The Death Penalty

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Introduction

The issue of the death penalty has been an area of enormous academic and political ferment in the United States over the last forty years, with the country flirting with abolition in the 1970s, followed by a period of renewed use of the death penalty, and then a period of retrenchment, reflected in a declining number of death sentences and executions and a recent trend leading six states to abolish the death penalty in the last six years. Internationally, there is a steady movement away from the death penalty, which has been abolished throughout the European Union, although certain states in the Middle East (Saudi Arabia, Iran) and Asia (China, Singapore, Japan) have continued to use it frequently.

Death penalty statues vary some across the 32 states with current enforceable statutes in the United States, but capital punishment is universally reserved for a relatively narrow category of “first-degree” murders that involve one or more aggravating circumstances. These aggravating circumstances typically include murdering a police officer or witness, murder for hire, multiple murders, and murders that are “heinous, atrocious, or cruel.” Even cases that are initially treated as capital eligible, are very unlikely to result in a death sentence; defendants often plead guilty in return for receiving a noncapital sentence, some defendants are found guilty of a lesser charge in jury trials, and some juries decide not to impose the death sentence even when the law would permit them to do so (National Research Council 2012).
This entry will review some of the major social science studies evaluating the issue of whether the death penalty deters, which have largely failed to provide any convincing evidence of deterrence, as well as the major studies exploring racial bias in the administration of the death penalty.

**Procedural Issues Associated with the Death Penalty**

The modern death penalty era in the United States began in 1972 with *Furman v. Georgia* (408 U.S. 238 1972). In that case, the U.S. Supreme Court was concerned that the unchanneled discretion of prosecutors, judges, and juries led to the arbitrary administration of the death penalty. As a result, the Court struck down every then-existing sentence of death, stating “that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” While the Justices apparently believed that their decision would lead to the abolition of the death penalty, it ironically propelled its strong revival.

Most states, including some that had not had the penalty before, responded to *Furman* by enacting specific death penalty statutes that were designed to address the Court’s articulated concerns, including the implementation of a pre-trial capital hearing along with separate guilt and sentencing trials, the consideration of so-called aggravating and mitigating circumstances that enhance or undermine the case for execution respectively, and the automatic appeal of death sentencing decisions. Four years later, in *Gregg v. Georgia* (428 U.S. 153, 169 1976), the Supreme Court held that “the punishment of death does not invariably violate the Constitution” and indicated that several of these new statutes were facially constitutional.

However there is a substantial and growing body of evidence that challenges the notion that the procedural changes that were deemed facially constitutional in *Gregg* have adequately
addressed the concerns of *Furman* in practice. Indeed, in October 2009, the American Law Institute (ALI) voted overwhelmingly to withdraw its death penalty framework from the Model Penal Code because that framework had proved to be woefully inadequate in application. The April 15, 2009 "Report of the Council to the Membership of The American Law Institute" expressed concerns over the inability to avoid the arbitrary, discriminatory, or simply erroneous invocation of this irrevocable punishment. These difficulties are compounded by the need to construct a system that, on the one hand, allows for consistent sentencing outcomes but simultaneously gives the factfinder sufficient leeway to consider the circumstances surrounding each crime.

Despite concerns about the administration of the death penalty, it has been broadly popular in the United States, especially during periods such as the late 1980s and early 1990s when crime in the United States was particularly high. As a result, politicians such as New York Governor Mario Cuomo failed to win reelection in part due to their opposition to the death penalty, while other governors, such as George W. Bush of Texas, were launched into national prominence because of their strong support for the death penalty.

