment and that the new Georgia model for capital trials and judicial

review sufficiently protected defendants from “arbitrary and capricious” outcomes. In other words the general consensus of the Court’s majority was that these new regulations ensured that the consideration of extra legal factors (e.g. race) and unguided jury discretion would no longer be a problem in capital sentencing. After *Gregg*, many states incorporated the Georgia model into their laws.

In his separate majority opinion in *Gregg*, Justice White placed more emphasis on the appellate review process in helping him to reach his decision. His confidence in these legislative mandates are clear when he stated it can “no longer be said that the penalty (of death) is being imposed so wantonly, freakishly and so infrequently that it loses its usefulness as a sentencing device. There is therefore a reason to expect that Georgia’s current system will escape the infirmities which were found to invalidate its previous system under *Furman*” (*Gregg v. Georgia*, 1976).

Not surprisingly, Justices Marshall and Brennan dissented from this majority. In his written opinion, Justice Brennan reiterated that the debate over capital punishment could not be “explained solely as the result of differences over the practical wisdom of a particular government policy” but at its very base, this debate “has been waged on moral grounds” (*Gregg v. Georgia*, 1976). He further went on to say that “foremost among the moral concepts recognized in the cases and inherent in the Clause is the primary moral principal that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings –a punishment therefore must not be so severe as to be degrading to human dignity” (*Gregg v. Georgia*, 1976).



Similarly, Justice Marshall took the position that the debate over the death penalty should not be grounded in how it was applied, but rather whether it should ever be used at all. Justice Marshall sidestepped the question of whether the Georgia model was constitutional and, instead, focused how unnecessary the death penalty was in meeting the goals of deterrence and retribution (*Gregg v. Georgia*, 1976). In his opinion, he declares “the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive” (*Gregg v. Georgia*, 1976). Obviously, judging from the strong statements of the Justices, the decision in this case did not come without controversy.

As previously mentioned, *Gregg v. Georgia* was one of five cases that the Court decided on with regard to the legality of capital sentencing statutes. The North Carolina model, which became the subject of *Woodson v. North Carolina*, made the death penalty mandatory for anyone convicted of first-degree murder. On June 3, 1974 James Woodson claimed that he was coerced into participating in the robbery of a local convenience store by three of his friends. During the robbery, a customer was severely injured and the store clerk was shot dead. Although Woodson was not the triggerman, he was convicted of first-degree murder and given an automatic death sentence (*Woodson v. North Carolina*, 1976).

After appealing his conviction, the Supreme Court in a 5-4 vote found that this model was unconstitutional and struck down the mandatory sentence. There were three problems that the Court had with this statute. First, the law “departed from contemporary standards” because throughout history the public had always rejected mandatory death sentences. Second, the “constitutional deficiency is not eliminated

by the mere formal removal of all sentencing power from juries in capital cases” (Woodson V. North Carolina, 1976). Essentially, a new problem could arise were juries would refuse to convict in certain cases because they may feel that the mandatory death penalty is too severe. Third, the North Carolina model did not allow for consideration of individual backgrounds given that the 8<sup>th</sup> amendment speaks to the individuality and uniqueness of the worth of every human being (Woodson v. North Carolina, 1976).

*Roberts v. Louisiana* mirrored that of *Woodson V. North Carolina*. Stanislaus Roberts was convicted of killing the owner of a gas station that he, along with three other men, had planned to rob. In this case, his codefendants testified against him for the prosecution (Melusky and Pesto, 2003). In Louisiana, the new death penalty statute stated that if a jury found that there was intent to kill or inflict “great bodily harm” within one of five categories of homicide (one of them being during a robbery) then the death penalty would be given automatically (Melusky and Pesto, 2003). Capital punishment would be implemented even in a situation where the jury recommended mercy. In addition, juries would be instructed on the crimes of second-degree murder and manslaughter even if none of the evidence in the case would suggest that those charges applied. However, if a jury did decide to convict based on the latter charges then it would essentially mean that the defendant would be acquitted of all greater charges (Roberts v. Louisiana, 1976).

In a 5-4 vote, the U.S Supreme Court decided that Louisiana’s model was in fact unconstitutional and struck it down. The Court’s reasons were similar to those presented in *Woodson v. North Carolina*. Namely, this mandatory statute inhibited the

inclusion of mitigating factors as it related to the crime or the individual's background, which completely goes against the 8<sup>th</sup> and 14<sup>th</sup> Amendment. Another reason why the majority struck down the statute is because it "plainly allows jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate" (*Woodson v. Louisiana*, 1976).

In contrast to the *Woodson* and *Roberts* case, *Jurek v. Texas* and *Proffitt v. Florida* shared success when the Supreme Court upheld their statutes. In *Jurek*, the defendant was charged with first-degree murder for killing Wendy Adams. The facts of the case state "by choking and strangling her with his bare hands, and by drowning her in after throwing her into a river...in the course of committing and attempting to commit kidnapping of and forcible rape upon the said victim" (*Jurek v. Texas*, 1976). After his conviction, Jurek appealed the case on the grounds that the death penalty was cruel and unusual and that Texas' sentencing procedure was unconstitutional. In a 7-2 vote, the Court rejected both of Jurek's claims, thus accepting the Texas model of capital sentencing. The Court found that the Texas statute was admissible because it allowed members of the jury to consider all types of mitigating circumstances. Again, it allowed members of the jury to focus on the unique context of both the crime and background of the defendant.<sup>6</sup>

In *Proffitt*, the defendant "stabbed a sleeping man with a butcher knife while burglarizing his home, and while awaiting trial had volunteered to a psychiatrist that

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<sup>6</sup> The Texas statute required that juries answer three questions: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

had had an uncontrollable desire to kill again” (Melusky and Pesto, 2003:109). After his conviction, Proffitt appealed on the same grounds as in *Jurek*. Once again, in a 7-2 vote, the Supreme Court ruled that the Florida model was acceptable. Florida’s statute outlined a two-step process where, if convicted of a capital crime, a jury would return an ‘advisory verdict’. Subsequently, the trial judge had the responsibility to decide on whether the defendant should receive life imprisonment or death. In reaching a decision on sentencing, the statute also outlined the judge’s obligation to submit a written explanation of their decision to the Florida Supreme Court as part of the automatic review included in this model. In short, the Supreme Court considered these safeguards to be sufficient in avoiding ‘arbitrary and capricious’ decisions by the lower courts.

The consolidated cases, lead by *Gregg v. Georgia* resulted in the reinstatement of the death penalty in the U.S. All of these cases touched upon the question of arbitrary sentencing. In the opinion of the Court, most of these new statute models were able to correct any flaws that could occur with jury discretion.

It is necessary to state that at the time when *Gregg* was decided, the Court had no empirical data to support whether the procedural forms would actually work in eliminating disparity. The Court *thought* that these new legal procedures might work but they had nothing to substantiate this claim. In his opinion, Justice Stewart implied that the Court did not have solid affirmation that procedural reform would work when he said “on their face, these procedures seem to satisfy the concern of *Furman*”<sup>7</sup> However the issue of race still had not been directly addressed by the Court. *Furman*

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<sup>7</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976)

was the closest that the Supreme Court had come to recognizing the possibility of racial disparity but *Gregg* had swept such issues back under the rug and renewed the optimism that the legal system could remedy itself. Over a decade later, the Supreme Court would have no choice but to take on the question of racial disparity and inconsistent application of the death penalty.

*McClesky v. Kemp*

*But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification...*

*-Justice Powell [McCleskey v. Kemp, 481 U.S. 279 (1987).]*

Warren McCleskey was found guilty on two counts of robbery and one count of murder in the death of a white police officer in Fulton County, Georgia. In appealing his conviction, McCleskey argued that his death sentence was unconstitutional because it was “administered in a racially discriminatory manner” thus in violation of both the 8<sup>th</sup> and 14<sup>th</sup> amendments (*McCleskey v. Kemp*, 1987). In order to prove his claim, McCleskey referred to a study conducted by Professor David Baldus and colleagues which revealed after controlling for hundreds of case characteristics, the odds of a death sentence for those who kill white victims in Georgia were on average 4.3 times higher than for those who killed non-white victims (Baldus et al., 1990). In using empirical research, McCleskey made the bold statement that he was unfairly targeted by the justice system to receive the death penalty simply because his victim had been a white person.

*McCleskey* was unique because it brought to the fore the idea that the widespread usage of extra-legal factors in capital sentencing was empirically

supported and should thus be recognized by the courts. *McCleskey* suggested that these empirical findings should invalidate the death sentences of all similar cases in the state of Georgia. In a 5-4 vote, the Court rejected the arguments set forth by the petitioner.

Writing for the majority, Justice Powell made clear that in presiding over these types of cases, their “analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving ‘the existence of *purposeful* discrimination’” (*McCleskey v. Kemp*, 1987). The Court rejected the results of the Baldus Study finding that “such general statistical evidence about the operation of Georgia’s capital sentencing system cannot be the basis for an inference that *McCleskey* himself was deliberately discriminated against” (Paternoster, Brame and Bacon, 2008:210). In the eyes of the Court, it was not enough for the petitioner to highlight trends of racial disparity and then make the assumption that it automatically applied to his or her case. If *McCleskey* were to have any semblance of success in his arguments he would have to “demonstrate that the prosecutors, judges and jurors in his particular case had an intent to discriminate and acted on that intent (Paternoster, Brame and Bacon, 2008:210).

Furthermore, Justice Powell argued that while there may be a risk of racial injustice there are also other kinds of prejudice that are just as likely if not more so. For example, other unexplained disparities could relate to such things as the gender of the defendant, gender of the courtroom actors, or physical attractiveness of the defendant or victim (*McCleskey v. Kemp*, 1987). The concern that the majority articulated in their response was that if *McCleskey*’s claims, based on statistics, were

allowed by the Court it would leave the door open for all types of claims of general correlation rather than clear and direct causal evidence. One could extend this argument to possibly conclude that all people that commit crime would then try to use the latest research and paint themselves as victims of the justice system rather than take responsibility for their criminal behavior. Finally, the majority made the suggestion that if there was some credence to the McCleskey claims based on the Baldus Study evidence then the proper place for it to be considered should be the state legislatures (McCleskey v. Kemp, 1987).

Justice Brennan implored that while McCleskey was *unable* to prove that race was an extra legal factor used in his specific case, it should not matter. In Justice Brennan's opinion, he noted that *Furman* made it clear that the Court was most concerned with "the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one" (McCleskey v. Kemp, 1987). In other words, the fact that McCleskey was able to show a general trend of the influence of race in Georgia should have been enough to raise the alarm that the *risk* of sentencing an offender to death because of race was too great. Furthermore, Justice Brennan found that "...concern for arbitrariness focuses on the rationality of the system as a whole and the fact that a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational" (McCleskey v. Kemp, 1987).