**Deterrence and the Death Penalty**

The simplest law and economics assessment would suggest that the death penalty should deter murder, as it enhances the maximum penalty associated with killings. It is now recognized that this simple theoretical analysis is inadequate. First, capital punishment is invoked rarely and after years of delay, due to the post-*Furman* implementation of long and complicated legal procedures that must be exhausted before any death sentence can be administered, thereby undercutting any deterrent potential. Second, the costs of running a death penalty system are staggering, and any attempt to estimate the effect of capital punishment on crime must also take
into account the fact that implementing a capital punishment system may draw resources away from other, more effective law enforcement projects. A recent study from California estimated that the state’s system for prosecuting death penalty cases cost taxpayers $4 billion between 1976 and early 2011, even though only 13 executions were carried out over the same time period (Alercon and Mitchell 2011). Cook (2009) similarly concluded that North Carolina’s execution system cost $11 million annually, while a regression analysis performed using Maryland case data calculated that capital trials cost approximately $1 million more to prosecute than non-capital trials (Roman et al. 2009).

The former Manhattan District Attorney Robert Morgenthau spoke out eloquently about the “terrible price” inflicted by the presence of capital punishment in the hopes that his words might forestall New York’s 1995 launch of a death penalty system:

Some crimes are so depraved that execution might seem just. But even in the impossible event that a statute could be written and applied so wisely that it would reach only those cases, the price would still be too high.

It has long been argued, with statistical support, that by their brutalizing and dehumanizing effect on society, executions cause more murders than they prevent. "After every instance in which the law violates the sanctity of human life, that life is held less sacred by the community among whom the outrage is perpetrated." (Morgenthau 1995)

When the New York death penalty law was adopted over Morgenthau’s opposition, he simply refused to seek the death penalty in the borough of Manhattan, as did his fellow District Attorney in the Bronx. From the implementation of the New York death penalty law in 1995, until 2004 (when it was judicially abolished), the murder rate dropped in Manhattan by 64.4 percent (from 16.3 to 5.8 murders per 100,000) and in the Bronx by 63.9 percent (from 25.1 to 9.1 per 100,000). Another New York City borough with the same laws and police force and with broadly similar economic, social, and demographic features as Manhattan and the Bronx –
Brooklyn – had a top prosecutor who issued the largest number of notices of intention to seek the death penalty, and yet Brooklyn experienced only a 43.3 percent decline in murders over this period (from 16.6 murders to 9.4 per 100,000 in 1995) (Kuziemko 2006; Donohue and Wolters 2009). Strong causal inferences cannot be drawn from Manhattan and the Bronx’s homicide decline, but this example illustrates the lack of an apparent capital punishment deterrent effect in the crime patterns across these counties.

While a steady stream of papers beginning with Ehrlich (1976) have tried to make the empirical case that the death penalty has been a deterrent to murder in the United States, these studies have largely been rejected by the academic community (National Research Council 1978; Donohue and Wolters 2005; Donohue and Wolters 2009; Kovandzic et al. 2009; National Research Council 2012). The mounting evidence undermining the view that the death penalty deters crime has begun to influence the U.S. Supreme Court’s discussion of the constitutionality of the death penalty, as illustrated by the debate between Justices Stevens and Scalia in Baze v. Rees (553 U.S. 35 2008). Justice Stevens agreed with the majority in that case that the cocktail of drugs used by Kentucky to execute prisoners did not violate the Eighth Amendment, but went on to argue that there was “no reliable statistical evidence that capital punishment in fact deters potential offenders.”

Justice Scalia responded sharply to Justice Stevens’s concurrence. Referencing an article by Cass Sunstein and Adrian Vermeule, Scalia argued, “Justice Stevens’ analysis barely acknowledges the ‘significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one.’” However, knowledgeable researchers believe that this so-called "significant body of evidence" was based on outdated or invalid econometric techniques and models. Indeed, shortly after the decision was handed down, Sunstein indicated
that he had changed positions in the wake of the scholarly demolition of the existing pro-
deterrence literature, writing, “In short, the best reading of the accumulated data is that they do
not establish a deterrent effect of the death penalty” (Sustein and Wolfers 2008).

In April of 2012, a panel of the National Research Council (NRC) issued a report on
deterrence and the death penalty, concluding that previous research was “not informative about
whether capital punishment decreases, increases, or has no effect on homicide rates.” The panel
based this decision on two main factors. First, they noted that existing studies did not adequately
model the effect of non-capital punishment on crime, which would bias estimates of the effect of
capital punishment on crime if common factors influenced both the frequency of death sentences
and the severity of non-capital punishment. To accurately capture the deterrent effect,
researchers would need to show the deterrent effect of the death penalty in comparison to other
common sanctions.