Some have stated that the ruling in *McCleskey* essentially acted as an "obstacle to progress" (Amnesty International Report, 2003: 4). For example, South Carolina murder defendant, Earl Matthews, presented evidence showing that the

prosecutor in the county where he was convicted discriminated against him. In all of the cases in which the prosecutor had sought death, all victims had been white. In addition, testimony given by former employees of the prosecutor evidenced the prosecutor's racial prejudices. Despite these factors that seemed to point to prejudice, Matthews' death sentence was not struck down (Paternoster, Brame and Bacon, 2008)

Similar to *Matthews*, in another South Carolina capital case, Raymond Patterson presented statistical evidence to show that the prosecutor's office in the county where he had been convicted also displayed racial discrimination. In that county, although there had been 174 murders involving black victims since 1977, the prosecutor had not sought a single death sentence in a black victim's case. In addition, Patterson's lawyers argued that the prosecutor had used multiple pre-emptive strikes to secure an all-white jury (Paternoster, Brame and Bacon, 2008).

Since the *McCleskey* ruling in 1987 these few defendants have tried to use statistical proof but all have failed. *McCleskey* remains the most current position that the Court has taken on race and capital sentencing. The next section will offer a review of the more pertinent research studies relating to race and capital sentencing. In addition, the next section will discuss the role of the prosecutor and what research has shown to be relevant factors in their decision-making.



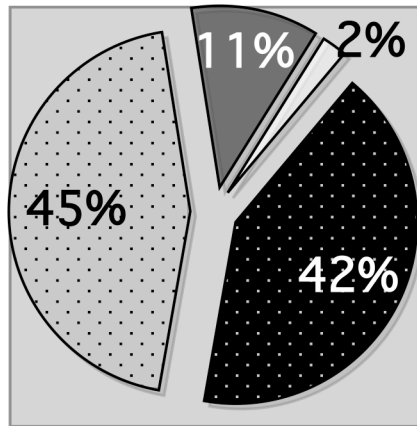
## Chapter 3: Literature Review

### Race and the Death Penalty

As of January 1, 2009 there are over 3, 297 people in state and federal facilities waiting to be executed (Death Penalty Information Center). While whites remain the majority on death row, similar to general crime trends, blacks are disproportionately represented on death row compared to their percentage in the population of just over 12% (Allan and Clubb, 2008). Interestingly, when looking at the death row populations for all regions in the 2000 U.S Census (New England, Mid-Atlantic, East North Central, South, Border, West North Central, Mountain, Pacific) blacks are the only racial category consistently over-represented (Allan and Clubb, 2008:Table 8.1). **Figure 2** offers a current breakdown of the racial makeup of death row.

As discussed in the past section, these updated trends merely reflect what has been a fact since capital punishment was instituted. In the 19<sup>th</sup> century, several states had created laws where the death penalty applied only if the offender was black thus making it unsurprising that black would be disproportionately represented on death row (Bowers, 1974).

**Figure 2**  
U.S. Death Row Inmates By Race (As of January 1, 2009)



■ Black ■ White ■ Hispanic □ Other

Johnson (1941) is the earliest known study to look at race and capital sentencing. In *The Negro and Crime*, he attributes the struggles of the black community to a history of intolerance and a “continuous vicious cycle of caste barriers” (p.94). He makes the argument that the murder of a white person by a black offender is not viewed as morally equal to the murder of a black person by someone of the same race. In his study, Johnson collected data on murder cases during the 1930s in several counties of North Carolina, Virginia and Georgia. In analyzing the four racial combinations, he found that killers of white victims were more likely to get both life imprisonment and the death penalty while black offenders that killed white victims were executed at higher rates than any other combination.

A few years later, another study also looked at trends from the 1930s and found similar results as Johnson. Garfinkel (1949) studied ten different counties in

North Carolina and analyzed 673 homicide cases. Not only did he find that the majority of homicides were intraracial, he also discovered that whenever there was interracial violence involving a black offender that individual had a higher likelihood of receiving a death conviction.

With the advent of the 1960s, race issues were at the center point of American democratic debate. Equal protection and rights under the law was the mantra of many grassroots and community advocates. At this time, another important research study looked at the state of Texas and its experience with race and capital sentencing. In this investigation, however, Koeninger (1969) looked at disparity from a slightly different perspective. His key question was whether race made a difference when it came to death sentences that were commuted. In looking at data from 1924 to 1968, he found that blacks convicted and sentenced to death had their cases commuted in 16% of the cases whereas whites convicted and sentenced in similar cases had their death sentence commuted 26% of the time.

While the vast majority of studies in the 1960s and earlier all seemed to point to the influence of race in capital sentencing, some did not share those conclusions. For example, Judson et al. (1969) used a sample of 238 first-degree capital murder cases in California between 1958 and 1966. They collected data on the cases using questionnaires that were sent out to the California Department of Corrections and also sent them out to the judges, prosecutors and defense attorneys for each of the cases (p.1310). They found that “Juries administered the system extremely satisfactorily in the race area. Once the effects of other aspects of the case were removed, the defendant’s or victim’s race had *no effect* on the penalty variable” (1421). The

researchers then concluded that based on their results, they were convinced that “California clearly appears not to be unconstitutional on racial bias grounds” (1421).

In 1973, the *Annals of the American Academy of Political and Social Science* published a special volume entitled ‘Blacks and the Law’. In it, two researchers revealed the results from a groundbreaking study that looked at rape convictions and executions in eleven states, including Georgia. Data was collected over a twenty-year period (1945-1965) and in over 230 counties combined. The findings indicated that while death sentences for the crime of rape had drastically declined, rape cases that involved a black perpetrator and white victim had not (Wolfgang and Reidel, 1973). Overall, it was revealed that black men accused of raping white women were approximately 18 times more likely to get a death sentences than if a white or black man had raped a black women (Wolfgang and Reidel, 1973).

This study, given its statistical rigor and wide acceptance in criminological research circles, was one of the first to play a substantial role in a Supreme Court case. The findings were entered as evidence in *Maxwell v Bishop (1970)* in the petitioner’s attempt to show why their conviction had been racially motivated. In the end, the statistical evidence was rejected as grounds for a stay of the death sentence (Maxwell v. Bishop, 1970). The court rejected the evidence for two reasons: (1) the petitioner only presented general statistical evidence about discrimination and not evidence that he had personally been the victim of racial prejudice (2) the study was incomplete because it did not consider all relevant legal variables, did not include counties from all over the state, and did not include data from the county that tried and convicted Maxwell (Paternoster, Brame and Bacon, 2008).

A few years later, Zimring and colleagues (1976) examined 204 homicide cases in Philadelphia and ultimately found that 65% of those who killed a white person received death or a life sentence while only 25% of those who killed a black person received either of those sentences. Bienen and colleagues (1988) looked at capital sentencing in New Jersey and reviewed 404 cases. It was found that a person who killed a white victim would be 10 times more likely to face the death penalty than if the victim were Hispanic or Black. However, if the offender was Black or Hispanic and had killed a white victim, they were twice more likely to be charged with a capital offense.

As the past discussion on legal precedents highlights, the early 1970s saw a shift in the capital punishment discourse with the rulings in *Furman* and *Gregg*. Research responded in turn to now look at how disparities could have been impacted by these critical changes in law. Bowers and Pierce (1980) recognized the importance of earlier stages in the criminal process. In their study, they analyzed data from Florida between 1973 and 1977 where they found that “black offenders that killed white victims were more than twice as likely to be indicted for first degree murder (thus making them eligible for the death penalty) compared to black offenders who killed black victims. Other studies that focus on the indictment stage also found similar results (Radelet, 1981; Bowers, 1983; Radelet and Pierce, 1985; Paternoster, 1983; Paternoster, 1984; Paternoster and Kazyaka 1988). Other researches have looked at the success of capital sentence appeals and race (Radelet and Vandiver, 1983). Still others have taken an interest in looking at the actual proportion of people killed by the state and its racial implications (Kleck, 1981).

The post-*Furman* research has displayed some interesting findings. For example, Riedel (1976) sought to compare sentencing outcomes across U.S. states before and after *Furman*. They used two data sets and were provided with a list of all offenders that were given the death penalty by the NAACP Legal Defense and Educational Fund. The final sample consisted of 407 offenders in twenty-eight states. The other set of data came from the National Prison Statistics (NPS). Riedel found there were actually a higher number of non-whites sentenced to death *after* *Furman* than before. This was particularly striking given that this major Supreme Court ruling was supposed to address disparate sentencing procedure rather than make it worse.

Ziesel (1981) conducted a study of prisoners on death row in Florida. He observed that after *Furman* the percentage of people on death row that had killed blacks rose and the percentage of black offenders on death row dropped. Reverse discrimination prompted by *Furman* in an effort to “balance” the capital sentencing system has been offered as a potential reason for this result (Lester, 1998).

The above two studies are a good example of how the data on race and capital sentencing have been telling many different stories. It is important to point out that the studies have all focused on different stages in the capital sentencing process. Some have looked only at death row populations, others at the rate of executions, still others the decision to seek death by a jury or judge. Moreover, astute researchers have made it clear that it is a dangerous assumption to automatically link racial disparity to a process of racial discrimination (Paternoster, Brame and Bacon, 2008).

To date, the study conducted by Baldus, Woodworth and Pulaski (1990) is the most well-known and comprehensive investigation to rigorously test whether racial

discrimination is fact or fiction. While the raw data suggests that racial disparity exists, to conclude that this disparity was as a result of a racist death penalty system required more proof. The purpose of the Baldus Study was to address what became known as the *Impossibility Hypotheses*.

The first hypothesis, formulated by Supreme Court Justice Harlan in 1971 “questions whether trial-level reforms, particularly the use of standards and guidelines to channel the exercise of jury discretion, can distinguish rationally between those who should live and those who should die” (Baldus et al., 1990: 2) The second hypothesis “questions the ability of state supreme courts to provide the oversight of their death-sentencing systems required to ensure that they operate in a consistent, nondiscriminatory fashion” (Baldus et al., 1990: 2).

In the aftermath of *Furman* and *Gregg* there was some doubt as to whether procedural changes in statutes could truly remedy the underlying problem of arbitrariness and disparity. Data used in the analysis were from the Procedural Reform Study (1970-1978) and Charging and Sentencing Study (1973-1979) somewhat overlapped. The first study (N=156) was predominantly used to test the second impossibility hypothesis and the second study (N=594) was primarily used to test the first impossibility hypothesis (Baldus et al., 1990). Together, they are considered as one study even though the results from the Charging and Sentencing Study dominated the discussion in *McCleskey*. The Baldus Study controlled for over 400 variables and the main logistic regression model had 39 predictor variables.

The general findings were that after *Furman*, there was (controlling for aggravating factors and other legally relevant variables) a “statewide decline in the

race of defendant effect” (Baldus, et.al., 1990:182). However, they noticed that race of victim had significant explanatory power and persisted in the post-*Furman* era, especially in rural areas. Another important finding was that racial disparity was most dramatic for the ‘middle of the road’ capital cases. That is, capital cases that exhibited neither the most aggravating nor the least aggravating factors.

The Baldus Study rejected commonly held views about the factors that go into deciding death sentences. The emergence of the race of victim as paramount in death sentencing and race of defendant as irrelevant was unique compared to all other past work in this area. The resilience of race seemed undeniable however it now appeared to be manifesting itself in a new way. The covert discriminatory effects of victim race had now replaced the overt discriminatory effect of offender race. Instead of a death penalty system that seemed to directly target black offenders, the Baldus Study suggested a fundamental shift toward targeting anyone that killed white victims. In this way, discrimination and prejudice still persisted but in a more subtle fashion.

In 1998, Baldus and colleagues conducted another study that looked at race disparity in Philadelphia. They collected data from the Administrative Office of Pennsylvania Courts and the Court of Common Pleas of Philadelphia County and garnered nearly 700 homicide cases (Baldus et al, 1998). The interesting finding in this study, in contrast to the earlier study in Georgia, was that both the race of defendant and a race of victim had an effect on the probability of receiving a death sentence. With all the work that had now been done in the area of race and capital sentencing, the U.S General Accounting Office conducted a meta-analysis of 28 studies. It found that in 82% of the studies, those who murdered whites were more



likely to get the death penalty. More importantly, “legally relevant variables, such as aggravating circumstances, were influential but did not help to explain fully the racial disparities researchers found” (GAO, 1990:6).

While the Garfinkel (1949) and Johnson (1941) studies in North Carolina provided us with some of our first real research on issue of race, a 2001 study was able to offer new insight into whether race effects in North Carolina had changed. In reviewing capital sentences between 1993-1997, Unah and Boger (2001) reviewed 502 death eligible cases and controlled for 113 potential factors. Their results suggested that not much had changed in North Carolina given that the odds of receiving the death penalty rose 3.5 times if a defendant murdered a white person.

Paternoster et al (2004) looked at the state of Maryland’s track record on death sentencing and primarily the prosecutor’s charging decision. The homicide data used spanned from 1978-1999. The researchers screened about 6,000 first and second-degree murders in the state and then meticulously went through each case to see if they were in fact “death eligible”. In the end, they concluded “the probability of being sentenced to death was about twice as high for those who killed white victims as for those who killed a black” (Paternoster, Brame, and Bacon, 2008:206). In addition, the place where the crime was committed also seemed to increase the likelihood that one would be given a death sentence.

Pierce and Radelet (2005) analyzed California data between the years 1990-1999. Using a sample of 263 cases, the researchers found “defendants convicted of killing non-Hispanic white victims receive the death penalty at a rate of 1.75 per 100 victims compared to the rate of 0.47 for defendants convicted of killing non-Hispanic

Blacks” (Pierce and Radelet, 2005:19). They also noted “if we compare death sentencing rates for those who kill non-Hispanic whites and non-Hispanic Blacks strong differences persist even across different levels of aggravation” (p.24).

For Colorado, Hinden, Potter and Radeley (2006) identified two overlapping sets of cases: (1) cases where a defendant that was sentenced to death in Colorado between 1972-2005 (2) cases where the death penalty was sought from 1980-1999. The researchers were able to come up with 110 cases for their study. Using newspaper articles, published decisions by appellate courts, interviews with attorneys and information from the Colorado Department of Corrections, they were able to collect details about each case. In the end, it was found that those who killed a white victim were four times more likely to get a death sentence than if they had killed a black person. In addition, they also looked at gender and found that the highest probability of receiving the death penalty could be attained if a white female was killed.

In a 2008 study of Tennessee, researchers used data comprised of 986 first-degree murder cases ranging from years 1977 to 2006. They controlled for such variables as the cause of death (e.g. stabbing shooting) , motive, location of homicide, and offender criminal history. The study evaluated two decision-making points in capital sentencing: (1) prosecutorial decision to pursue the death penalty (2) jury decision to deliver a death sentence. It was found that “if there is racial discrimination with respect to victims, it occurs more in the prosecutorial office than at the jury stage” (Scheb, et al., 2008).

According to the study, blacks accused of killing black victims were just as likely, if not slightly more likely, to be sentenced to death than blacks that killed whites. The same was true when looking at white defendants. However, when blacks killed black victims, prosecutors would seek death 25% of the time but the number increased to 39% if the victim were white. Likewise, prosecutors sought death when the defendant was white and victim was black 24% of the time but if the victim were white in this scenario the rate increased to 40% (Scheb, et al., 2008). It is important to note that greater disparity appeared when looking at the *prosecutor's decision* to seek death after conviction compared to the stage where the court finally decided punishment. The wide discretion available to the prosecutor leaves much room for arbitrary choices in case processing and opportunity for prejudicial views to seep through.

The actors within the criminal justice system are central figures to how crime and criminal behavior are defined and how laws are enforced. Sentencing a person to death comes as a result of a number of decision-making points by individual actors. Learning about how these individuals process defendants through the justice funnel brings us a step closer to revealing how disparities, especially by race, come about. In the next section, we look at the role of the prosecutor and what research says about the factors that guide their decisions.

### Prosecutorial Decision Making

A prosecutor is an elected or appointed attorney whose role is to “advocate for the public in felony cases and in a variety of generally less serious offenses” (Perry, Bureau of Justice Statistics Report, 2006). The authority afforded to a prosecutor’s

office can vary depending on the jurisdiction and therefore should not be understood as fixed. In some places prosecutors control the initial charging decision while in other places they merely rubber stamp the charging decision of the police department. Some prosecutors do extensive investigation and police work for each criminal case while others may rely wholly on law enforcement (Williams, 1976). **Table 3** lists the official duties of the Attorney General for the state of Georgia.

Overtime, the role of the prosecutor has emerged as central within the criminal justice system (Forst, 2002). Prosecutors are powerful because their job gives them an inordinate amount of discretion in decision-making. Kingsnorth et al. (2002) define this discretion as “the authority to choose among a variety of procedural alternatives in pursuit of case resolution” (553). Prosecutorial discretion is displayed in the following three ways: (1) the circumstances under which a criminal charge will be filed (2) the level at which an alleged offender will be charged and (3) when to discontinue prosecution (Albonetti and Hepburn, 1996). When it comes to capital cases, a prosecutor’s discretion also includes making a decision on whether they will seek the death penalty once the defendant is convicted of the capital offense<sup>8</sup>.

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<sup>8</sup> In Georgia, crimes that could be charged as capital offenses are: murder, kidnapping with bodily injury or ransom when the victim dies; aircraft hijacking; treason. (Capital Punishment 2007, Bureau of Justice Statistics) <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st01.htm>

**Table 3**  
State of Georgia Attorney General Official Duties

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The Attorney General is given authority and obligations by the Georgia Constitution and the Official Code of Georgia. Duties include:

- Serving as the attorney and legal advisor for all state agencies, departments, authorities and the Governor.
- Providing opinions on legal questions concerning the State of Georgia or its agencies, which are binding on all state agencies and departments.
- Representing the State of Georgia in all capital felony appeals before the Supreme Court of Georgia.
- Representing the State of Georgia in all civil cases before any court.
- Representing the State of Georgia in all cases appearing before the Supreme Court of the United States. The
- Prosecuting public corruption cases where criminal charges are filed against any person or business for illegal activity when dealing with the State of Georgia.
- Conducting special investigations into questionable activity concerning any state agency or department or a person or business that has done business with the State of Georgia.
- Initiating civil or criminal actions on behalf of the State of Georgia when requested to do so by the Governor.
- Preparing all contracts and agreements regarding any matter in which the State of Georgia is involved.

The Attorney General does not, and indeed by law cannot, provide legal advice to private citizens.

*Source: Adapted from the official website, Attorney General for the State of Georgia, <http://law.ga.gov/02/ago/home/0.2705.87670814.00.html>*

Misner (1996) offers three reasons that explain why prosecutorial discretion has increased over the decades:

- (1) Criminal law has so many overlapping and complicated provisions that it is now left to the legal expertise of the prosecutor to determine whether to characterize conduct as criminal and which provisions to apply based on the circumstance.
- (2) Our oversaturated legal system is highly dependant upon plea-bargaining because there are not be enough resources or time to take every potential criminal case to trial.

(3) The development of sentencing guidelines and growth of statutes with mandatory minimums has increased the importance of the charging decision by the prosecutor since this decision determines the range of sentences available to the court.

Prosecutors do not have specific rules or guidelines that they are expected to follow in making their case selection decisions (Misner, 1996; Spohn and Holleran, 2004). The autonomy and power of the prosecutor is difficult to ignore especially since their decisions can dictate the outcome of a criminal case. The decision to seek the death penalty is the most critical that a prosecutor will ever make given the irreversible outcome.

Albonetti (1991) describes the theory of “uncertainty avoidance” in decision-making. Rational choice models assume that the actor has knowledge of all available options but in reality this is rarely the case. In most situations, the justice actor (such as the prosecutor) has incomplete knowledge of all facets of the case before them. The author suggests that when decision-makers within the justice system are placed in this predicament, they rely upon rationality that is “the product of habit and social structure” (Albonetti, 1991: 249).

What this essentially tells us is that decision making, rather than being a purely objective process, is usually tainted with the individual’s predilections. While incomplete knowledge is an unavoidable aspect of the criminal process, it presents the problem of not immediately being clear on, for example, a prosecutor’s motives in making different choices in two cases that appear to be similar. In a worst-case

scenario, these situations may allow an actor's negative biases to guide how they undertake their responsibilities.

Few researchers have examined the influence of offender or victim characteristics on the prosecutor. Most attempts made to get at this 'black box' of decision-making were conducted in the 1980s and only a handful of more recent work has taken a look at this issue. On the prosecutor's decision to reduce charges, older studies suggest a particularly strong influence of seriousness of offense and prior record (McDonald, 1985; Meyer & Gray, 1997). Past studies have also indicated that offender characteristics such as gender, age and race matter in criminal charge reduction (Albonetti, 1992; Bernstein, Kick, Leung, & Schulz, 1977; Farnworth & Teske, 1995; Figueira-McDonough, 1985; Miethe & Moore, 1986). For example, Bernstein et al., (1977) found white defendants more likely to receive favorable charge reductions compared to black defendants. Albonetti (1992) showed younger males were less likely to receive reduced charges when compared to older defendants and female defendants. Farnworth and Teske (1995) revealed that young, Black men were less likely to have their initial charges reduced by the prosecutor compared to all other defendants.