Second, the panel wrote that existing research did not adequately model “potential
murderers’ perceptions of and response to the capital punishment component of a sanction
regime.” The NRC panel noted that potential offenders cannot be deterred by the death penalty
unless they are aware of the threat, and there is a large body of literature confirming that the
general public is very poorly informed about the actual likelihood of the imposition of death
penalty sentences. The NRC report also determined that many earlier studies used “strong and
unverifiable assumptions” in their identification strategies (National Research Council 2012).

Racial Bias in the Implementation of the Death Penalty

There is expansive empirical literature on whether race affects prosecutors’ and jurors’
dead penalty decisions, with nearly all recent studies finding that race does influence capital
sentencing outcomes. David Baldus’s 1990 study of capital sentencing in Georgia, Equal Justice
and the Death Penalty, was a landmark study in the empirical evaluation of the impact of race on the administration of the death penalty. Similar studies conducted in states, counties, and cities across the United States confirm these findings, and a number of studies have used controlled experiments to pinpoint precisely how race affects capital outcomes. The results of these studies further corroborate the findings of the econometric literature: race inappropriately influences the administration of the death penalty even after controlling for legitimate case characteristics.

The Baldus Study on Capital Sentencing in Georgia

Baldus’s Georgia study investigated the effect of race on decisions throughout the charging and sentencing process by analyzing a large, stratified random sample of 1,066 defendants selected from the universe of 2,484 defendants who were charged with homicide and subsequently convicted of murder or voluntary manslaughter in Georgia between March 28, 1973 and December 31, 1979. The researchers then weighted this sample, which included 127 defendants who had been sentenced to death, to evaluate the effect of race on capital sentencing in the case universe as a whole. The researchers reviewed each defendant’s case files and collected data on the circumstances of the offense and the characteristics of the defendant. Using both linear probability and logit models, the Baldus team conducted an extensive regression analysis investigating the main effect of race on capital sentencing in Georgia. Eight models differing in their method and in their explanatory variables were presented, each of which indicated that victim race inappropriately influenced which defendants were sentenced to die and which were permitted to live.

This comprehensive analysis showed that defendants convicted of murdering a white victim were statistically significantly more likely to be sentenced to death than defendants convicted of murdering a black victim. A logistic regression model from this study showing that
defendants convicted of murdering a white victim were 4.3 times more likely to be sentenced to
death than defendants convicted of murdering a black victim became the core piece of evidence
regarding race-of-victim discrimination in McCleskey v. Kemp (481 U.S. 279 1987). This
difference was statistically significant at the .005 level. Victim race exerted a greater influence
on capital sentencing outcomes than numerous legitimate factors, such as whether the offense
was coupled with kidnapping, whether the victim was frail, or whether the victim was an on-duty
law enforcement officer.

Baldus et al. also used two different approaches to evaluate whether death sentencing
decisions were influenced by the interaction of the race of the defendant and the victim. First,
the authors examined narrative summaries of cases that were death-eligible under the state’s
contemporaneous-felony statutory aggravating circumstance. This statutory aggravating factor
served as rough proxy for death-eligibility, because death penalties were imposed primarily in
cases involving contemporaneous felonies. The researchers classified the 438 cases involving a
contemporaneous felony into various crime sub-categories, and then compared the death
sentencing rates for similar types of cases involving different combinations of defendant and
victim race.

As shown in Table 1, controlling for the type of contemporaneous felony revealed that
the race of the victim strongly influenced capital sentencing. The interaction between defendant
and victim race was particularly pronounced for armed robbery cases, as a black defendant was
over six times more likely to be sentenced to death if convicted of murdering a white victim than
if convicted of murdering a black victim. The disparity between the death sentencing rates of
cases involving a black defendant and white victim and cases involving a black defendant and a
black victim is statistically significant at the .01 level. The disparity between these racial
combinations is also significant at the .05 level for kidnapping cases and the .01 level for armed robbery cases.