Ball (2006) examined the disparate treatment of particular defendants in count bargaining decisions. The author found that defendant characteristics (such as race and age) had no significant influence on the prosecutor however the legally relevant variables (such as the offenders prior felonies and seriousness of the current charge) were significant. Wooldredge and Griffin (2005) examined Ohio's sentencing reform, which resulted in significant increases in prosecutorial discretion. In looking at race,

they found that overall levels of charge reduction increased, however, no particular racial and/or gender group benefited from this more than another.

Spears and Spohn (1997) looked at the influence of victim characteristics on the prosecutor's charging decisions when it came to rape cases. They found that strength of evidence was not significant. The relevant factors were the prosecutor's impression of the victim's moral character, victim behavior at the time of the sexual assault and if the victim was a teenager or adult. They did not find race of victim effects. Frenzel and Ball (2007) used data collected by the Pennsylvania Commission on Sentencing which reflected all felonies and misdemeanors in 1998. Their main dependent variable was case disposition. Essentially, their goal was to determine if race predicted negotiated plea deals with the prosecutor compared to going to trial. They eventually found that white offenders were more likely to be able to strike a plea deal with a prosecutor compared to black offenders who were more likely to have their case go to trial.

In states with mandatory minimums in their sentencing laws, the role of the prosecutor becomes even more important. In these states, Ulmer et al (2007) describes the prosecutor as having "pure" discretion over sentencing outcomes (427). In their study, the researchers conducted a multi-level analysis to determine the circumstances where a prosecutor would apply a mandatory minimum for drug crimes. They did not find a significant race effect for Black defendants but did find "Hispanics offenders have almost twice the odds of receiving mandatory minimums compared to white offenders" (442).



With regard to death penalty decisions and the prosecutor, even less literature has been produced within the field. Sorenson and Wallace (1999) examined pre-trial decisions made by prosecutors to determine whether they were influenced by race. They used data from a Midwest county and looked at all potential capital cases from 1991 to 1996. After controlling for legally relevant considerations, they found that homicide cases where a black defendant had killed a white victim were more likely (compared to all other racial combination) to have a prosecutor pursue first-degree murder charges, be served with a notice of aggravating circumstances and subsequently proceed to a capital murder trial.

Free (2002) conducted a meta-analysis of prosecutors' charging decisions in 24 studies. Of the 24, he found that 15 had no significant race effects on charging decisions but noted that other social status factors such as gender and age sometimes influence these decisions. He also made an attempt to assess 19 death penalty studies and ultimately drew the conclusion that race determined whether prosecutors sought the death penalty. However, in taking a closer look at his chosen studies, it is clear that he does not select studies with consistent dependent outcomes. In other words, decisions of other actors such as judges and juries are also included. This overlap makes it difficult to take this meta-analysis at face value. There are simply not enough studies to produce definite results about the prosecutor and decisions in capital cases.

Overall, the literature on prosecutorial decision-making appears to show mixed results. In some situations, prosecutors are heavily influence by legal factors while in others race, age and gender seem to matter more.

The relevance of the prosecutor in the processing of a criminal case cannot be overstated which is why the prosecutor's decision to seek the death penalty is central to the current investigation. With capital sentencing, the prosecutor does not reveal *why* they may choose to seek death in one case compared to another, which makes this stage in sentencing somewhat secretive. This 'black box' of case processing makes it more difficult to understand why there is sentencing disparity among various demographics. As a result, research is necessary to figure out if disparity in capital cases is based on legitimate factors or if there are other variables, such as race, that contribute to a prosecutor's decision to seek death.

The current study continues in a similar line of investigation as past research. The results may help to make an appropriate judgment on whether the magnitude of race effects (specifically, race of victim) has stayed the same or if this new 'post-racial' America (where race is supposedly an irrelevant feature) is reflected in Georgia's legal system. More importantly, it will be interesting to test the assertion by the Scheb et al. (2008) that the prosecutor's office is likely to perpetuate racist practices.

Georgia led the way in changing its legal procedures for administering capital punishment. The *Gregg* ruling recognized this advancement by reinstating capital punishment in 1976. To reiterate, the Baldus Study on Georgia looked at data in the 1970s and was able to draw important conclusions about the importance of race in the death penalty system. However, an important legal argument could be made that the new legislation did not have time to set it in and actually have an impact in removing

disparity. The Court seemed confident that race and justice would dramatically improve in Georgia but to date no research has been done to confirm or deny this.

## Chapter 4: Research and Methods

### Data

The dataset was obtained from the Atlanta Journal-Constitution that researched 2,328 murder convictions in the state of Georgia ranging from January 1, 1995 to December 31, 2004. The main sources used to uncover these cases were court and prison records. In addition, information on case specifics were gleaned from such sources as medical examiner reports, search and arrest warrants, police reports and Georgia Supreme Court decisions. After these steps were taken, some cases still had incomplete information and so the newspaper also interviewed local district attorneys, judges and other law enforcement officials in order to obtain complete records.

The sample of interest is *death-eligible* murder convictions (i.e. capital cases). As noted in the previous section, at least one of the ten legislated aggravators is required before a homicide case can be tried as a capital case in Georgia. Of the cases that were deemed death eligible in the Atlanta Journal-Constitution data, a portion was excluded from the final sample. These excluded cases were comprised of murderers that had pleaded guilty but were deemed mentally ill<sup>9</sup>, cases where children below the age of 17 committed the murder and, finally, convictions that were overturned on appeal unless the defendant was convicted again within the decade examined by the newspaper. After excluding all cases that would not have been

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<sup>9</sup>Well before the U.S Supreme Court addressed the question of executing the mentally insane (Ford v. Wainright, 477 U.S 399 [1986] and Atkins v. Virginia, 536 U.S 304 [2002]), Georgia was the first state to ban executing the mentally retarded through a state statute (Ga.Code. Ann. Sect 17-7-131(i)). However, it remains a requirement that defendants prove mental deficiency beyond a reasonable doubt.

considered death eligible due to special circumstances, the new sample size was 1317 (Atlanta Journal Constitution, 2008).

Within the sample of death eligible cases, the data included the categories of African-American, Caucasian, American Indian or Alaskan Native, Asian or Pacific Islander and Hispanic. Victims that were neither black nor white were excluded from this study because of the extremely small number of these alternative groups present in the sample. Defendants that were neither black nor white were excluded from the sample for the same reason. The final N size for my sample was 1272 death eligible cases<sup>10</sup>.

### Hypotheses

(1): The murder of a white victim (irrespective of the race of defendant) will be positively and significantly related to whether a prosecutor will seek the death penalty.

(2) The murder of a white victim by a black offender should generate the highest odds that a prosecutor will seek the death penalty compared to all other racial combinations.

(3): The murder of a black victim by a black offender should generate the lowest odds that a prosecutor will seek the death penalty compared to all other racial combinations.

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<sup>10</sup> Due to their small number, 22 cases of racial/ethnic groups other than white or black were eliminated. Only cases that involved either a white or a black defendant or victim were analyzed.

## Analysis

In order to test the hypothesis of whether race of victim and offender/victim race combinations are relevant to a prosecutor's decision to seek the death penalty, the multivariate logistic regression method of analysis is used. The decision to use this statistical method was based upon the nature of the research question. The dependent variable is dichotomous (1=yes, the prosecutor will seek death and 0=no, the prosecutor will not seek death) and so this method was appropriate. The benefits of this approach are three-fold. First, it is helpful in calculating the probability of success over the probability of failure given that the results of the analysis are in the form of an odds ratio. Second, logistic regression also provides knowledge of the relationships and strengths among the variables. With odds ratios, a number greater than 1 signifies a positive relationship while a number less than 1 signifies an inverse (or negative relationship). Third, this approach is commonly used and well understood by researchers in the field. A disadvantage to this approach is that it makes the assumption that variables that could be relevant to a predicted outcome have not been omitted from the model (Paternoster and Brame, 2008).

The logistic regression analysis was broken up into six models. The key dependent outcome for each model was whether the prosecutor sought the death penalty. Model 1 included only the victim race and controls. Model 2 looked at the impact of a white offender killing a black victim along with the controls. Model 3 included analysis of white offenders killing white victims. Model 4 included the variable for black offenders killing black victims. Model 5 included the variable for black offenders killing white victims. Finally, model 6 included all the offender/victim

racial combinations except for the black defendant kills a black victim variable. I used black kills black as a reference category because of my assumption that these kinds of cases would receive the lowest likelihood of a prosecutor seeking death.

### Models

The six models are as follows:

$$\ln(\text{deathsought}) = B_1 + B_2\text{whitevictim} + B_3\text{Vicsex} + B_4\text{confession} + B_5\text{multiplevictim} + B_6\text{AgF1...} + B_{13}\text{AgF10} + B_{14}\text{priorcon} + B_{15}\text{sexrel} + B_{16}\text{drugrel} + B_{17}\text{alcorel} + B_{18}\text{offsex} + B_{19}\text{urban} + B_{20}\text{stranger} + B_{21}\text{offage} + \varepsilon$$

(1)

$$\ln(\text{deathsought}) = B_1 + B_2\text{whitekillsblack} + B_3\text{Vicsex} + B_4\text{confession} + B_5\text{multiplevictim} + B_6\text{AgF1...} + B_{13}\text{AgF10} + B_{14}\text{priorcon} + B_{15}\text{sexrel} + B_{16}\text{drugrel} + B_{17}\text{alcorel} + B_{18}\text{offsex} + B_{19}\text{urban} + B_{20}\text{stranger} + B_{21}\text{offage} + \varepsilon$$

(2)

$$\ln(\text{deathsought}) = B_1 + B_2\text{whitekillswhite} + B_3\text{Vicsex} + B_4\text{confession} + B_5\text{multiplevictim} + B_6\text{AgF1...} + B_{13}\text{AgF10} + B_{14}\text{priorcon} + B_{15}\text{sexrel} + B_{16}\text{drugrel} + B_{17}\text{alcorel} + B_{18}\text{offsex} + B_{19}\text{urban} + B_{20}\text{stranger} + B_{21}\text{offage} + \varepsilon$$

(3)

$$\ln(\text{deathsought}) = B_1 + B_2\text{blackkillsblack} + B_3\text{Vicsex} + B_4\text{confession} + B_5\text{multiplevictim} + B_6\text{AgF1...} + B_{13}\text{AgF10} + B_{14}\text{priorcon} + B_{15}\text{sexrel} + B_{16}\text{drugrel} + B_{17}\text{alcorel} + B_{18}\text{offsex} + B_{19}\text{urban} + B_{20}\text{stranger} + B_{21}\text{offage} + \varepsilon$$