Second, the researchers employed regression techniques to examine how the race of the defendant and victim interacted to influence capital sentencing outcomes. The research team began by conducting a multiple regression analysis that considered the (nonracial) circumstances of each case to produce an estimate of the probability that it would result in a death sentence. They then used the results of this regression analysis to construct an eight-point egregiousness scale based on the estimated probability that each case would result in a death sentence. Finally,
the research team placed the 472 most egregious cases of the total sample into an eight-level egregiousness scale and compared the racial characteristics of actual sentencing rates within each level. The results of this regression-based analysis are provided in Table 2.

Table 2: Race of Defendant/Victim and Death Sentencing in Georgia by Egregiousness Categories

<table>
<thead>
<tr>
<th>Predicted Chance of a Death Sentence, from 1 (low) to 8 (high)</th>
<th>% Sentenced to Death for Murders with a Black Offender and a Black Victim (A)</th>
<th>% Sentenced to Death for Murders with a Black Offender and a White Victim (B)</th>
<th>% Sentenced to Death for Murders with a White Offender and a Black Victim (C)</th>
<th>% Sentenced to Death for Murders with a White Offender and a White Victim (D)</th>
<th>Ratio of (B) / (A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0% (0/19)</td>
<td>0% (0/9)</td>
<td>---</td>
<td>0% (0/5)</td>
<td>Undefined</td>
</tr>
<tr>
<td>2</td>
<td>0% (0/27)</td>
<td>0% (0/8)</td>
<td>0% (0/1)</td>
<td>0% (0/19)</td>
<td>Undefined</td>
</tr>
<tr>
<td>3</td>
<td>11.1% (2/18)</td>
<td>30.0% (3/10)</td>
<td>0% (0/9)</td>
<td>2.6% (1/39)</td>
<td>2.7</td>
</tr>
<tr>
<td>4</td>
<td>0% (0/15)</td>
<td>23.1% (3/13)</td>
<td>---</td>
<td>3.4% (1/29)</td>
<td>Infinite</td>
</tr>
<tr>
<td>5</td>
<td>16.7% (2/12)</td>
<td>34.6% (9/26)</td>
<td>---</td>
<td>20% (4/20)</td>
<td>2.08</td>
</tr>
<tr>
<td>6</td>
<td>5.0% (1/20)</td>
<td>37.5% (3/8)</td>
<td>50.0% (2/4)</td>
<td>15.6% (5/32)</td>
<td>7.5</td>
</tr>
<tr>
<td>7</td>
<td>38.5% (5/13)</td>
<td>64.3% (9/14)</td>
<td>0% (0/5)</td>
<td>38.5% (15/39)</td>
<td>1.67</td>
</tr>
<tr>
<td>8</td>
<td>75% (6/8)</td>
<td>90.9% (20/22)</td>
<td>---</td>
<td>89.3% (25/28)</td>
<td>1.21</td>
</tr>
</tbody>
</table>

Table 2 shows that controlling for egregiousness, cases involving black defendants and white victims were substantially more likely to result in a death sentence than cases involving other combinations of defendant and victim race. Other than at the two lowest levels of the egregiousness scale (where no death sentences were imposed), a black defendant convicted of murdering a white victim was substantially more likely at each egregiousness level to be sentenced to death than either a black defendant convicted of murdering a black victim or a white defendant murdering a white victim. (As the authors noted, the racial disparities shrink at the highest egregiousness level - level 8 - since most defendants received the death penalty.)

Subsequent Studies of Race and Capital Sentencing
The Baldus team’s regression models uniformly demonstrate that race infected the administration of capital punishment in Georgia during the study’s sample period. Well-controlled studies using more recent data from jurisdictions across the country have similarly found that the race of the victim influences who is sentenced to die. This finding is consistent across studies and permeates both the pre- and post-1990 literature. An overview of the pre-1990 literature on the role of race in post-\textit{Furman} capital sentencing was captured in a 1990 report of the U.S. General Accounting Office, which issued a clear assessment of a set of studies conducted by 21 sets of researchers and based on 23 distinct datasets: “Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the \textit{Furman} decision.” The report also concluded:

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies. . . . [Our] synthesis supports a strong race of victim influence.

The GAO noted that “The race of victim influence was found at all stages of the criminal justice system process, although there were variations among studies as to whether there was a race of victim influence at specific stages.”

Findings that race influences the administration of capital punishment are similarly robust in the post-1990 literature. Table 3 presents the regression results of ten methodologically rigorous recent studies on the effect of victim race on capital sentencing outcomes, which have found that defendants convicted of murdering a white victim are significantly more likely to be sentenced to death than similarly-situated defendants convicted of murdering a black victim (Donohue 2013). The relative probabilities presented in this table were estimated by regression models that controlled for variables that are expected to affect capital sentencing decisions.
In addition, studies that have examined the interaction between defendant and victim race has have generally confirmed that black defendants are remarkably more likely to be sentenced to death if their victim is white rather than black. Table 4 displays these unadjusted rates of racial disparity. For example, in the Baldus et al. Georgia study, black defendants were 17.2 times more likely to be sentenced to death if the victim was white rather than black. The figures in this table are just overall percentages, not regression-adjusted estimates, but their uniformity is
revealing.

<table>
<thead>
<tr>
<th>Location</th>
<th>Period of Study</th>
<th>Type of Case</th>
<th>% of Cases with a Black Defendant and a Black Victim that Result in a Death Sentence (A)</th>
<th>% of Cases with a Black Defendant and a White Victim that Result in a Death Sentence (B)</th>
<th>% of Cases with a White Defendant and a Black Victim that Result in a Death Sentence (C)</th>
<th>% of Cases with a White Defendant and a White Victim that Result in a Death Sentence (D)</th>
<th>Ratio of (B)/(A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1990-1999</td>
<td>Reported homicides</td>
<td>.7% (36/5355)</td>
<td>3.5% (34/984)</td>
<td>0% (0/244)</td>
<td>1.9% (79/4206)</td>
<td>5.14</td>
</tr>
<tr>
<td>Florida</td>
<td>1976-1987</td>
<td>Homicides</td>
<td>0.8% (36/4428)</td>
<td>12.6% (92/731)</td>
<td>3.4% (9/264)</td>
<td>4.9% (227/4645)</td>
<td>15.48</td>
</tr>
<tr>
<td>Georgia</td>
<td>1973-1979</td>
<td>Defendants charged with homicide and subsequently convicted</td>
<td>1.2% (18/1443)</td>
<td>21.5% (50/233)</td>
<td>3% (2/60)</td>
<td>7.8% (58/748)</td>
<td>17.2</td>
</tr>
<tr>
<td>Illinois</td>
<td>1988-1997</td>
<td>Defendants convicted of first-degree murder</td>
<td>1.1% (27/2526)</td>
<td>4.7% (17/363)</td>
<td>4.8% (3/59)</td>
<td>4.8% (23/458)</td>
<td>4.38</td>
</tr>
<tr>
<td>Maryland*</td>
<td>1978-1999</td>
<td>Death-eligible first- or second-degree murder</td>
<td>2.30% (27/2526)</td>
<td>13.80% (17/124)</td>
<td>4.60% (3/59)</td>
<td>8.90% (23/258)</td>
<td>6</td>
</tr>
<tr>
<td>Missouri</td>
<td>1977-1991</td>
<td>Non-negligent homicides</td>
<td>1.2% (24/2033)</td>
<td>7.1% (17/239)</td>
<td>3.3% (3/90)</td>
<td>3.9% (58/1488)</td>
<td>6.03</td>
</tr>
<tr>
<td>Nebraska</td>
<td>1973-1999</td>
<td>Death-eligible homicides</td>
<td>8.7% (2/23)</td>
<td>18.2% (4/22)</td>
<td>20.0% (1/5)</td>
<td>21.0% (13/62)</td>
<td>2.09</td>
</tr>
<tr>
<td>Ohio</td>
<td>1981-1994</td>
<td>Homicides</td>
<td>2.3% (77/3337)</td>
<td>10.8% (56/517)</td>
<td>4.3% (8/184)</td>
<td>5.5% (130/2385)</td>
<td>4.69</td>
</tr>
<tr>
<td>East Baton Rouge, LA</td>
<td>1990-2008</td>
<td>Defendants convicted of homicide</td>
<td>8.3% (11/132)</td>
<td>30% (9/30)</td>
<td>0% (0/3)</td>
<td>12% (3/25)</td>
<td>3.6</td>
</tr>
</tbody>
</table>