(4)

$$\ln(\text{deathsought}) = B_1 + B_2\text{blackkillswhite} + B_3\text{Vicsex} + B_4\text{confession} + B_5\text{multiplevictim} + B_6\text{AgF1...} + B_{13}\text{AgF10} + B_{14}\text{priorcon} + B_{15}\text{sexrel} + B_{16}\text{drugrel} + B_{17}\text{alcorel} + B_{18}\text{offsex} + B_{19}\text{urban} + B_{20}\text{stranger} + B_{21}\text{offage} + \varepsilon$$

(5)

$$\ln(\text{deathsought}) = B_1 + B_2\text{blackkillswhite} + B_3\text{whitekillsblack} + B_4\text{whitekillswhite} + B_5\text{Vicsex} + B_6\text{confession} + B_7\text{multiplevictim} + B_8\text{AgF1...} + B_{15}\text{AgF10} + B_{16}\text{priorcon} + B_{17}\text{sexrel} + B_{18}\text{drugrel} + B_{19}\text{alcorel} + B_{20}\text{offsex} + B_{21}\text{urban} + B_{22}\text{stranger} + B_{23}\text{offage} + \varepsilon$$

(6)

Dependent

The key outcome of interest was the prosecutor’s decision to seek the death penalty. As a dichotomous variable, the dependent *deathsought* outcome had two possible outcomes: 1= yes, the prosecutor sought death and 0= no, the prosecutor did not seek death. From Table 5 you can see that there were 653 cases where the victim was black and 613 cases where the victim was white. Overall, the prosecutor sought death in 336 of all the eligible capital cases between 1995 and 2004. The prosecutor sought death in 106 of the black victim cases compared to 233 of the white victim cases.



**Table 4**  
 Joint Frequency Distribution of the Prosecutor’s Decision to Seek Death and Race of the Homicide Victims

Prosecutor’s Decision	Black Victim	White Victim	Total
Death Sought	103	233	336
Death Not Sought	550	386	936
<b>Total</b>	653	619	1272

In an unadjusted analysis, the probability that the prosecutor will seek death in black victim cases is .16 (103/653) and .38 (233/619) in white victim cases.

Therefore, the odds that a prosecutor will seek death are .19(.16/.84) for cases involving black victims and .61 (.38/.62) for cases involving white victims.

Prosecutors are 3.21 times (.61/.19) more likely to seek death in white victim cases.

These figures show us that there is increased risk that a prosecutor will seek the death penalty for those who murder whites compared to those that murder Blacks.

### Independent

The main independent variable for this study was the race of the victim (*whitevictim*). This dummy variable was constructed as 1=white and 0=non-white<sup>11</sup>.

As previously stated, the categories included in the original data were white, black, American Indian or Alaskan Native, Other, Asian or Pacific Islander, Hispanic, Unknown, No Entry. I collapsed the race of victim into a dummy variable and dropped the cases of the other racial/ethnic groups because of their small distribution.

<sup>11</sup> Cases that were included in the “white” category were those that had at least one white victim. The cases included in the “non-white” category were all black victims.

The cases that remain were evenly split between white and black. Of the 1272 cases, 619 of the cases included at least one white victim (48.7%) and black victim cases accounted for 653 of the death eligible cases (51.3%).

The other independent variables of interest were the combined defendant race and victim race on the odds that a prosecutor seeks the death penalty. The dummy variables *blackkillswhite*, *whitekillsblack*, *blackkillsblack*, *whitekillswhite* were all given the values of 1=yes, if the combination was present and 0=no, if the combination was absent. From Table 5 we can see that most capital murder cases are intra-racial. There were 975 intra-racial cases which accounted for 77% (975/1272) of all the cases. Of the interracial cases (297), black defendants killing white victims accounted for the majority of cases at 93% (276/297). Overall, cases involving black defendants accounted for 71% (908/1272) of the total caseload.

**Table 5**  
Joint Frequency Distribution of the Race of Offender and Race of the Homicide Victims

	Black Victim	White Victim	<b>Total</b>
Black Offender	632	276	908
White Offender	21	343	364
<b>Total</b>	653	619	1272

## Controls

Inevitably, there will always be factors that relate to either the independent or dependent variables in a relationship. The incorporation of controls is essential to ensuring that other possible explanations for the variation in Y are not ignored. Both legal and extra legal variables that could persuade a prosecutor to seek death were controlled for.

The key legal factors included were the eight *aggravators* described in Table 3<sup>1213</sup>. These aggravators were mainly included to determine whether the *type* of aggravator was important to the prosecutor. Also incorporated were factors that intuitively may influence a prosecutor to act more aggressively in pursuing a death sentence. For example, whether the defendant submitted a *confession* to the murder at any point in the murder investigation (1=yes, 0=no)<sup>14</sup>. Also included was a dummy variable of whether there was an *eyewitness* to the crime entered as evidence. Effort was made to include cases where DNA was entered into evidence but there were so few cases that the relevance of DNA could not be meaningfully analyzed. For violent crime (usually rape or homicide) only 5-10% of the universe of cases has biological evidence that can be scientifically tested and used as evidence.<sup>15</sup>

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<sup>12</sup> The fifth aggravator was excluded because there were no cases in the sample where a judicial officer was killed.

<sup>13</sup> The eighth aggravator was excluded because there was only 1 case in the sample where an officer was killed and so the large odds ratio of a prosecutor seeking death in these types of cases was misleading

<sup>14</sup> The evidence of a confession should not be confused with a plea agreement where the defendant recognizes their responsibility for the crime in a court of law and forgoes their right to take the case to the trial stage. It is not uncommon for defendants to confess, possibly during an interrogation, but then later proceed to trial if they feel their chances of avoiding a harsher punishment are strong.

<sup>15</sup> <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php>

Other main case characteristics were dummy variables such as whether the crime was *sex* (e.g. sexual torture) related. Mitigating factors such as whether the crime was *drugs or alcohol* related (1=yes, 0=no) were also measured. Yet another dummy variable looked at how heinous the crime was with regard to the number of victims that were killed. The *multiple victim* measure described whether the defendant had killed at least two victims (1=yes, 0=no). The dummy variable *stranger* (1=yes, 0=no) approximated the relationship between the victim and the offender.

Another included factor was a dummy variable called *priorcon* that described whether the defendant had at least one prior violent crime in their history before the current death eligible offense. Having no prior record could be considered a mitigating factor and having an extensive record could be considered an aggravating factor. An attempt was also made to get at geography and how that may impact case processing. The Baldus Study, as described in the previous chapter, had found that whether the crime had taken place in an urban setting mattered when it came to death case processing. The variable *urban* revealed whether the prosecutor was operating in an urban district (1=yes) or a rural/suburban district (0=no, not urban). Location may influence a prosecutor to seek death particularly if the crime takes place in a suburban community that does not have high rates of violent crime. Given that cities and urban centre have higher rates of violent crime, homicides in these locations may be viewed as more commonplace and so a prosecutor may be less likely to seek death. Finally, I controlled for the *gender* of the offender and victim (1=male, 0=female) and well as a dummy variable for the age of the offender (1=18-24, 0=24-99).

**Table 6**  
Descriptive Statistics

<b>Variable</b>	<b>Mean</b>	<b>SD</b>
White Victim	0.49	0.50
Black Kills White	0.22	0.41
Black Kills Black	0.50	0.50
White Kills White	0.27	0.44
White Kills Black	0.02	0.13
Offender Sex	0.94	0.23
Victim Sex	0.67	0.47
Offender Age	0.54	0.50
Prior Convictions	0.19	0.39
Aggravator 1	0.09	0.29
Aggravator 2	0.80	0.40
Aggravator 3	0.02	0.14
Aggravator 4	0.59	0.49
Aggravator 6	0.05	0.21
Aggravator 7	0.39	0.49
Aggravator 9	0.01	0.08
Aggravator 10	0.01	0.12
Drug related	0.26	0.44
Sex related	0.05	0.23
Alcohol related	0.08	0.28
Stranger	0.23	0.42
Urban	0.26	0.44
Multiple Victims	0.13	0.34
Eyewitness	0.41	0.49
Confession	0.29	0.45
Offender Race	0.29	0.45

## Chapter 5: Results

Before analyzing the main models, I ran a preliminary model just to see if race of offender would have any effect. (1=white, 0=black). Despite my main focus on race of victim, I thought it would be important to confirm the findings of the earlier death penalty research (particularly the Baldus Study) suggesting that the race of defendant was not important. Table 7 shows us that cases involving white offenders are highly influential in a prosecutor's decision to seek death. However, in Table 8 we see that when race of victim is included in the model, race of offender is no longer significant. There are two things that we can take away from this: (1) there is an effect for being a white offender (2) the effect is *entirely* due to the fact that white offenders predominantly kill white victims.

**Table 7**  
Logistic Regression (Offender Race)

<b>Variable</b>	<b><i>b</i></b>	<b><i>SE</i></b>	<b><i>OR</i></b>
<b>Offender Race</b>	<b>.61***</b>	<b>.16</b>	<b>1.84</b>
Offender Sex	.16	.33	1.17
Victim Sex	-.29	.17	.74
Prior Convictions	-.04	.21	.95
Aggravator 1	.79***	.28	2.21
Aggravator 2	1.23***	.26	3.43
Aggravator 3	1.24***	.58	3.47
Aggravator 4	.86***	.20	2.36
Aggravator 6	1.57***	.34	4.82
Aggravator 7	1.60***	.17	4.96
Aggravator 9	1.42	.92	4.17
Aggravator 10	2.92***	.75	18.68
Drug related	-.57**	.19	.563
Sex related	.86**	.33	2.36
Alcohol related	.09	.28	1.09
Stranger	.81***	.19	2.26
Urban	-1.21***	.22	.29
Multiple Victims	1.23***	.21	3.43
Eyewitness	.01	.16	1.01
Confession	.58***	.16	1.79

**Table 8**  
Logistic Regression (Offender and Victim Races)

<b>Variable</b>	<b><i>b</i></b>	<b><i>SE</i></b>	<b><i>OR</i></b>
<b>White Victim</b>	<b>.73***</b>	<b>.20</b>	<b>2.08</b>
<b>Offender Race</b>	<b>.17</b>	<b>.20</b>	<b>1.19</b>
Offender Sex	.13	.32	1.14
Victim Sex	-.29	.17	.74
Prior Convictions	-.02	.22	.97
Aggravator 1	.79***	.28	2.21
Aggravator 2	1.23***	.26	3.42
Aggravator 3	1.34***	.59	3.85
Aggravator 4	.77***	.20	2.16
Aggravator 6	1.50***	.34	4.48
Aggravator 7	1.64	.17	5.15
Aggravator 9	1.33	.92	3.79
Aggravator 10	2.97***	.75	19.58
Drug related	-.47**	.19	.62
Sex related	.84**	.33	2.32
Alcohol related	.08	.28	1.08
Stranger	.62	.20	1.85
Urban	-.13***	.22	.32
Multiple Victims	1.56***	.22	3.51
Eyewitness	.03	.16	1.03
Confession	.58***	.16	1.79

Note. \* $p < .05$ , \*\* $p < .01$ , \*\*\* $p < .001$



## Model 1

**Table 9** shows the six regression outputs for the AJC Georgia data. In the first model, we can see that a number of the variables display a strong and significant relationship to the main dependent variable. The key independent variable, race of victim, behaved positively and is highly significant at the .01 level ( $p=0.000$ ). In other words, the killing of a white victim is significantly related to a prosecutor's decision to seek the death penalty. If a defendant kills a white victim, the odds of a prosecutor seeking the death penalty are 2.229 times higher than if a defendant kills a black victim. At this point, before turning to racial combinations, it appears that the Baldus Study findings remain accurate in its portrayal of the Georgia capital sentencing system.