* Raw numbers not available for Maryland
In a sophisticated national-level study including 99.4% of persons admitted to death row in the U.S. between 1977 and 1999, researchers Blume, Eisenberg, and Wells (2004) analyzed data on murders and the composition of death row from the 31 states that admitted ten or more defendants to death row during this time period. The researchers obtained data on the characteristics of murders, the racial composition of death row, and the legal and political characteristics of different states. They then compared the overall population of murderers to the death row population to determine which factors are related to the probability of being convicted of capital murder and placed on death row.

The researchers found that variation in black representation on states’ death rows across the country can be largely predicted by three variables: (1) the overall proportion of murders committed by blacks, (2) the proportion of all murders involving a black offender and a white victim, and (3) whether a state is a former confederate state (where the large proportion of murders involve black defendants and victims). The finding that black on white murders were treated more harshly than other types of murders was statistically significant at the .01 level. Variables such as whether a judge imposes the final sentence, the amount of political pressure on judges, and state Supreme Court Justices’ political ideology were not related to the proportion of blacks on death row.

Blume et al. (2004) also calculated the rate at which murder cases involving different combinations of defendant and victim race resulted in death sentences for the eight states for which they had complete data for the period from 1977 to 2000. Table 5 displays this data and shows that cases involving a black offender and a white victim are far more likely to result in the
offender being placed on death row than cases involving other combinations of offender and victim race. The combination of a black offender and a white victim leads to a death sentence roughly 3 to 23 times more frequently than the rate associated with black offender-black victim cases.

### Table 5. Capital Sentencing Rates by Race of Defendant and Victim in 8 States (1977-2000)

<table>
<thead>
<tr>
<th>State</th>
<th>% Sentenced to Death for Murders with a Black Offender and a Black Victim (A)</th>
<th>% Sentenced to Death for Murders with a Black Offender and White Victim (B)</th>
<th>% Sentenced to Death for Murders with a White Offender and Black Victim (C)</th>
<th>% Sentenced to Death for Murders with a White Offender and White Victim (D)</th>
<th>Ratio of (B) / (A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>0.5 (35/7091)</td>
<td>9.9 (72/726)</td>
<td>2.1 (4/187)</td>
<td>4.2 (114/2734)</td>
<td>20.1</td>
</tr>
<tr>
<td>Indiana</td>
<td>0.6 (12/2151)</td>
<td>4.2 (16/375)</td>
<td>0.0 (0/100)</td>
<td>2.2 (49/2272)</td>
<td>7.6</td>
</tr>
<tr>
<td>Maryland</td>
<td>0.2 (10/4174)</td>
<td>5.2 (25/479)</td>
<td>0.7 (1/137)</td>
<td>1.4 (20/1429)</td>
<td>21.8</td>
</tr>
<tr>
<td>Nevada</td>
<td>2.5 (11/442)</td>
<td>10.1 (18/178)</td>
<td>1.3 (1/80)</td>
<td>3.7 (46/1244)</td>
<td>4.1</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>1.8 (112/6310)</td>
<td>4.9 (46/947)</td>
<td>1.2 (4/335)</td>
<td>2.2 (90/4055)</td>
<td>2.7</td>
</tr>
<tr>
<td>South Carolina</td>
<td>0.3 (14/4784)</td>
<td>6.8 (50/738)</td>
<td>5.0 (9/179)</td>
<td>2.7 (72/2654)</td>
<td>23.2</td>
</tr>
<tr>
<td>Virginia</td>
<td>0.4 (18/4975)</td>
<td>6.5 (46/713)</td>
<td>2.3 (5/217)</td>
<td>1.8 (58/3167)</td>
<td>17.8</td>
</tr>
<tr>
<td>Arizona*</td>
<td>0.5 (13/2416)</td>
<td>4.8 (19/400)</td>
<td>2.8 (7/247)</td>
<td>5.9 (95/1613)</td>
<td>8.8</td>
</tr>
</tbody>
</table>