Of the controls, it is not surprising to see that the majority of death eligible aggravators are significant and positively related to a prosecutor's decision to seek death. A few observations stand out within the group of control variables. For example, whether a defendant confessed to the capital homicide at some point in the investigation increases the odds that a prosecutor would seek death. This is highly significant at the .01 level. Confessing to a capital murder exhibits a greater level of culpability than if a defendant did not confess. In addition, the killing of multiple victims also influences a prosecutor to seek death. In multiple victim cases, the odds increase by over 3.5 times compared to single victim cases. Killing multiple people most likely shows a degree of malevolence that may convince a prosecutor that a death sentence is an appropriate response.

**Table 9**  
*Logistic Regression (N=1272)*

Variable	Model 1			Model 2			Model 3		
	<i>b</i>	<i>SE</i>	<i>OR</i>	<i>b</i>	<i>SE</i>	<i>OR</i>	<i>b</i>	<i>SE</i>	<i>OR</i>
White Victim	.83***	.17	2.29						
Black Kills White									
Black Kills Black									
White Kills White							.59***	.17	1.80
White Kills Black				.30	.58	1.34			
Offender Sex	.12	.33	1.13	.07	.33	1.08	.16	.33	1.177
Victim Sex	-.28	.18	.75	-.27	.18	.77	-.28	.18	.754
Offender Age	-.10	.17	.91	-.14	.16	.87	-.08	.17	.928
Prior Convictions	-.06	.22	.95	-.14	.22	.87	.78	.29	2.188
Aggravator 1	.77**	.30	2.17	.75*	.28	2.12	1.241*	.27	3.460
Aggravator 2	1.24***	.27	3.46	1.27***	.26	3.58	1.25***	.58	3.476
Aggravator 3	1.35*	.59	3.88	1.17*	.58	3.26	1.17***	.58	3.217
Aggravator 4	.77***	.20	2.16	.88***	.20	2.47	.88***	.20	2.408
Aggravator 6	1.50***	.34	4.49	1.65***	.34	5.23	1.65***	.34	5.226
Aggravator 7	1.65***	.18	5.18	1.62***	.18	5.07	1.62***	.18	5.072
Aggravator 9	1.31	.93	3.69	1.30	.93	3.67	1.30	.93	3.668
Aggravator 10	3.00***	.76	20.16	3.04***	.78	20.99	3.04***	.78	20.989
Drug related	-.47*	.20	.63	-.61**	.20	.54	-.55**	.20	.576
Sex related	.84*	.34	2.32	.84*	.33	2.31	.86**	.33	2.372
Alcohol related	.10	.28	1.10	.20	.28	1.23	.09	.28	1.093
Stranger	.60**	.20	1.82	.79***	.19	2.20	.82***	.20	2.280
Urban	-1.15***	.22	.32	-1.38***	.22	.25	-1.23***	.22	.293
Multiple Victims	1.26***	.22	3.52	1.27***	.22	3.56	1.22***	.22	3.393
Eyewitness	.02	.17	1.02	-.04	.16	.96	.02	.17	1.015
Confession	.59***	.16	1.80	.60***	.16	1.82	.59***	.16	1.798

Note. \**p* < .05, \*\**p* < .01, \*\*\**p* < .001

**Table 9b**  
*Logistic Regression (N=1272)*

Variable	Model 4			Model 5			Model 6		
	<i>b</i>	<i>SE</i>	<i>OR</i>	<i>b</i>	<i>SE</i>	<i>OR</i>	<i>b</i>	<i>SE</i>	<i>OR</i>
White Victim									
Black Kills White				.37*	.19	1.46	.80***	.21	2.24
Black Kills Black	-.86	.17	.42						
White Kills White							.90	.19	2.46
White Kills Black							.78***	.58	2.20
Offender Sex	.11	.32	1.12	.04	.32	1.04	.12	.32	1.13
Victim Sex	-.29	.17	.74	-.26	.17	.76	-.29	.18	.74
Offender Age	-.08	.16	.91	-.16	.16	.85	-.07	.16	.92
Prior Convictions	-.04	.22	.95	-.15	.21	.85	-.04	.22	.96
Aggravator 1	.77**	.28	2.16	.73**	.28	2.08	.77**	.28	2.17
Aggravator 2	1.23***	.26	3.44	1.27***	.26	3.58	1.23***	.26	3.43
Aggravator 3	1.37*	.59	3.94	1.19*	.58	3.3	1.37*	.59	3.94
Aggravator 4	.77***	.20	2.17	.83***	.20	2.29	.78***	.20	2.18
Aggravator 6	1.50***	.34	4.52	1.63***	.34	5.12	1.50***	.34	4.49
Aggravator 7	1.64***	.18	5.19	1.64***	.17	5.19	1.64***	.18	5.16
Aggravator 9	1.32	.93	3.74	1.21	.93	3.36	1.34	.93	3.83
Aggravator 10	3.01***	.76	20.47	3.08***	.78	21.92	3.00***	.76	20.09
Drug related	-.49*	.19	.60	-.56*	.19	.56	-.49*	.20	.60
Sex related	.84*	.33	2.31	.82*	.32	2.27	.84*	.33	2.32
Alcohol related	.09	.28	1.09	.23	.28	1.25	.07	.28	1.08
Stranger	.59**	.19	1.81	.67**	.20	1.96	.61**	.20	1.84
Urban	-1.13***	.22	.32	-1.36***	.21	.25	-1.11***	.22	.32
Multiple Victims	1.28***	.22	3.57	1.28***	.21	3.62	1.26***	.22	3.54
Eyewitness	.02	.16	1.02	-.04	.16	.95	.02	.16	1.02
Confession	.59***	.16	1.81	.59***	.16	1.81	.59***	.16	1.80

Note. \* $p < .05$ , \*\* $p < .01$ , \*\*\* $p < .001$

Also, cases where there are multiple victims may create public outcry for the toughest punishment. The relationship of the parties also has an influence on which sentence to pursue. When the victim is a stranger, the odds increase by more than 1.8 times than if the victim and offender are known to one another. The finding on geography also corresponds with the Baldus Study. Cases where the crime took place in a suburban setting are more likely to result in a prosecutor seeking death.

### Model 2

In this regression, the *whitekillsblack* combination is incorporated into the model. The data suggests that cases where white defendants kill black victims are *not related* to a prosecutor's decision to seek death. This variable is highly insignificant. The relationship between the control variables and the dependent variables discussed in Model 1 are all relatively unchanged and so will not be repeated. In the data, offenders between the ages of 18 and 24 accounted for more than half of all capital murders but the prosecutor did not seem swayed by age in the slightest.

### Model 3

In this regression, the *whitekillswhite* combination is incorporated into the model. The data suggests that intraracial cases where white defendants kill white victims are significantly related to a prosecutors' decision to seek death. This variable is highly significant at the .01 level. In these cases, the odds that a prosecutor will seek death are 1.8 times higher than all other cases. The relationship between the control variables and the dependent variables discussed in model 1 are relatively unchanged and so will not be repeated.

#### Model 4

In this regression, the *blackkillsblack* racial combination is incorporated into the model. The interesting story here is that compared to all other cases, black defendants that kill black victims have a significant *inverse* relationship to a prosecutor seeking death. This negative relationship is highly significant at the .01 level. This means that cases where black offenders kill black victims are less likely to result in prosecutor's seeking death. It is important to point out that this is the only racial combination where this takes place. Once again, the relationship between the control variables and the dependent variables discussed in Model 1 are relatively unchanged and so will not be repeated.

#### Model 5

In this regression, I incorporated an independent variable accounting for cases where a black defendant kills a white victim (*blackkillswhite*). The data suggests that in cases where black defendants kill white victims, the odds that a prosecutor will seek death are just under 1.5 times more compared to all other cases. This variable is somewhat significant at the .10 level. The relationship between the control variables and the dependent variables discussed in Model 1 are all somewhat similar in this model. It is important to point out that it appears that the odds of a prosecutor seeking death is higher in cases when both the offender and victim are white. However, this effect is most likely true because white offenders predominantly kill white victims.

## Model 6

This model compared all the racial combinations to the *blackkillsblack* variable. The data suggests that the racial combinations of *blackkillswhite* and *whitekillswhite*, compared to *blackkillsblack* cases are significantly related to a prosecutor's decision to seek death. These two racial combinations both had highly significant p-values (0.000). It is also important to point out that the beta values of these combinations (0.8 and 0.78 respectively) show that race of defendant is not a critical aspect in these outcomes. The race of the victim seems to be driving the relationship. In this model, we also notice that the *whitekillsblack* is non-significant.

In cases where a white defendant kills a white victim, the odds of the prosecutor seeking death are 2.3 times higher than when a black offender kills a black victim. In cases where a black offender kills a white victim, the odds increase by 2.1 times compared to a case where a black defendant kills a black victim.<sup>16</sup> Interracial murders are more commonplace and so that fact provides a good explanation for why it might appear that a prosecutor would target a white on white murder more so than an interracial one. To data suggests that the race of victim is paramount.