*Note: The data for Arizona combines Blacks and Hispanics into a single “minority” category. Thus, the numbers in the last row of the table for Arizona Black Offender and Black Victim also includes Hispanic offenders and victims.

### A New Test of Racial Bias in Capital Sentencing

In a recent working paper, Alberto F. Alesina and Eliana La Ferrara propose a novel test of racial bias in capital sentencing based on whether reversals of death sentences vary depending on the race of the defendant and victim. The authors model the behavior of the trial court as minimizing the weighted sum of the probability of sentencing an innocent defendant to death and that of letting a guilty defendant free (the inevitable tradeoff between Type I and Type II error). The authors suggest that racial bias exists when the relative weight of these two types of errors is.
a function of defendant and/or victim race. Thus, if decisionmakers throughout the criminal justice system consider minority on white crimes to be more serious, the relative weighting of the burdens of Type I and Type II error might shift in favor of a greater likelihood of erroneous conviction for defendants accused of these crimes. Under the assumption that higher courts are less likely to be affected by racial bias, one can predict that the combination of defendant and victim race will be only correlated with reversals if lower courts are affected by racial bias. The authors test this prediction by looking nationwide at all capital appeals that became final between 1973 and 1995 and by gathering information on the race of the defendant and victim(s) in these cases. They find robust evidence of bias in minority on white murders: in Direct Appeal and Habeas Corpus cases, the probability of error is 3 and 9 percentage points higher for minority on white murders, respectively, than for minority on minority murders.

**Controlled Experiments and Social Science Evidence on the Pathways of Racially Biased Decision Making in Capital Sentencing**

Some social science research has tried to illuminate the mechanisms leading to racially biased capital sentencing decisions. For example, a study by Mona Lynch and Craig Haney (2009) investigated how the process of juror deliberation can generate racially biased death penalty sentences. In their study, Lynch and Haney recruited 539 mock jurors to participate in video-simulated death penalty trials. Each juror viewed identical videos of the case, varying only the race—through both appearance and voice—of the defendant and victim. As part of their data collection, Lynch and Haney quantified “verdict certainty” by asking mock jurors to assess, both before and after deliberation, with what level of certainty they felt that the defendant deserved the death penalty for the particular homicide committed. Lynch and Haney found that after collective deliberation, not only did all jurors favor the death penalty more frequently, but the tendency to sentence black defendants to death more often than white defendants was
exacerbated among white jurors and jurors with poor instruction comprehension. Additionally, white jurors felt more certain that the nature of the homicide merited the death penalty when the defendant was black rather than white. The 2009 Lynch and Haney study also shed important light on how capital jurors evaluate mitigating and aggravating factors. Lynch and Haney found that white male jurors were less likely to consider mitigating evidence for black defendants; there was no comparable effect for women and non-white jurors when treated as a separate group, but the “white male dominance” of deliberation sessions nonetheless led to biased sentencing outcomes. Similarly, they conclusively found that jurors gave less weight to two categories of mitigating factors—namely, psychiatric problems and substance abuse issues—when the victim was white than when the victim was black.

Their 2009 findings accord with those of their previous study (Lynch and Haney 2000) that investigated whether juror comprehension of the judge’s instructions was a factor in sentencing bias. The authors again created a video-simulated trial that altered only the race of the victim and defendant for a “mid-range” robbery-murder case. They recruited 402 jury-eligible participants to watch the videotaped trial and answer a series of questionnaires. Finally, each juror completed an instructional comprehension test on the judicial instructions guiding their sentencing decision.