## Predicted Probabilities

Predicted probabilities are useful in determining the likelihood that an event will occur  $[(\text{success}/(\text{success}*\text{failure}))]$  as opposed to the “odds of something occurring” as a ratio (success: failure). Figures 3-10 display the predicted

---

<sup>16</sup> While gender issues are not the focal concern of my research, I did run a separate regression and created a variable, *whitefem*, from the sample of female victims (n=414). My goal was to delve into the notion that the lives of white victims (particularly females) are considered more valuable in the eyes of the justice system. This relationship, while controlling for all the same factors as my main models, turned up positive and significant (p-value=.013) where the odds that a prosecutor would seek death increase 2 times when compared to cases of black female victims.

probabilities that a prosecutor will seek death for each of the six main models. When looking solely at the race of victim, the probability that a prosecutor will seek death is 0.24 in cases of white victims and 0.13 in cases of black victims. This means that prosecutors are nearly twice times as likely to pursue death in cases where victims are white compared to cases involving black victims.

Figure 3: White Victims vs. Black Victims

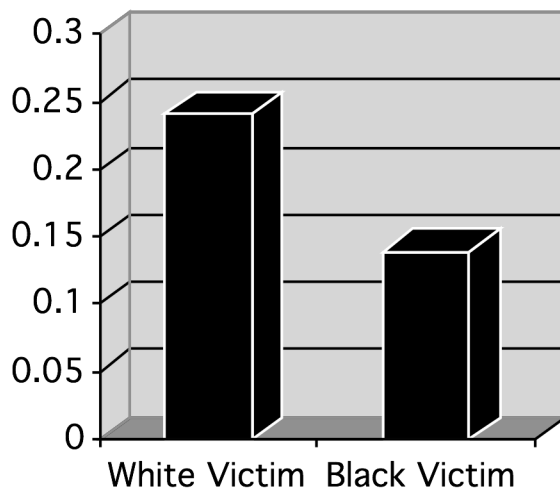
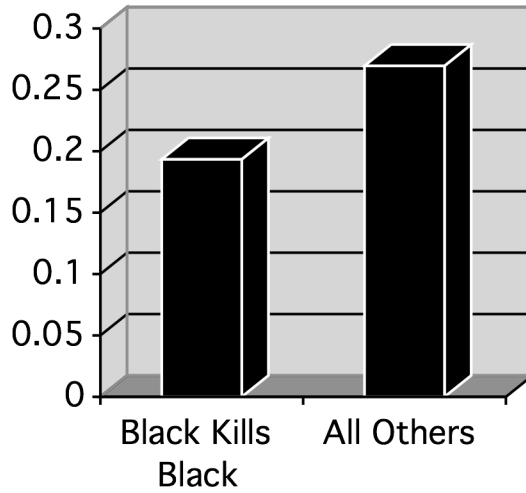
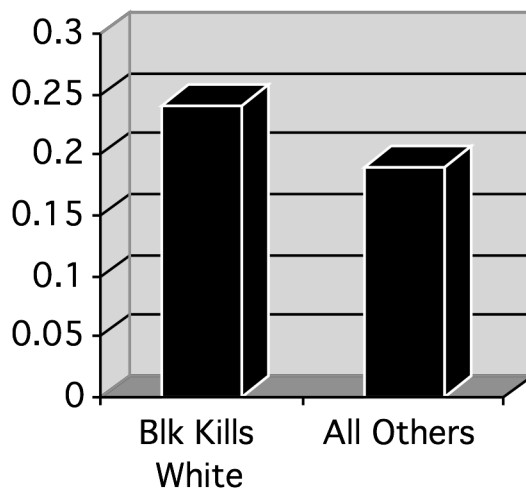


Figure 4: Black Kills Black vs. All Others



In Figure 4, the probability that a prosecutor will seek death in cases where a black defendant kills a black victim is 0.19 compared to 0.27 in all other cases. In other words, a prosecutor is significantly *less likely* to find an offender that murders a black victim worthy of death especially in cases where the offender is also black.

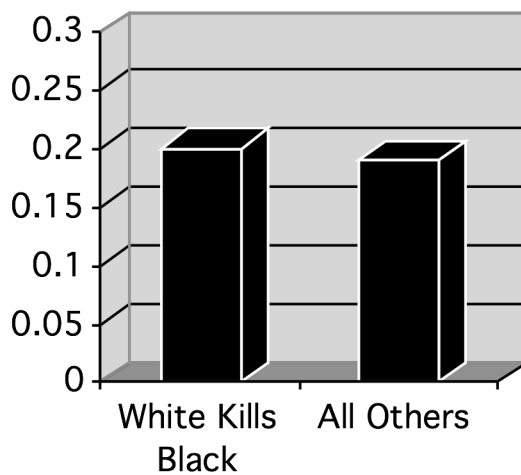
Figure 5: Blk Kill White vs. All Others





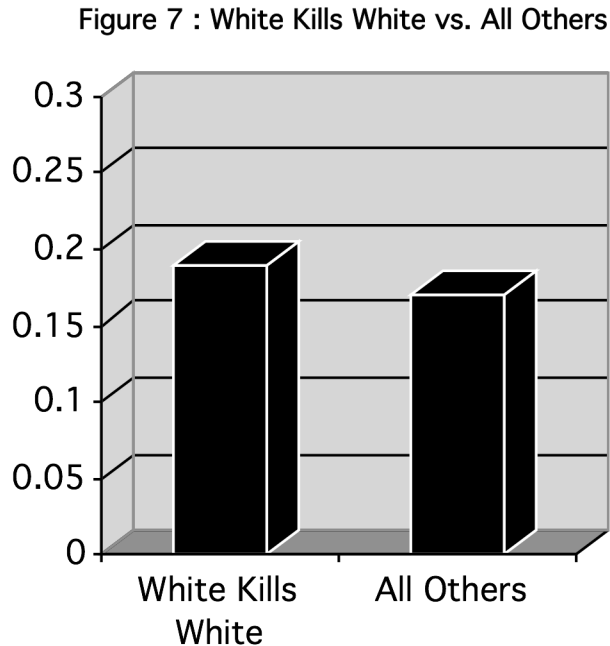
In Figure 5, not surprisingly, we see that when a black offender kills a white victim, compared to all other cases, the chance that the prosecutor will seek death is higher. This is in contrast to Figure 4 when we see the prosecutor less concerned in pursuing death (compared to other cases) if the victim and offender are black. In Figure 6, the non-significant relationship indicates that a white defendant killing a black victim has no impact on the prosecutor's decision to seek death. Once again, this figure suggests a lack of interest in pursuing death sentences if the victim is black.

Figure 6: White Kills Black vs. All Others (n/s)



In Figure 7, the probability that a white killing another white person will result in the prosecutor seeking death is 0.19 compared to all other cases (0.17). To reiterate findings discussed earlier, this is most likely due to the fact that white offenders predominantly kill white victims. White victims seem to evoke a stronger interest on

the part of the prosecutor to seek death. This trend remains consistent throughout the results.



The next selection of figures compares the racial combination to cases where a black defendant kills a black victim. In Figure 8, we learn that a prosecutor is about 2.3 times more likely to pursue the death penalty when a white person kills another white person than in black intra-racial killings. Figure 9 once again shows that killing a white person increases the prospect of a prosecutor seeking death by 2.25 times. The race of defendant is not crucial to the dependent variable but the race of victim is what drives the relationship.

Figure 8: White Kill White vs. Black Kills Black

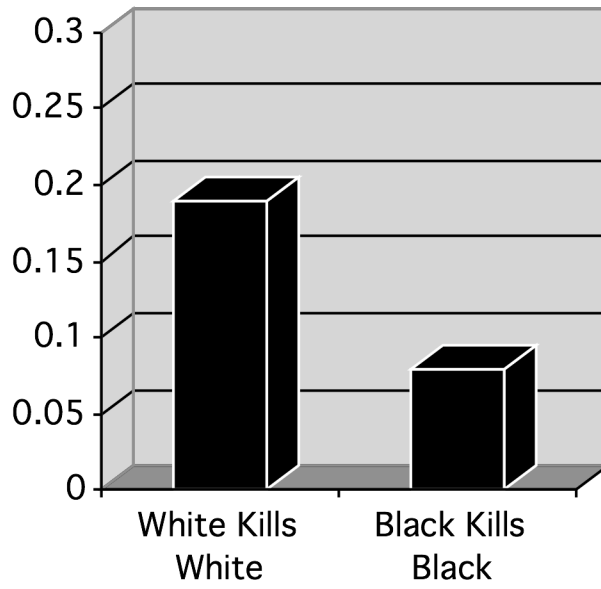


Figure 9: Black Kill White vs. Black Kills Black

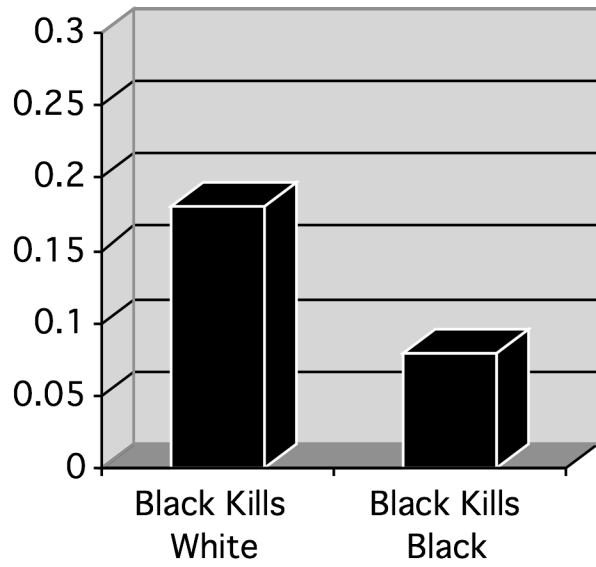
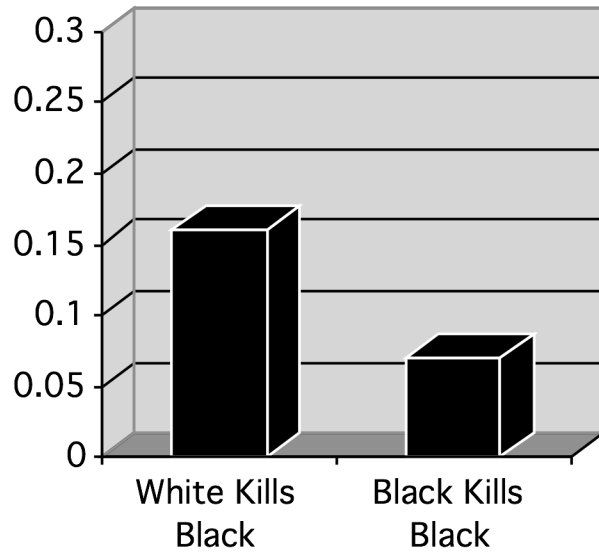


Figure 10: White Kill Black vs. Black Kills Black (n/s)



Finally, Figure 10 displays a *non-significant* relationship when comparing a white offender killing a black victim to a case of a black offender killing a black victim.

## Chapter 6: Discussion and Conclusions

The role of the prosecutor in deciding whether or not a capital crime warrants the death penalty is an important stage because it incorporates a wide range of discretion that often gets overlooked. The goal was to determine if the past findings of Baldus et al. (1990), which suggested Georgia's death penalty system suffers from serious racial bias, were still true. In conclusion, the results show that racial bias may still be a problem in the Georgia capital sentencing system. The office of the prosecutor may still be perpetuating racist practices.

My first hypothesis is supported by this investigation because when looking solely at the race of victim, it is clear that prosecutors are harsher on defendants that kill white victims. On a brighter note, the odds of a prosecutor seeking death in white victim cases (approx 2.2) seem to have greatly diminished to just under half of what was found in the Baldus Study (approx 3.5). Even though race of victim is still a relevant variable, it has become less so since the 1970s. Any degree of racial prejudice is problematic, however, it is a positive finding that race of victim appears to be losing its influence on the death penalty system. The argument could be made that while racial practices may still exist, the legal prescriptions enacted in 1976 to address disparity in the death penalty is showing some promise.

My second hypothesis was rejected because cases where white offenders kill white victims have slightly higher odds of the prosecutor seeking death instead of cases where a black offender kills a white victim, which is a close second. However, for these controls, it is likely that the high levels of intraracial homicide can account

for this. White offenders kill white victims at higher rates and which could be why white intraracial homicides are more likely to be targeted by the prosecutor. Moreover, the difference in the size of the coefficients for these two racial combinations are negligible and thus gives weight to the finding that race of defendant is not driving the relationship. The third hypothesis was supported. The only *negative* and significant racial combination was *blackkillsblack*. In other words, black defendants that kill black victims are less likely to result in a prosecutor seeking death. All other racial combinations have higher odds that a prosecutor will seek death compared to the *blackkillsblack* independent variable.

My findings support the United States General Accounting Office study, which concluded that the majority of studies (82% ) on disparity and sentencing have found race of victim to be a consistent factor in prosecutor decision-making (GAO, 1990). In cases where black defendants kill black victims, the negative and highly significant relationship fuels the idea that the justice system is still more concerned with seeking justice for the lives of white victims. In addition, the results for the current study imply that we need to be more cognizant of the more subtle forms of racism that the Georgia capital sentencing system may be perpetuating. If cases involving white victims are more likely to garner aggressive prosecution, there remains the question of why black victims are not afforded the same response.

All of the legal aggravators in the models were positively related to the dependent variable. The vast majority of these controls were highly significant with only a couple falling just outside of the 0.10 significance range. When it came to the variable that looked at location, my data revealed that a prosecutor is significantly

more likely to pursue the death penalty if they are within a suburban or rural setting and less likely if they are in an urban setting. While my investigation is not designed to consider this question in detail, it is important to mention that geography has been found to be a relevant factor in other states (Paternoster et al., 2004).

One possible explanation is the connection between race and geography. Minority groups are more likely to be clustered within urban areas whereas whites usually spread out to the surrounding suburban neighborhoods outside city limits (Welch, 2001). With the strong finding that those who kill whites are more likely to receive the death penalty, an inference could be made that since whites mostly live in suburban/rural locales it is understandable that this control variable would also be significant.

At first glance I was somewhat perplexed by the non-significant eyewitness variable. A possible reason for this finding could be that eyewitness evidence is important for the conviction stage but may not be as important for the subsequent sentencing stage. At the point of sentencing, guilt has already been established and so whether there is an eyewitness may not sway the prosecutor either way.

The variable *prior convictions* displayed a negative and non-significant relationship to the outcome. It is possible that priors may not have been measured consistently. It was unclear whether priors only included felony convictions for violent crime or if it also included other crime types.

## Limitations

Paternoster and Brame (2008) point to a recent criticism of the usage of regression based models. The argument follows that regression analysis is a limitation in the research on race and capital sentencing because race is not the type of variable that can be manipulated therefore leaving one unable to determine what would happen if a victim's race were different. In other words, regression analysis creates implausible counterfactuals (976). In response to such criticisms, and in defense of the chosen method for the current study, Paternoster and Brame (2008) concede that while it is true that one must be "careful in making causal inferences in the absence of direct manipulation" (978), it is still a useful approach to compare the outcomes of similar capital cases for people in different racial categories. Of course, this statistical method may not be ideal but it can still inform the researcher and wider audience about the possible consequences of race even though one cannot prove that race has had a direct causal impact on the prosecutor in making a decision. Overt discrimination, which may be manifested in the race of offender effects, should be distinguished from covert discrimination, which may be manifested in race of victim effects.

The primary sample was unable to allow for meaningful evaluation for race/ethnicity effects for other demographic groups. It may be that the outcomes are different for Hispanic, Asian, or Native American offenders or victims. It is difficult to garner solid data on these groups because of their small number in the capital sentencing system. Determining how these groups compare to blacks and whites was missing from the study.



Although the study was not intended to be a replication of the Baldus Study, it was clearly not as extensive compared to the 400 variables that Baldus and colleagues were able to analyze for Georgia. Also, not having much information about the criminal history of the offender beyond the relevant murder conviction was problematic. Securing a more detailed criminal history of the offender is useful because it acts as another legally relevant variable that the prosecutor might use. The Baldus Study was better able to control for detailed offender and victim background characteristics.

Another limitation is that a small number of the cases in the data had multiple victims where the victims were more than one race. Although this was not common, there were instances where both a black and white victim were murdered. While I highly doubt that a handful of cases could completely skew the data, it is an important issue to keep in mind when interpreting the results.

Another limitation in the data is not having much background on the prosecutor. Since discretion is critical to the role of the prosecutor, it would have been helpful to incorporate individual factors about the prosecutor that may affect the way they make decisions. For example, it may have been relevant to look at years of experience as a district attorney or past history of prosecutorial misconduct.

### Theoretical Implications

From these findings, an argument could be made that colorblind racism and the racial threat perspective continue to offer the more realistic interpretation of race rather than the 'post-racial America' perspective. The bulk of racism seems to be operating implicitly rather than explicitly. Instead of directly targeting black

defendants, the death penalty avenges the lives of white victims. Ogletree and Sarat (2006) find that capital punishment is a “living embodiment of a system of white privilege” (264).

What is certain is that although the results of the current study suggest that we may be moving in the right direction, we are still far from the extreme of pure justice on the continuum of discrimination and disparity (see Figure 1). Also, there is support for the conflict perspective because it appears that criminal activity committed against whites is deemed to be more criminal than if the activity is committed against blacks. Once again, this reinforces the perception that the law remains committed to protecting the dominant class/racial group.

### Policy Implications

Paternoster et al. (2004) offers that although the vast majority of cases have found race effects in capital sentencing, this “does not mean that [prosecutors] are motivated by intentional racial prejudice or bigotry” (48). The researchers noted that a survey of Maryland’s State’s Attorneys revealed that prosecutors would use the wishes of family members of victims in deciding whether to pursue the death penalty. It may be possible that families of white victims are more likely to push for the death penalty than family members of black victim.

In 2003, the Bureau of Justice Statistics reported that 59% of whites felt that the death penalty was applied fairly while only 32% of blacks agreed with that statement (BJS, 2003). The chasm between white and black opinions on the fairness of capital punishment exemplifies a society where a large portion remains disenchanted with the legal system. Even though the current study highlights that race

of victim may be less relevant in capital sentencing today than in the past, it may take a lot more to change the perception that many blacks continue to have of capital punishment. The difference in opinions between blacks and whites on the death penalty may take much more time to converge.

In 2006, the American Bar Association released a report that included recommendations on how to improve prosecutorial misconduct more broadly. However, the report also touched on discretion and how it can either be supervised or restricted to make case processing more transparent. A main argument they presented was that the numerous aggravating factors under death penalty legislation could virtually render most murders death-eligible. However, most murders are not charged as such. The ABA recommended that each prosecutor's office create written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law (American Bar Association, 2006). This is a step in the right direction. It is possible that policy initiatives requiring states attorney's offices to document and justify their decisions can help open up this black box.

In 1995, there was a revision of the Federal Death Penalty Protocol requiring all federal prosecutors to submit for review all cases where capital charges *could* be pursued, regardless of whether the federal prosecutor *would* have pursued a death sentence (RAND, 2006). A Federal review committee was established where all cases fitting this criteria would be dissected. A final recommendation would then be forwarded to the U.S Attorney General who would make the final decision about whether the prosecutor could pursue the case. By policy, information about the race

of the offender or victim is excluded from the case information to make it truly 'colorblind' (RAND, 2006). There is available research suggesting that the Federal capital sentencing system has been able to avoid the taint of racially biased sentencing (DOJ, 2001; RAND, 2006).

One idea may be to have state level capital sentencing systems mirror that of the federal system to see if they can accomplish the apparent success of the federal system. Centralizing decision making and taking away discretion of the individual prosecutors, as in the federal system, may help to address bias issues. Also, the fact that case review is 'colorblind' may also act as a deterrent to racially charged decision making.

#### Future Research/Legal Change

Although I have focused on the prosecutor throughout this study, I recognize that there may be bias in other stages in the justice funnel. Changes to the role of the prosecutor will not resolve all disparity issues. For example, law enforcement officers are the first to uncover crime and initiate investigation. An interesting study may be to research whether police spend more time investigating cases of white victimization, increasing the probability of arrest, conviction and sentencing. Another area for future research might be to estimate multi-level models that include jurisdiction and characteristics of the jurisdiction such as racial makeup, education, incomes, etc. This study finds that urban vs. rural/suburban matters. It would be interesting to see what exactly it is about these areas that make them relevant to the prosecutor's decision-making.

Finally, another interesting route for research might be to determine if racial effects are addressed at the appellate level (Georgia's Supreme Court review). It may be that we already have checks and balances in the system to correct for disparity at earlier stages.

### Conclusion

*Furman v. Georgia* symbolized the justice system's acknowledgement of a 'dual' or two-tiered justice system; that is, a system where laws were applied differently in similar contexts. The finality of death gives us the right to demand that our legal system mete out punishments in a fair and impartial way. The only thing more frustrating than knowing racial disparity persists in capital sentencing, even after controlling for important factors, is not knowing *why* it occurs.

It is highly unusual that the public knows so little about the domain of the prosecutor when it comes to decision making, even though the prosecutor is a critical figure in capital sentencing. This society has made important steps to move beyond the ugly history of racial intolerance. We have now entered into an era where prejudice exists in new and implicit forms. While race of victim seems to matter less today than it did in the past, it is still influential in the state of Georgia. The current study focused on the prosecutor but the issue is much bigger than any single role. Other justice actors contribute to these outcomes as well and all must take responsibility. It may not be possible to completely eradicate our justice system of bias but it is necessary to start somewhere.

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