Lynch and Haney’s results from 2000 revealed a bias against black defendants among those with a low comprehension of sentencing instructions. In particular, jurors who did not understand the role of mitigating and aggravating circumstances were more likely to treat mitigating factors as aggravating in black than white defendant cases. For example, when a defendant had psychiatric problems, a mitigating factor, jurors mistakenly used this as an aggravating factor for 18% of black defendants but only 9% of white defendants. Further, even
when mitigation was defined properly, the evidence was regarded as “significantly less mitigating” for black than for white defendants.

Based on this finding, Lynch and Haney concluded that black defendants faced the most pronounced discrimination by those who least understood the judge’s instructions, and this discrimination was manifested in a misapplication of circumstances that led to a harsher view of the crime. Haney has elsewhere identified this as the inevitable result of an “empathetic divide” between white jurors and black defendants (Lynch and Haney 2009). This divide can lead jurors to engage in what Haney refers to as “moral disengagement” to separate themselves from the defendants they sentence.

An important 2006 study analyzed over 600 death-eligible cases in Philadelphia, Pennsylvania between 1979 and 1999 and showed how arbitrary this type of racial bias can be. (Eberhardt 2006). Forty-four of the cases involved a black defendant and white victim; another 308 had a black defendant and a black victim. Over 40 (mostly white) Stanford undergrads rated “the stereotypicality of each Black defendant’s appearance,” using whatever indication they felt appropriate. The study found that “24.4% of those Black defendants who fell in the lower half of the stereotypicality distribution received a death sentence, whereas 57.5% of those Black defendants who fell in the upper half received a death sentence.” The study found that “stereotypically black” defendants who had been convicted of murdering a white victim were more likely to receive a death sentence. That this finding represents racial bias in the capital punishment regime is underscored by the fact that when a black defendant was accused of killing a black victim, the defendant's "stereotypical blackness" did not predict a sentence of death. In other words, it is not something intrinsic to "stereotypical black" defendants that makes them more likely to be sentenced to death, but rather how the system processes their cases when race
becomes salient, as it apparently is in cases involving a black defendant who killed a white victim.

**Conclusion**

Despite decades of attempts to show that capital punishment deters murder, no study that purports to reach that finding has been deemed to meet the standards of modern empirical research. (National Research Council 1978; Donohue and Wolfers 2005; Donohue and Wolfers 2009; Kovandzic et al. 2009; National Research Council 2012). Given the impossibility of employing randomized executions, it is not clear whether any stronger refutation of the deterrence hypothesis is possible.

At the same time, a large and growing literature suggests that the probability of being sentenced to death is powerfully influenced by the interaction of the race of the defendant and victim (Baldus et al. 1990; United States General Accounting Office 1990; Lynch and Haney 2000; Blume et al. 2004; Eberhardt 2006; Lynch and Haney 2009; Donohue 2013). Most studies find that killers of white victims are far more likely to receive the death penalty than killers of minority victims. In addition, homicide cases with black defendants and white victims are significantly more likely to receive death penalty sentences, even when controlling for the egregiousness of the crime.

Other arenas of death penalty research in the United States have also focused on the financial cost of a death penalty system (Cook 2009; Roman et al. 2009; Alercon and Mitchell 2011) and the high rates of sentencing reversals (Liebman et al. 1999; Alesina and La Ferrara 2011), two factors that have fueled criticism of the current system. With U.S. crime rates at a relative low after the crime surge of the late 1960s through early 1990s, and with a series of DNA exonerations of death row inmates, enthusiasm for the death penalty in the U.S. appears to
be on the decline. Whether these factors coupled with a perceived lack of deterrent benefit, the scourge of racial discrimination in implementation, and the substantial costs of a death penalty system will further the recent trends of state abolitions or be overwhelmed by a counter-insurgence by pro-death penalty forces will be one of the interesting features of the criminal justice landscape over the next decade and beyond.
References:


