Florida Law Review

Volume 43 | Issue 1 Article 1

January 1991

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Florida Law Review

VOLUME 43 JANUARY 1991 NUMBER 1

CHOOSING THOSE WHO WILL DIE: RACE AND THE DEATH PENALTY IN FLORIDA

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This article examines the relationship between defendants' and victims' racial characteristics and the imposition of the death penalty

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This research was funded in part by the Racial and Ethnic Bias Study Commission, Florida Supreme Court. The Commission gave the researchers complete autonomy in conducting this research, and therefore any opinions and interpretations herein are those of the researchers, and not necessarily those of the Commission. Professor Radelet also gratefully acknowledges support from NIMH Grant No. 5 T32 MH15161-14, administered through the Family Research Laboratory, University of New Hampshire, as work on this project was completed while he was a postdoctoral fellow at New Hampshire (on sabbatical leave from the University of Florida).

The authors thank Professors Samuel R. Gross and Robert Mauro for their helpful comments on an earlier draft, and Watt Espy for information on Florida's execution history. We also thank former Justice William Brennan for inspiring our title; *see infra* note 233 and accompanying text.

in Florida. After a brief historical overview, the article presents a review of the research that explores the possibility that racial bias affects the imposition of the death penalty under Florida's current statute,[1] which took effect on December 8, 1972.[2] The article then examines data on all Florida homicides and death sentences over a twelve-year period, 1976 through 1987, to determine whether race affects contemporary death sentence decisions in Florida.

I. HISTORICAL OVERVIEW

The best source of historical information concerning executions in America is Watt Espy and his extensive archives in Headland, Alabama.[3] These records provide the basis for this article's examination of the history of the death penalty in Florida. Because Espy's research is ongoing, information regarding new executions and the discovery of missing data from already confirmed executions will further assist future students of the death penalty.

A. *Executions Under Local or Military Jurisdiction, 1769-1924*

City or county authorities controlled executions in Florida until 1924, when state law began to govern executions.[4] The Espy records contain 173 executions carried out under local authority, all of which were by hanging.[5] In addition, 18 executions were carried out under military authority, 13 of which were by firing squad.[6] The first execution in Florida occurred in January, 1769, when a "cracker" went to the gallows in St. Augustine for murder.[7] Only one hanging in Florida occurred after 1924: James Alderman was executed in Fort Lauderdale

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1. FLA. STAT. § 921.141 (Supp. 1990).

2. Ehrhardt & Levinson, *Florida's Legislative Response to* Furman: *An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10, 10 n.2 (1973); *see also* Thornton, *Florida's Legislative and Judicial Responses to* Furman v. Georgia: *An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 108, 109 n.15 (1974).

3. Espy's data archive [hereinafter Espy File], continues to grow daily; figures reported herein are current as of early 1991. For more information, contact Watt Espy at P.O. Drawer 277, Headland, Ala. 36345. Espy's work on the death penalty over the years has largely been unfunded. *See* N.Y. Times, Oct. 21, 1987, at A16, col. 2.

4. M. Vandiver, Race, Clemency, and Executions in Florida, 1924-1966, at 27 (Dec. 1983) (unpublished Masters Thesis, Florida State University) (available in Florida History Collection at University of Florida Library).

5. Espy File, *supra* note 3.

6. *Id.*

7. *Id.*

on August 17, 1929, following a federal murder conviction for a triple murder on a Coast Guard ship.[8]

The State of Florida has executed only one woman.[9] On September 22, 1848, Jacksonville authorities executed, by hanging, a slave named Celia for the murder of her master, Jacob Bryan.[10] Bryan had mistreated the slave. The white jurors that convicted her recommended clemency and a pardon.[11] After an outcry from local slave owners and the general white population, however, Governor Mosely denied clemency and allowed the execution to proceed.[12]

Of the 191 executions under local and military authority in Florida, the race of 11 of the prisoners is unknown.[13] Of the remaining 180 individuals, statistics reveal that 73.3% (N=132) were black, and 26.6% (N=48) were white.[14] The executions of the white prisoners were comprised of 5 executions for aiding runaway slaves, 2 executions for rape, and 6 executions for "other" crimes.[15] The remaining 35 prisoners were put to death for murder.[16]

Of the black prisoners, the state executed 11 for rape, 112 for murder, and 9 for other crimes.[17] Executions for rape were rare before 1924. Of the 13 recorded pre-1924 executions for rape, 84.6% (N=11) involved black prisoners and only 15.4% (N=2) involved white prisoners.[18]

B. *Executions Under State Jurisdiction, 1924-1964*

Records of executions after 1924, when the state obtained control of executions, are more complete. Between 1924 and 1964 Florida executed 196 prisoners.[19] All 196 executions occurred in the state's

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8. N.Y. Times, Aug. 18, 1929, at 10, col. 1.
9. Fla. Times Union (Jacksonville), May 5, 1989, at A19, col. 1.
10. *Id.*
11. *Id.*
12. *Id.* col. 2-3.
13. Espy File, *supra* note 3.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See* W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 423-27 (1984) (listing these executions, including the defendant's name, race, age, offense, date of execution, county of offense, and some information on whether an appeal was taken). Bowers obtained the data from Watt Espy, and since Espy's work has continued after this book was published, more information is now known about some executions for which Bowers reported missing data. *Id.*; *see also* Espy File, *supra* note 3 and accompanying text.

electric chair, then located in Raiford, Florida.[20] Florida executed one additional prisoner, David Watson, a black convicted of murder under federal law and electrocuted September 15, 1948.[21] Watson and Alderman[22] are the only known prisoners executed in Florida after being convicted of a federal offense.[23] Overall, 67.5% (N=133) of the 197 prisoners electrocuted between 1924 and 1964 in Florida were black.[24]

Of the 197 executions during this period, Florida executed 43 prisoners for rape.[25] Of these 43 rape executions, 95.3% (N=41) involved blacks.[26] The race of the victim is known in 39 of the 43 rape cases, and in each of the known cases the victim was white.[27] The other 154 prisoners were sent to the electric chair for murder, and of these executions 59.7% (N=92) of those executed were black.[28] The victim's race is known in 146 of the 153 murder cases, and of those executed 76.7% (N=112) were white.[29]

The homicide victim's race also affected the awarding of clemency in capital cases during this period.[30] Margaret Vandiver compared the 196 prisoners who were executed after a Florida conviction between 1924 and 1964 with the 59 prisoners whose death sentences were commuted.[31] She found that the state gave clemency to 44.3% of those convicted of crimes against blacks, but gave clemency to only 15.2% of those whose crimes victimized whites.[32] Among black offenders, 41.1% received clemency in black-victim cases, but only 3.4% received clemency in white-victim cases.[33]

Such statistics cannot, of course, tell the full story of the links between race and executions in Florida's history.[34] Lynchings of blacks

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20. *Id.*

21. Watson, a sailor, was convicted in Key West for murdering a shipmate. On the day before his execution, the Florida cabinet gave special permission for the federal authorities to use the state's electric chair. Fla. Times Union (Jacksonville), Sept. 15, 1948, at 9, col. 1.

22. *See supra* note 8 and accompanying text.

23. Espy File, *supra* note 3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. M. Vandiver, *supra* note 4, at 115.

30. *See id.* at 101-03.

31. *Id.* at 102.

32. *Id.*

33. *Id.* at 103.

34. *See id.* at 33-59 for some excellent case examples of how the race of the defendant and victim explicitly or implicitly affected the outcome in capital or potentially capital cases.

for alleged crimes continued into the 1930s.[35] The NAACP counted 178 lynchings in Florida between 1889 and 1918, and 90.4% (N=161) of the lynchings victimized blacks.[36] In the first two decades of this century, Florida's lynching rate exceeded that of any other state, and was double the rates of Georgia, Louisiana and Mississippi.[37]

In the 1940s, a case in Groveland, Florida, attracted international attention when four black men were suspected (on weak evidence) of raping a white woman.[38] A posse killed one of the suspects.[39] A jury sentenced a second suspect (age 16) to life in prison, and condemned the other two to death.[40] After an appellate court ordered a retrial for the two men sentenced to death, one of the men was killed by a sheriff, and the other, after being resentenced to death, had his sentence commuted to life by Governor LeRoy Collins.[41] While all 4 of these defendants may have been innocent, Freddie Pitts and Wilbert Lee, 2 black men condemned to death for a murder in Port St. Joe in 1963, definitely were innocent.[42] The governor pardoned the pair in 1975, but the Florida legislature today continues to refuse to award them any indemnities for their wrongful convictions.[43]

C. *On Death Row in 1972*

The pace of Florida executions, like those in other states, slowed in the early 1960s and gradually came to a halt.[44] Florida executions

35. *See generally* J. MCGOVERN, ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL (1982) (utilizing the lynching of Neal to discuss the practice of lynchings in the South in the 1930s).

36. NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918, at 32 (1969).

37. Colburn & Scher, *Florida Politics in the Twentieth Century*, in FLORIDA'S POLITICS AND GOVERNMENT 35, 37 (M. Dauer ed. 1980).

38. Lawson, Colburn & Paulson, *Groveland: Florida's Little Scottsboro*, 65 FLA. HIST. Q. 1, 25 (1986) (case study demonstrating how white supremacy was preserved through legal means).

39. T. WAGY, GOVERNOR LEROY COLLINS OF FLORIDA: SPOKESMAN OF THE NEW SOUTH 65 (1985).

40. *Id.*

41. *Id.* at 65-66. Collins opposed capital punishment, and sought to commute any death sentence where justification could be found. In this case, Collins justified commuting the sentence to life because Collins doubted the black man's guilt. After the commutation, Lake County Circuit Court Judge Truman G. Futch ordered a grand jury investigation of the clemency proceedings. *Id.* at 64-69.

42. *See* G. MILLER, INVITATION TO A LYNCHING 6, 266, 307 (1975) (outlining the prosecution of Pitts and Lee).

43. Gainesville Sun, May 16, 1990, at 6B, col. 4. In 1990, the latest attempt to award Pitts and Lee $500,000 failed by a 6 to 4 vote in the Claims Committee of the Florida House of Representatives. *Id.*

44. *See* M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 126-34 (1973).

ceased after the double execution of Emmett Blake and Sie Dawson on May 12, 1964.[45] Subsequently, death penalty opponents successfully challenged the constitutionality of the death penalty statutes of Florida and other states.[46] These challenges culminated in the 1972 decision of the United States Supreme Court in *Furman v. Georgia*, which, in effect, invalidated all existing death penalty statutes in American jurisdictions.[47]

As a result, all those on death row, approximately 600 prisoners in 30 states and the District of Columbia, had their sentences commuted to life imprisonment.[48] At that time there were 98 inmates on Florida's death row: 66.3% (N=65) of whom were black and 33.7% (N=33) of whom were white.[49] Seventy-three were under a death sentence for murder (47 black males, 1 black female, and 25 white males).[50] Another 25 prisoners had received death sentences for rape, and 68% (N=17) of those prisoners were black.[51] Of the 98 Florida inmates whose death sentences were commuted by *Furman*, three later demonstrated their innocence: Freddie Pitts and Wilbert Lee, who received pardons in 1975,[52] and James Richardson, who won his freedom in 1989.[53]

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45. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 109 (1987). There is reason to believe that Dawson was innocent, because there were "no eyewitnesses and the circumstantial evidence was slight and inconclusive." *Id.*

46. Greenberg & Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQ. 112 (1969) (outlining challenges to and inequities of capital punishment in the United States); *see* M. MELTSNER, *supra* note 44.

47. 408 U.S. 238 (1972). *See* Marquart & Sorensen, *A National Study of the* Furman-*Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A.L. REV. 5, 11-13 (1989).

48. Marquart & Sorensen, *supra* note 47, at 11-13.

49. Fla. Dep't of Corrections, Summary: Prisoners on Death Row (July 5, 1972) (unpublished document on file with Professor M. Radelet, Dep't of Sociology, University of Florida, Gainesville, Fla).

50. *Id.*

51. *Id.*

52. *See supra* note 43 and accompanying text.

53. Florida Times-Union, Apr. 21, 1990, at A1, col. 1. *See generally* M. LANE, ARCADIA (1970) (discussing the trial of James Richardson). Due to questions concerning evidence presented at trial, a federal district court judge vacated the death sentences of two other black inmates, Jerry Chatman and Robert Shuler on May 4, 1972, just weeks before *Furman* was decided. *See* Shuler v. Wainwright, 341 F. Supp. 1061, 1076 (M.D. Fla. 1972), *rev'd in part and vacated in part*, 491 F.2d 1213, 1226 (5th Cir. 1974).

D. *Post-*Furman *Executions in Florida*

The 1980 Census found that 13.8% of Florida's population was black;[54] this percentage serves as an initial base point in interpreting death sentencing patterns. The first prisoner executed in Florida after the *Furman* decision was John Spenkelink, who was executed on May 25, 1979.[55] In the next dozen years (prior to August 31, 1991) 26 additional prisoners were executed.[56] Of these 27 post-*Furman* executions, 63% (N=17) of the executions involved whites convicted of killing whites,[57] 22.2% (N=6) involved blacks who were convicted of killing whites,[58] and 14.8% (N=4) involved blacks who were convicted of killing blacks.[59] Therefore, only 4 of the 27 post-*Furman* prisoners were executed for killing blacks, and 2 of them had a jury recommendation of life.[60] In Florida's history, the state has never executed a white prisoner for a crime against a black victim.[61]

II. RESEARCH ON RACE AND CAPITAL PUNISHMENT IN FLORIDA

A United States General Accounting Office (GAO) report published in 1990 examined every post-*Furman* study in America that had inves-

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54. U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION: FLORIDA, ch. B, pt. 11, table 14, at 7 (1982).

55. NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 6 (Jan. 21, 1991) (unpublished document) [hereinafter Death Row U.S.A.].

56. *See id.* at 6-8 and author's data base file discussed *infra* note 175.

57. *See* sources cited *supra* note 56.

58. *Id.* One of these prisoners, David Washington, pleaded guilty to killing two blacks and one white. Washington v. State, 362 So. 2d 658, 662 (Fla. 1978).

59. *See* sources cited *supra* note 56. The authors' research demonstrates that the courts very rarely sentence a person to death in modern times for killing a single black victim. Two of the four post-*Furman* cases in which blacks were executed for killing blacks involved two codefendants, Marvin Francois and Beauford White, who were convicted of killing six people. *See* Francois v. State, 407 So. 2d 885, 887 (Fla. 1981); White v. State, 403 So. 2d 331, 334 (Fla. 1981). In a third post-*Furman* case, James Dupree Henry was condemned for killing a black man, but most of the news coverage about the case did not involve the decedent, but instead involved a white police officer who was slightly wounded when Henry was apprehended. *See* Radelet & Mello, *Executing Those Who Kill Blacks: An Unusual Case Study*, 37 MERCER L. REV. 911, 919-21 (1986). The fourth black executed for killing a black, Bobby Francis (executed June 25, 1991), like Beauford White, was condemned after receiving a jury recommendation of life imprisonment.

60. *Id.*

61. *See* Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOC. Q. 529, 533 (1989). Indeed, out of the 15,978 cases in Espy's archives in 1989, only 30 involved white defendants who were executed for crimes against blacks. *Id.* at 532. Furthermore, in most of these 30 cases, other factors besides the homicide help to explain why the court imposed the death penalty. *Id.* at 534-35.

tigated the relationship between race and death sentencing.[62] Of the 28 studies the GAO reviewed, 11 utilized Florida data.[63] Further, two books, one by W. Bowers and the other by Samuel Gross and Robert Mauro, have been published that contain data derived from these 11 studies.[64] This section of the article reviews this body of scholarship.

The earliest post-*Furman* study of Florida's condemned population involved interviews with 83 of the 96 men on death row in 1977.[65] These 83 inmates had a total of 106 victims.[66] However, only 7.5% (N=8) of those victims were black.[67] In contrast, during the previous 4 years, 50.7% of the state's homicide victims were black.[68] While the authors of this early study estimated that only 7% of Florida homicide deaths resulted from interracial killings, 44.3% of prisoners on Florida's death row were there for such crimes.[69]

Steven Arkin examined all first degree murder prosecutions in Dade County (the county surrouinding Miami) between 1973 and 1976.[70] Arkin found that black defendants with white victims were the most likely to receive a death sentence.[71] The small number of death sentences in the sample (N=10), however, precluded any in-depth analysis or conclusions.[72] Hence, while Arkin concluded that arbitrariness existed in Dade County's death sentencing, he found no conclusive evidence of racial bias.[73]

Further, Arkin's study examined only those cases in which the prosecutors had requested a first degree murder indictment.[74] As a result, he was unable to inspect earlier decisionmaking points to deter-

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62. GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE REP. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 26, 1990) [hereinafter GAO].

63. *See id.* at 10-12 (listing the studies that GAO examined).

64. W. BOWERS, *supra* note 19; S. GROSS & R. MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989).

65. Lewis, Mannle, Allen, & Vetter, *A Post-*Furman *Profile of Florida's Condemned — A Question of Discrimination in Terms of the Race of the Victim and a Comment on* Spinkellink v. Wainwright, 9 STETSON L. REV. 1, 16 (1979) [hereinafter Lewis].

66. *Id.* at 30.

67. *Id.* at 31.

68. *Id.* at 32.

69. *Id.* at 33.

70. Arkin, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 77 (1980).

71. *Id.* at 90.

72. *Id.*

73. *Id.* at 100-01.

74. *Id.* at 86.

mine if race correlated with the degree of indictment requested. Additionally, in their reexamination of Arkin's data, Gross and Mauro noticed a strong race-of-victim effect[75] that Arkin had overlooked: only 1 of the 138 black-victim cases resulted in a death sentence, and that defendant also pleaded guilty to the murder of 2 whites.[76]

In 1980, Bowers and Pierce published the first post-*Furman* statewide study of the link between race and death sentencing.[77] Their research, which also examined patterns in Texas, Georgia, and Ohio,[78] used data compiled on all first degree murder indictments in 21 Florida counties between 1973 and 1976, and all homicide indictments from 20 Florida counties between 1976 and 1977.[79] The researchers first observed differences in sentencing based on the defendants' race and the victims' race.[80] The statistics revealed that 22.1% of blacks accused of killing whites were sentenced to death, compared to 4.6% of whites accused of killing whites, and only .06% of blacks accused of killing blacks.[81] From this pattern, Bowers and Pierce hypothesized that if all offenders had been condemned to death at the same rate as blacks accused of killing whites, Florida's death row population by the end of 1977 would have been 887, instead of the actual figure of 147.[82]

To check the possibility that these patterns result because black-on-white homicides are more likely to involve a contemporaneous felony, Bowers and Pierce cross-tabulated race and death sentencing only among those cases classified by the Federal Bureau of Investigation (FBI) as involving other felonies.[83] They found that of those cases involving a contemporaneous felony, 32.3% of the black-on-white cases, 21.5% of the white-on-white cases, and 4.4% of the black-on-black cases resulted in a death sentence.[84] Thus, the existence of an accompanying felony failed to explain why blacks convicted of killing whites more often were sentenced to death.

Bowers and Pierce also found that a death sentence in Florida is 2.5 times more likely to be imposed in the panhandle region than in

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75. S. GROSS & R. MAURO, *supra* note 64, at 30 n.29.
76. *Id.*
77. Bowers & Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).
78. *Id.* at 563.
79. *Id.* at 592.
80. *Id.* at 594.
81. *Id.*
82. *Id.* at 595.
83. *Id.* at 597-98.
84. *Id.* at 599.

the southern region of the state.[85] Moreover, race affected more than sentencing. Race also affected the probability of both a first degree murder indictment given a homicide indictment, and a first degree murder conviction given a first degree murder indictment.[86]

Bowers continued this analysis by constructing multivariate models of decisionmaking at various stages of the criminal justice process, again using the above data sets.[87] Using data on 508 defendants indicted for homicide in Florida between 1976 and 1977, Bowers tried first to predict whether a particular case would result in a first degree murder indictment.[88] Among the variables that predicted a more severe indictment were: (1) the existence of other felonies, (2) the existence of multiple offenders, (3) the existence of female victims, (4) the crime location, and (5) whether the defendant's attorney was court appointed.[89] Still, after controlling for the effects of these factors, black defendants with white victims were 19% more likely, and white defendants with white victims were 15% more likely, than black defendants with black victims to be indicted for first degree murder.[90]

Next, Bowers looked at who among the 612 defendants in Florida between 1973 and 1977 was most likely to be convicted of first degree murder, given a first degree murder indictment.[91] The probability of a first degree conviction increased for those accused of a felony-related killing, those with female victims, and those from Central Florida.[92] With these factors held constant, black-on-white offenders and white-on-white offenders were 29% and 18%, respectively, more likely to be convicted than black-on-black offenders.[93] Bowers also found that given a conviction for first degree murder, defendants with white victims were more likely than defendants with black victims to be sentenced to death.[94]

Following the 1980 Bowers study, Hans Zeisel, Professor of Law and Sociology at the University of Chicago, published the results of

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85. *Id.* at 602.
86. *Id.* at 609.
87. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1071-72 (1983).
88. *Id.* at 1073-74.
89. *Id.* at 1074-75.
90. *Id.* at 1073-74.
91. *Id.* at 1078-79.
92. *Id.* at 1079-80.
93. *Id.* at 1079.
94. *Id.* at 1084-85.

his 1981 study of race and death sentencing in Florida.[95] Zeisel observed that 94% of Florida death row inmates received death sentences for killing whites.[96] Between 1972 and September 1977, Zeisel estimated that 31% of those convicted of killing whites during a felony were sentenced to death, compared to only 1% of those convicted of killing blacks during a felony.[97] Further, among those prisoners condemned to death for killing whites during a felony, 47% were black and 24% were white, thus indicating a disparity in sentencing depending on the defendant's race.[98] Zeisel went on to demonstrate that after the initial charges of race-of-victim bias in Florida death sentencing were put forth in 1977, the proportion of black-victim cases on Florida's death row began to rise.[99]

While primarily investigating gender differentials in Florida death sentencing, Linda Foley also has added to the body of research concerning the influence of race on death sentencing. Foley used the same basic data set as Bowers and Pierce. In her first paper,[100] Foley raised the initial question of what circumstances would prompt the state to dismiss charges, given a homicide indictment.[101]

Holding legal factors constant, such as the number of victims and the presence of additional felony charges, Foley found that female defendants were more likely than male defendants to have homicide charges dismissed.[102] After controlling for the number of victims, additional felonies, and the victim-defendant relationship, Foley found that the judge's decision to impose a death sentence correlated with both the sex of the defendant and the race of victim.[103] Foley concluded "that defendants in capital cases in Florida receive differential treatment due to their attributes and attributes of their victims at decision-making stages of the legal system."[104]

In a second paper based on this same data set,[105] Foley studied the relationship between the defendant's race and sex, the victim's

95. Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

96. *Id.* at 458.

97. *Id.* at 460.

98. *Id.* at 460-61.

99. *Id.* at 464-65.

100. Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16 (1982).

101. *Id.* at 19.

102. *Id.* at 21.

103. *Id.*

104. *Id.* at 22.

105. Foley, *Florida After the* Furman *Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases*, 5 BEHAVIORAL SCI. & THE LAW 457, 459 (1987).

race and sex, and trial outcome, conviction offense, and imposition of the death penalty.[106] Again, Foley held constant legal factors such as the presence of additional felonies and the number of offenders.[107] The study led to three significant findings. First, younger defendants were more likely to be convicted than older defendants.[108] Second, both males and those with white victims were more likely to be convicted of first degree murder.[109] Finally, courts were more likely to impose a death sentence on male defendants and on those accused of killing whites than on female defendants and those accused of killing blacks.[110]

In a 1981 paper,[111] Radelet restricted his data set to homicides between strangers, because the death penalty is rarely given in cases in which the victim and the defendant were friends or family.[112] Radelet used 1976 and 1977 data from 20 Florida counties, including 36 death penalty cases.[113] He found that 85% of the white-victim cases and 53.6% of the black-victim cases resulted in a first degree murder indictment.[114] Overall, 14% (N=30) of the white-victim cases ended with a death sentence, compared to only 5.4% (N=6) of the black-victim cases.[115]

Radelet found similar patterns when he restricted the sample to cases in which an indictment for first degree murder existed.[116] The relatively small sample size, however, prevented a determination of statistical significance.[117] A later reanalysis of Radelet's data[118] con-

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106. *Id.* at 460-64.

107. *Id.* at 460.

108. *Id.* at 462.

109. *Id.* at 463.

110. *Id.* Foley arrived at this result by examining 402 of the 829 cases in her data set. *Id.* at 459, 462. Foley does not state whether this analysis used the entire data set or used only those cases involving first degree murder convictions, where the defendants were eligible for a death sentence. Since her model of trial outcome uses 402 degrees of freedom, Foley appears to have used the entire data set for her analysis. *Id.* at 461. Therefore, Foley's study is not helpful in pinpointing the degree of racial or sex disparities at each decisionmaking stage of the legal process.

111. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981).

112. *Id.* at 921.

113. *Id.* at 920.

114. *Id.* at 922.

115. *Id.*

116. *Id.*

117. *Id.* at 922-23. Radelet's conclusion that the impact of defendant's race was not statistically significant was the focus of an article that argued Radelet's interpretation was too conservative, and that the evidence of bias against black homicide defendants was stronger than Radelet was willing to claim. Pomer, *A Skeptical Note on "Sophisticated" Statistics: The Misuse of Loglinear Analysis to Measure Racial Bias*, 19 SOC. FOCUS 109, 109 (1986).

cluded that "when the victim was white the odds of the 'yes' death penalty verdict are . . . 3.76 times higher than when the victim was black."[119]

In a subsequent study, Radelet and Vandiver[120] analyzed 145 Florida Supreme Court decisions in death penalty cases between 1973 and 1981.[121] They divided the cases into two categories according to whether the Florida Supreme Court had affirmed or reversed the trial court.[122] Because so few cases with black victims (N=11) involved death sentences, Radelet and Vandiver did not study this variable.[123]

While the two strongest predictors of the court's decisions, the number of victims and the jury recommendation, had legal relevance,[124] the defendant's race, the victim's sex, and the interaction between these two variables also were statistically significant predictors of the court's decision.[125] If the victim was female, the Florida Supreme Court was more likely to affirm a black defendant's conviction than a white defendant's conviction.[126] However, if the victim was male, the court was more likely to affirm a white defendant's conviction than a black defendant's conviction.[127]

The strong effect of victim's race on homicide indictment decisions encouraged Radelet and Pierce to examine closely prosecutorial discretion in homicide cases.[128] Specifically, they examined whether the defendant's race and the victim's race affected how prosecutors developed evidence in homicide cases.[129] Their data set consisted of 1017 Florida homicide cases between 1973 and 1977.[130]

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118. A. AGRESTI & B. FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 488-502 (2d ed. 1986). *See also* A. AGRESTI, CATEGORICAL DATA ANALYSIS 135-39, 171-77 (1990) (discussing why the association between death penalty verdict and defendant's race changes direction when we also control victim's race, and also illustrating loglinear model-fitting based on the death penalty data provided by Radelet).

119. A. AGRESTI & B. FINLAY, *supra* note 118, at 489.

120. Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983).

121. *Id.* at 917.

122. *Id.* at 918.

123. *Id.* at 919.

124. *Id.*

125. *Id.* at 920.

126. *Id.* at 922.

127. *Id.*

128. Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC. REV. 587 (1985).

129. *Id.* at 588.

130. *Id.* at 597.

Radelet and Pierce constructed the data set by merging two data sources which reported on each homicide: one compiled from court records, and one compiled from the investigating police department's records.[131] The latter data, called the "Supplemental Homicide Reports" (SHRs), consists of information about homicides forwarded by the local police to the FBI, where the information is compiled and released to the public.[132] Both data sources classified the homicide as either a felony, possible felony, or non-felony.[133] Hence, Radelet and Pierce could compare the police report depictions and the court record depictions of each case.[134]

The comparisons revealed that both data sources were consistently classified in 82.9% of the cases.[135] However, 82 cases were "downgraded" from a felony in the police report to a non-felony in the court record and 92 cases were "upgraded" from the police report to the court record.[136] Cases in which blacks were accused of killing whites were the most likely to be upgraded and least likely to be downgraded.[137] After controlling for several other factors, the defendant's race and victim's race remained significant predictors of upgrading and downgrading.[138]

The research revealed that upgrading had important consequences for death sentencing.[139] The data indicated that upgraded cases were only slightly more likely to result in a death sentence than those consistently classified as a felony: 16.4% versus 15.1%.[140] However, among the cases in which the defendant was not permitted to plea bargain, cases in the upgraded category were twice as likely to result in a death sentence as those consistently classified.[141] Further, that relationship was stronger among the white-victim homicides.[142] Radelet and Pierce concluded that upgrading is a tactic used to buttress a

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131. *Id.* at 594.
132. *Id.* at 596.
133. *Id.*
134. *Id.* at 597.
135. *Id.* at 598-99.
136. *Id. See* A. AGRESTI, ANALYSIS OF ORDINAL CATEGORICAL DATA 210-14 (1984) (discussing this data set for an audience of statisticians).
137. Radelet & Pierce, *supra* note 128, at 601.
138. *Id.* at 609.
139. *Id.* at 613.
140. *Id.* at 610, table 7.
141. *Id.* at 612-13.
142. *Id.*

decision to seek a death sentence, particularly when the victim is white.[143]

The last body of research based on Florida data to be reviewed by the GAO[144] was the Gross and Mauro study.[145] Gross and Mauro studied the death sentencing patterns of eight states, including Florida, covering the period from 1976 through 1980.[146] Their primary data came from the FBI's SHRs, which contain information on every reported homicide in America.[147] The data consist of the race, sex, and age of the victim and the suspect; the month, year, and location of the homicide; a description of the weapon; notations as to whether there were concurrent felonies with the homicide; and information on the victim-defendant relationship.[148] For their analysis, Gross and Mauro also obtained data on all Florida death penalty cases over the five year study period.[149] Using this information, they identified those cases in the SHR data set which resulted in death sentences.[150]

The data set for the Gross and Mauro study consisted of information on 3,501 Florida homicides.[151] Of these homicides 3.7% (N=130) resulted in a death sentence for the killer.[152] However, the probability of a death sentence varied depending on the victim's race: 6.3% of the white-victim cases (114 of 1803) and .8% of the black-victim cases (14 of 1683) resulted in a death sentence.[153] Further, if the victim was white, 13.7% of the black defendants and only 5.2% of the white defendants were condemned to death.[154]

Because roughly 80% of death sentences occur in cases in which the homicide was accompanied by a contemporaneous felony,[155] Gross and Mauro tested the hypothesis that the reason relatively few suspects with black victims received death sentences was that other

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143. *Id.* at 613.

144. GAO, *supra* note 62.

145. Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

146. *Id.* at 37.

147. *Id.* at 49.

148. *Id.* The SHRs are a victim-based data source: each victim, whether killed by one or multiple offenders, constitutes a single case. *See id.* at 49-51.

149. *Id.* at 49.

150. *Id.* at 50.

151. *Id.* at 55, table 1.

152. *Id.*

153. *Id.*

154. *Id.* at 56.

155. *Id.* at 57.

felonies rarely accompanied black-victim homicides.[156] Hence, they recalculated the above figures after restricting the population only to felony homicides.[157] Contrary to the hypothesis of racial equality, however, the race-sentencing relationship did not disappear: 27.5% of the white-victim felony homicides (95 of 346) and 7.0% of the black-victim felony homicides resulted in a death sentence.[158]

Gross and Mauro made several attempts to eliminate the race-sentencing relationship.[159] They questioned whether the difference observed was because whites are more likely than blacks to be killed by strangers.[160] The statistics suggested otherwise. Among homicides between strangers, 14.5% of the defendants with white victims were condemned to death and only 1.2% of the defendants with black victims were condemned to death.[161]

Another possible explanation for the differences was that whites were more often the victims in multiple murders. Again, the numbers did not support such a conclusion: 20.4% of the white-victim multiple murderers, and 11.1% of the black-victim multiple murderers, were condemned to death.[162] Moreover, neither the sex of the victim, the choice of weapon, or the location of the crime explained the race effect.[163] After all factors were simultaneously taken into account in a logistic regression model, Gross and Mauro concluded that "[i]n Florida the overall odds of an offender receiving the death penalty for killing a white victim were 4.8 times greater than for killing a black victim."[164]

Taken as a whole, the above eleven studies give strong evidence of racial disparities in capital sentencing in Florida. That those who kill whites are more likely to be sentenced to death appears to be an undeniable fact: the relevant question for researchers is *why* this pattern exists. Using different approaches, the above researchers have examined whether or not the most plausible non-racial characteristics (e.g., felony circumstances, victim-defendant relationship) can explain the sentencing disparities.[165] However, the efforts to identify legally

156. *Id.*
157. *Id.*
158. *Id.* at 57, table 4.
159. *Id.* at 58-66.
160. *Id.* at 59, table 7.
161. *Id.*
162. *Id.* at 61, table 10.
163. *Id.* at 66.
164. *Id.* at 78-79.
165. *See id.* at 58-66.

relevant reasons for racial disparities in capital sentencing have failed.[166]

The Florida patterns are similar to those found in Georgia, where researchers have studied death sentencing patterns in much more detail.[167] The evidence from Georgia indicates that even if Florida researchers were to statistically control for as many as two hundred other factors that might explain away the disparities, the disparities would remain.[168] In their 1990 review of all the research examining the possible post-*Furman* racial disparities in capital sentencing, the GAO concluded "the synthesis [of the 28 studies reviewed] supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions. Although there are limitations to the studies' methodologies, they are of sufficient quality to support the synthesis findings."[169]

Despite the compelling evidence of racial disparities in capital sentencing, what is known about race and death sentencing in Florida is limited. Lewis's simple but suggestive study was based only on interviews with prisoners on death row.[170] Arkin inspected evidence only from Dade County,[171] and Radelet and Vandiver's research examined appellate decisions, not sentencing at the trial court level.[172] Gross and Mauro's study contains the most recent data, but their study ended with homicide data collected through December, 1980.[173] The seven other Florida studies reviewed by the GAO[174] are based on essentially the same data set, and the latest homicide included was from 1977. The next two sections of this article will update this body of research.

III. DATA AND METHODOLOGY

The procedures used in this study are adopted from the Gross and Mauro study. Therefore, this study should be viewed as an update of

166. *Id.* at 66.

167. *See* D. BALDUS, G. WOODWORTH, & C. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 265 (1990).

168. *See id.*

169. GAO, *supra* note 62, at 6. For a more detailed review of this research, see Bienen, Weiner, Denno, Allison & Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 118-58 (1988); S. GROSS & R. MAURO, *supra* note 64, at 20-31.

170. Lewis, *supra* note 65, at 5.

171. Arkin, *supra* note 70, at 76.

172. Radelet & Vandiver, *supra* note 120, at 914.

173. Gross & Mauro, *supra* note 145, at 49.

174. *See* GAO, *supra* note 62, at 10-12 (for a list of studies reviewed).

their research.[175] The bulk of the data used in this study comes from the FBI's SHRs for Florida covering the years 1976 through 1987.[176] Because the SHR data set does not contain a case-by-case listing of the defendant's name, the victim's name, or any information about each case's adjudication, other sources of information were used to identify these characteristics in SHR cases in which a death sentence was ultimately given.[177] This procedure created the death penalty data set (DPDS) utilized in this study.[178] The data set was constructed by one of the present authors over the past decade. As of June 7, 1991, the DPDS contained information on 684 post-*Furman* death sentences and resentences in Florida, 127 of which involved a jury recommendation of life.[179]

The data used to compile the DPDS are gathered from several sources. After an inmate is sentenced to death, he or she and the attorney of record are sent a questionnaire; the information from the completed questionnaires is used as a source of data.[180] In addition, a copy of the judge's sentencing memorandum specifying any aggravating or mitigating circumstances is obtained from either the attorney of record or the Florida Supreme Court, if necessary. Further, the file is supplemented regularly with newspaper articles and court decisions in the case.

Florida courts issued 415 death sentences for crimes committed between January 1, 1976, and December 31, 1987.[181] Data were obtained for this study on each of the 415 cases. For purposes of this study, cases in which a person was condemned to death for two or

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175. However, this study has some differences from Gross and Mauro's work. For example, Gross and Mauro constructed a new SHR case if they were unable to find one that matched a given death penalty case. Gross and Mauro reported that the effect of constructing new SHR cases in those situations was "trivial." Gross & Mauro, *supra* note 145, at 54. For this study, the authors dropped the death penalty cases (N=45) for which no SHR case could be found. *See infra* note 186. Further, Gross and Mauro used the data base compiled by the NAACP Legal Defense and Educational Fund, while the death row data base used in this study was compiled by one of the authors (undated and unpublished data base on file with Professor Radelet at Dep't of Sociology, University of Florida, Gainesville, Fla. 32611) [hereinafter DPDS].

176. *See supra* note 148 and accompanying text. The SHR data were obtained from the FBI on magnetic tape.

177. *See infra* note 180 and accompanying text.

178. DPDS, *supra* note 175.

179. *Id.*

180. Since 1982, the author has sent these questionnaires. Confidentiality is guaranteed, hence they are not publicly available.

181. *See* DPDS, *supra* note 175.

more murders in one trial were counted as one case. However, if the person was condemned twice in two trials, the sentence from each trial was counted as a separate case. Further, no resentences were included in the data base and the cases of two men condemned to death for non-homicidal sex offenses were excluded from the study, thus reducing the sample to 413 cases.

Data on both the victim's and the defendant's age, race, and sex, the county where the crime occurred, the month and year of the crime, and the weapon used in the crime were obtained from both the SHR data and from the DPDS. Using these variables, 368 (89.1%) of the 413 Florida death penalty cases included in the DPDS were successfully matched with the information from the identical case in the corresponding SHR.[182] The reasons for not matching a case varied,[183] but failure to match in most cases was due to errors and omissions in the SHR data.[184]

Originally, the SHR data base consisted of 15,126 Florida homicides. To arrive at the correct population for the study, 205 homicides that were not criminal homicides were removed from the SHR data base.[185] Another 529 homicides involving felons who were

182. The matching was accomplished by first obtaining a printed copy of both computer files, and matching (by hand) on the basis of variables such as month, year, and county of the homicide, and the defendant's and victim's race, sex, and age.

183. For example, SHR matches could not be made because the victim was never found or found after several years, or, the murder was committed at sea.

184. The DPDS files may indicate that a death sentence was imposed in a certain county at a certain time. However, the SHR records may indicate no homicides, or only very dissimilar homicides, occurred during the same time period when the more reliable DPDS showed a capital crime occurred. Because of these discrepancies in the records, such cases were left unmatched. Comparison of the matched and unmatched cases revealed that neither the race of the defendant nor the race of the victim were associated with the probability of matching.

Gross and Mauro's methodology led them to construct new SHR cases for those death penalty cases they were unable to match. The SHR information was altered because the data base created by the NAACP Legal Defense and Educational Fund was smaller and more reliable than the SHR data. The authors excluded 10.9% of the total number of death sentences (45 of 413) by deleting unmatched cases from this study's DPDS. By constructing new cases to add to the SHR, the authors would have added only 45 cases to a sample of 10,142 cases, which would have biased the SHR data set by less than 1/2 of 1%. While hindsight leads the authors to favor Gross and Mauro's methodology, this study's sample of 368 death sentences is so large that the additional 45 cases would have had only minor effects on the estimates and would have had no effect on the conclusions. *See supra* note 175.

185. Homicides removed from the data base because they were not criminal homicides included deaths resulting from: hunting accidents; a child playing with a gun; and other acts of negligence.

shot by the police or citizens were also deleted, reducing the data base to 14,392 cases.

To accurately account for those cases in which 2 (or 3) offenders were condemned to death for murdering a single victim, 2 of the homicides in the SHR data were counted 3 times and 16 homicides were counted twice, increasing the overall number of cases to 14,412. Similarly, when a case involved a single offender and multiple victims, the data on all but 1 of the victims were removed from the SHR file.[186] This led to the removal of 63 cases and the reduction of the data base to 14,349 cases.

Additionally, because sentencing patterns cannot be studied if no defendant exists, the SHR data base was adjusted by removing cases that did not include an identified murder suspect. Therefore, 4,207 SHR cases which did not include an identifiable suspect were removed from the SHR file, further reducing the data base to 10,142 cases. Although certain types of homicides may attract more police scrutiny leading to different probabilities of identifying a suspect, and these differences may vary according to the victim's race, this study does not focus on such disparities. Instead, this study only focuses on what happens after a suspect is implicated. The methodology the authors used created an offender-level data base in which the characteristics of victims and the characteristics of homicide incidents were merged with the appropriate offender.[187]

IV. RESULTS

Table 1 shows the basic anomalies that this study attempts to explain. As Table 1 demonstrates, death sentences are a rare sanction: only 3.6% of the homicides in which there were identifiable suspects resulted in the death penalty. Overall, white suspects are more likely

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186. The present authors removed extra SHR cases in multiple murder circumstances because the SHR is a victim-based data set, with one case per victim and not one case per defendant. The authors found that removing the extra cases was necessary because retaining them would introduce bias in crosstabulations through inflation of the denominators. For example, consider a county with only two murders in a year committed by one defendant who was condemned. Retaining the second case in the data base would create the false impression that only 50% of the murders resulted in a death sentence because the defendant received one death sentence for committing two murders.

In two cases, defendants were condemned for killing both a white and black victim. In the first case, the authors removed the black-victim data. In the second case, the authors removed the white-victim data. Similarly, several cases involved both a female and male victim. In these cases, the authors alternated removing data based on the sex of the victim.

187. *See* DPDS, *supra* note 175.

TABLE 1

Proportion of Death Sentences by Race of Suspect and Victim: (death sentences/total number of cases)

	Percentage
All Cases	3.6% (368/10,142)
White Suspect	4.8% (239/4932)
Black Suspect	2.5% (129/5158)
White Victim	5.9% (319/5397)
Black Victim	1.0% (45/4696)
Black Kills White	12.6% (92/731)
White Kills White	4.9% (227/4645)
Black Kills Black	0.8% (36/4428)
White Kills Black	3.4% (9/264)

to be sentenced to death than black suspects (4.8% and 2.5%, respectively). However, further inspection reveals that this may be because (1) 95% of the white suspects are implicated for killing other whites;[188] (2) 86% of the black suspects are implicated for killing other blacks;[189] and (3) those who are suspected of killing blacks rarely are sentenced to death.[190]

188. This figure is derived from the last four lines of Table 4, which gives data on cases in which the race of both defendant and victim is known. There are 4909 white suspects, 4695 of whom were suspected of killing whites.

189. *Id.* There are 5159 black suspects, 4428 of whom are suspected of killing other blacks.

190. *See* Table 1. According to the 1980 Census, 8.8% of Florida's population had Spanish ancestry (N=858,158). *See* U.S. DEP'T OF COMMERCE, *supra* note 26, table 16, at 26. Of those, 82.9% were coded as white, 2.9% were coded as black, and 14.2% were coded as "other races." *See id.*

The SHR data did not identify Spanish ancestry until 1980, and after 1980, Spanish ancestry appears inconsistently across counties. Therefore, for this study, the authors made no comparison between cases involving defendants or victims with Spanish ancestry and other homicide cases. Since most persons with Spanish ancestry are coded as white, if any discrimination in Florida's

Additionally, Table 1 shows that cases with white victims are almost 6 times more likely to involve a death sentence than those with black victims (5.9% and 1.0%, respectively).[191] Among defendants who kill whites, strong race differences are apparent: black defendants are over twice as likely as white defendants (12.6% and 4.9%, respectively) to be sentenced to death.[192] Moreover, a black defendant suspected of killing a white victim is 15 times more likely to be sentenced to death than a black defendant suspected of killing a black victim (12.6% and 0.8%, respectively).[193]

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death sentencing against persons with Spanish ancestry exists, it would mean that the black-white differences reported in this study are underestimated (i.e., the black-white differences would be larger if Hispanics, now coded as whites, were removed). If discrimination against persons with Spanish ancestry is operating, future researchers who code persons with Spanish ancestry separately from blacks and whites will probably find the black-white differences in death sentencing to be greater than the differences found by this study.

191. In Table 1, as well as in other Tables, the number of cases varies by the crosstabulation presented. Under "All Cases," Table 1 lists a total of 10,142 homicides. However, the sum of the homicides listed in the victim category is 10,093 (5,397 plus 4,696). The 49 case difference results from cases which were excluded because the race of victim is "other" or missing. The number of death penalty cases will similarly vary in all tables by the specific crosstabulation presented because of missing data on one or more of the variables utilized.

192. Although the vocabulary in this study includes words such as "defendant" and "white killing white," the offenders listed in the SHR data are only suspects and not all of these suspects were eventually arrested or convicted.

193. Whites suspected of killing blacks are more likely to be condemned than blacks suspected of killing blacks (3.4% and 0.8%, respectively). However, whites suspected of killing blacks are less likely to be condemned than whites who are suspected of killing whites (4.9% and 3.4%, respectively). The relative infrequency of cases involving whites suspected of killing blacks (N=264), however, makes the effect of one or two death penalty cases highly visible in proportion shifts. Therefore, for the most part, the significance of these cases will not be assessed until the authors present the multivariate model. *See* Radelet, *supra* note 61 (providing historical analysis of cases in which whites were executed for killing blacks).

Blacks suspected of killing blacks fit a criminal stereotype called "normal primitives." V. SWIGERT & R. FARRELL, MURDER, INEQUALITY AND THE LAW 4-5 (1976). "Normal primitives" are defined as persons produced by a violent subculture and are determined according to race and class. *Id.* at 5. The authorities view murder by a "normal primitive" as more frequent, more tolerated, and more normal. *Id. See generally* Swigert & Farrell, *Normal Homicides and the Law*, 42 AM. SOC. REV. 16, 19-20 (1977) (suggesting that the "normal primitive" stereotype influences the legal process). Swigert and Farrell's study demonstrates that the courts often sentence offenders to long imprisonment because the legal system accepts the stereotype that blacks are inherently criminal. *See id* at 29-30; *see also* D. Hawkins, *Black and White Homicide Differentials: Alternatives to Inadequate Theory*, in HOMICIDE AMONG BLACK AMERICANS 109 (D. Hawkins ed. 1986) (suggesting areas for further research to disprove the stereotype that blacks are inherently violent).

TABLE 2

Proportion of Death Sentences by Felony Circumstances and Race of Suspect and Victim:

	Felony	Non-Felony
All Cases	12.1% (205/1696)	1.2% (91/7542)
White Victim	16.2% (185/1142)	2.0% (72/3680)
Black Victim	3.3% (18/542)	0.4% (17/3832)
Black Kills White	18.3% (76/415)	3.2% (8/248)
White Kills White	15.0% (109/725)	1.9% (64/3418)
Black Kills Black	2.8% (13/468)	0.5% (17/3655)
White Kills Black	6.8% (5/73)	0.0% (0/168)

While these statistical patterns are startling,[194] they do not necessarily constitute definitive proof of racial discrimination. After all, homicides in which whites are killed may be qualitatively different than homicides which victimize blacks. For example, crimes with white victims may be more likely to involve additional felonies, such as rape or robbery. On the other hand, crimes with black victims may not be as likely to be accompanied by felony circumstances.[195]

The presence of additional felonies is a strong correlate of death sentencing; 12.1% of the homicides with felony circumstances ended with a death sentence, compared to 1.2% of the non-felony homicides (see Table 2). However, the race patterns actually *gain* strength after

194. *See supra* notes 145-67 and accompanying text. This pattern is very close to the pattern found by Gross and Mauro. Gross and Mauro found that 6.3% of the white-victim cases and 0.8% of the black-victim cases resulted in death sentences. *See supra* text accompanying note 153. This study found that 5.9% of the white-victim cases and 1.0% of the black-victim cases resulted in death sentences. *See supra* text accompanying note 191.

195. In Florida, the jury and judge weigh "aggravating" and "mitigating" circumstances to decide which defendants convicted of first degree murder should be sentenced to death. FLA. STAT. § 921.141 (Supp. 1990). The presence of additional felonies can be used to justify finding some statutorily-defined aggravating factors, such as if "[t]he capital felony was committed while the defendant was engaged . . . in the commission of . . . robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy . . . ." or if "[t]he capital felony was committed for pecuniary gain." *Id.* § 921.141(5)(d), (5)(f).

taking into account the possibility of accompanying felonies. An examination of homicides with accompanying felonies reveals that 16.2% of the white-victim cases, and only 3.3% of the black-victim cases, resulted in a death sentence. In other words, those killing whites in felony murders are about 5 times more likely to be condemned to death than those killing blacks in felony murders. Further, after controlling for accompanying felonies, blacks killing whites are slightly more likely to be condemned to death than whites killing whites (18.3% and 15.0%, respectively). However, only 2.8% of homicides involving blacks killing blacks during an accompanying felony resulted in a death sentence.

Nor are the racial correlations explained by the relationship between the defendant and victim. Table 3 indicates that homicides committed by strangers are more likely than homicides committed by family or friends of the victim to result in a death sentence (8.1% and 1.4%, respectively). However, among stranger-homicides involving white victims, 11.4% result in a death sentence as compared to 2.1% of the stranger-homicides involving black victims. Among those stranger-homicides with white victims, blacks are more likely than whites to be condemned (16.5% and 9.3%, respectively). Moreover, a black who kills a white stranger is 9 times more likely to be condemned than a black who kills a black stranger (16.5% and 1.7%, respectively).

The race differences possibly could be explained by the number of victims, because death sentences are more often imposed in cases of

TABLE 3

Proportion of Death Sentences by Victim Suspect Relationship and Races

	Strangers	Non-Strangers
All Cases	8.1% (133/1638)	1.4% (103/7197)
White Victim	11.4% (119/1046)	2.3% (84/3637)
Black Victim	2.1% (12/579)	0.5% (17/3530)
Black Kills White	16.5% (51/310)	4.0% (9/225)
White Kills White	9.3% (68/734)	2.2% (75/3398)
Black Kills Black	1.7% (9/517)	0.5% (16/3386)
White Kills Black	4.8% (3/62)	0.7% (1/138)

TABLE 4

Proportion of Death Sentences by Number of Victims and Race of Suspect and Victim

	Multiple Homicides	Single Homicides
All Cases	10.1% (69/685)	3.2% (299/9457)
White Victim	12.4% (64/516)	5.2% (255/4881)
Black Victim	2.5% (4/159)	0.9% (41/4537)
Black Kills White	22.9% (11/48)	11.9% (81/681)
White Kills White	11.3% (53/467)	4.2% (174/4177)
Black Kills Black	2.8% (4/143)	0.7% (32/4279)
White Kills Black	0.0% (0/16)	3.6% (9/248)

multiple murder (10.1% and 3.2%, respectively). For example, if blacks are more likely than whites to be killed in single-victim murders, the lower death sentencing rate among the black-victim group would be explained. However, Table 4 indicates that among case of multiple murder, 12.4% of the white-victim cases, and 2.5% of the black-victim cases resulted in a death sentence. Moreover, blacks killing whites in a multple murder have a very high death sentence rate: 22.9% compared to 11.3% of the homicides in which whites kill whites and 2.8% of the homicides in which blacks kill blacks.

The only category of cases with a higher death sentencing rate than blacks suspected of multiple murders against whites is the category of blacks suspected of murders against white female victims. Overall, suspects with female victims are more likely than those with male victims to be sentenced to death (6.7% and 2.5%, respectively). However, this does not explain why black-victim cases are, overall, less likely than white-victim cases to result in a death sentence. Table 5 shows that those suspected of killing white women are over 5 times more likely to be condemned than those suspected of killing black women (9.7% and 1.8%, respectively). Furthermore, a black suspected of killing a white woman is 15 times more likely to be condemned than a black who is suspected of killing a black woman (24.4% and 1.6%, respectively).

Two additional possibilities might explain the sentencing disparities. The first possible explanation is that the use of a gun in the

TABLE 5

Proportion of Death Sentences by Victim's Sex and Race of Suspect and Victim

	Female Victim	Male Victim
All Cases	6.7% (177/2639)	2.5% (191/7497)
White Victim	9.7% (157/1618)	4.3% (162/3779)
Black Victim	1.8% (18/1010)	.7% (27/3686)
Black Kills White	24.4% (38/156)	9.4% (54/573)
White Kills White	8.2% (119/1458)	3.4% (108/3186)
Black Kills Black	1.6% (16/978)	.6% (20/3444)
White Kills Black	6.7% (2/30)	3.0% (7/234)

commission of a homicide results in disparities in sentencing. The second possible explanation is that the crime's occurrence in an urban[196] setting as opposed to a rural setting results in disparities in sentencing. Table 6 shows that suspects who use guns are slightly less likely to be condemned than suspects who use other weapons. Doubtless, this is because a gun may indicate a lower degree of premeditation and cause a quicker death. But among those who do not use a gun, defendants who kill white victims are 7 times more likely to be sentenced to death than defendants who kill black victims (7.8% and 1.1%, respectively). Conversely, there exists a small (and not statistically significant) difference in the death sentencing rates of urban versus rural locations, as shown in Table 7. In both urban and rural locations, however, defendants with white victims are more likely to be sentenced to death.

Finally, all the predictor variables in this study were combined into one statistical model with the dependent variable consisting of whether a homicide resulted in a death sentence being imposed. Because the dependent variable is dichotomous, logistic regression was

196. Urban is defined as areas where the population exceeds 100,000.

TABLE 6

Proportion of Death Sentences by Weapon Type and Race of Suspect and Victim

	Other	Guns
All Cases	4.9% (166/3404)	2.8% (184/6575)
White Victim	7.8% (149/1904)	4.6% (157/3394)
Black Victim	1.1% (16/1484)	.8% (24/3151)

TABLE 7

Proportion of Death Sentences by Location and Race of Suspect and Victim

	Rural	Urban
All Cases	3.9% (163/4160)	3.4% (205/5982)
White Victim	6.8% (148/2186)	5.3% (171/3211)
Black Victim	.7% (13/1942)	1.2% (32/2754)

selected as the statistical technique.[197] Logistic regression allows examination of the unique effects of each variable while simultaneously controlling for the effects of all others.[198] A variable's unique effects are assessed through the odds ratio, which represents the probability of receiving a death sentence divided by the probability of not receiving a death sentence.[199] The variable's odds ratio is the antilog of its beta in the regression equation.[200]

Table 8 shows that most of the predictive variables retain their significance while controlling for the others. Only the suspect's race and the type of murder weapon lose explanatory strength. Not surpris-

197. Logistic regression is a common statistical procedure and is described in most intermediate statistics textbooks. For discussion of logistic regression, see S. GROSS & R. MAURO, *supra* note 64, at 246-55; A. AGRESTI & B. FINLAY, *supra* note 118, at 482-86.

198. *See* A. AGRESTI & B. FINLAY, *supra* note 118, at 482-86.

199. *See id.*

200. *See id.*

TABLE 8

Logistic Regression Models for Death Sentences (N=8133)

Variable	Beta	Std. Error	Attained Significance	Odds Ratio
Intercept	-5.94	.79	<.001	
O's Race	.14	.19	.477	--
V's Race	-1.23	.26	<.001	3.42
Felony	-1.60	.18	<.001	4.95
Stranger	1.05	.18	<.001	2.86
# Victs.	1.14	.20	<.001	3.13
# O's	1.02	.18	<.001	2.77
V's Sex	1.16	.16	<.001	3.19
Gun	.22	.16	.153	--
Location	.36	.15	.02	1.43

(Likelihood Ratio) is 1449.46, and for the model with intercept only is 1972.03. The difference between these figures, the model chi-square, tests the statistical significance of the nine terms in the model. This difference is 522.57, with 9 degrees of freedom, which is significant at <.0001. Death penalty = 1, other cases = 0. All independent variables are (1,2), with 2 signifying Black Offender, Black Victim, No Accompanying Felon, Stranger, Multiple Victims, Multiple Offenders, Female Victim, Use of "Other" (non-gun) Weapon, and Rural Location.

ingly, the presence or absence of contemporaneous felonies is the best predictor of a death sentence, with the presence of felony circumstances statistically estimated to increase the odds of a death sentence almost fivefold (4.95 odds ratio).

However, the second strongest predictor of a death sentence, as indicated in Table 8, is the victim's race (3.42 odds ratio). This is the central finding of this study: controlling for all other factors, the odds of a death sentence are 3.42 times higher for defendants who are suspected of killing whites than for defendants suspected of killing blacks. The victim's race is a stronger predictor of a death sentence than are such factors as the victim-defendant relationship (2.86 odds ratio) or whether the crime was a multiple murder (3.13 odds ratio).[201] Further, the location of the homicide, a non-legal factor, also is statistically significant in predicting a death sentence when the impact of

201. A second model was run in which a variable representing the product of the defendant's and victim's race was inserted. This variable was an interaction term and was necessary to test the hypothesis that any effect of defendant's race was dependent upon the victim's race, *i.e.*, that blacks were more likely than whites to be sentenced to death if the victim was white, and that blacks were less likely than whites to be sentenced to death if the victim was black. However, this variable failed to attain statistical significance.

other variables is held constant. The odds of a death sentence for a homicide committed in a rural area is 1.43 times higher than the odds of a death sentence for a homicide committed in an urban area.

V. DISCUSSION

Statistical studies, by their very design, can never constitute definitive proof that variable A causes variable B. It always remains possible, at least in theory, that the relationship between A and B is caused by a third variable that was not included in the model. Social scientists proceed with their work by observing a correlation and then testing to see if other plausible variables might reduce or eliminate the correlation. Introducing control variables may also *increase* the size of the disparity, as was the case in this study's data set when the presence or absence of additional felonies was used as a control variable. The conclusion that may be reached on the basis of the above findings is that the hypothesis that victim-based racial discrimination permeates contemporary death sentencing in Florida cannot be rejected.

Although this study controlled for the most plausible variables that might have explained the race-sentencing correlations, the correlations did not disappear, and in fact remained strong. These results are strikingly consistent with those found by David Baldus and his colleagues in Georgia.[202] Baldus took account of some 230 variables that "might have explained the race-sentencing disparities on nonracial grounds."[203] Initially, Baldus found that the odds of a death sentence were 11 times higher for defendants who kill whites than for defendants who kill blacks.[204] Baldus' best model, using 39 predictive variables, concluded that the odds of a death sentence were 4.3 times higher for those who killed whites than for those who killed blacks.[205]

Similarly, Gross and Mauro found the odds ratio for victim's race to be 4.8.[206] The present study's multivariate model, controlling for seven nonracial factors, resulted in an analogous odds ratio of 3.4.[207]

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202. *See* D. BALDUS, G. WOODWORTH & S. PULAKSI, *supra* note 167.

203. McCleskey v. Kemp, 481 U.S. 279, 287 (1987).

204. *See id.* at 286.

205. *Id.* at 287.

206. Gross & Mauro, *supra* note 145, at 78.

207. *See* Table 8. Minor differences between this study's odds ratio and the odds ratio reported by Gross and Mauro were expected due to differences in sampling and methodology. *See supra* notes 175 & 184. The difference between this study's odds ratio and the odds ratio reported by Gross and Mauro is not statistically significant. The authors calculated the statistical significance of this difference by subtracting the Betas from the two studies and dividing the Betas by the square root of the sum of the squared standard errors. This procedure produced

Replicating the Baldus study in Florida by collecting information on two hundred variables for each homicide case would cost hundreds of thousands of dollars, but the evidence at our disposal indicates that the final conclusions from such a study would differ little from the conclusions reached in this study.

Using a point of view derived solely from strict statistical logic, absolute proof of intentional discrimination is impossible to achieve. From a practical point of view, however, our society regularly makes life and death decisions based on weaker statistical evidence than this study has found with regard to race and capital sentencing in Florida.[208] Statistical probabilities do not definitively prove causal relationships, but they regularly are used as guidelines for decisionmaking.

As Gross points out, based on statistical evidence we know that smoking greatly increases the risk of death from heart disease, but race is more predictive of death sentencing than is smoking predictive of heart disease.[209] Those who argue that statistics do not prove discrimination are using the same form of argument as tobacco companies that argue that no definitive proof exists showing that smoking causes health problems. Statistics do not "prove,"[210] but they are sufficient to cause many smokers to change their behavior. In short, statistical studies can offer little to those who demand absolute proof of *anything*. Nevertheless, statistics can provide practical, and indeed life saving, guidelines.

For example, consider the fact that 95% of defendants executed in Florida for rape between 1924 and 1966 were black,[211] and, as far as the records show, all those executed had white victims.[212] Even statistical correlations this strong cannot definitively prove that intentional racial discrimination was operating in Florida's criminal justice system during this period. However, in the case of capital punishment,

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a Z-score of .78, which was not statistically significant. Even though this procedure tests for differences of Betas, the procedure is transferrable to Odds Ratios because the Odds Ratios are calculated from Betas. *See* A. AGRESTI & B. FINLAY, *supra* note 118, at 488-502.

208. Decisions to quit smoking or reduce cholesterol are based on statistical findings, for example. For more discussion of this point, see *infra* notes 209-10 and accompanying text.

209. *See* Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1308 (1985).

210. Theories or principles are derived from observed facts or patterns. Theories, such as a theory of racial discrimination, stand until the theories are proved wrong. Since theories cannot be definitively proved, scientific understanding is advanced through falsifying standing theories. *See, e.g.*, K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 40-42, 78-92, 252-54 (1959).

211. M. Vandiver, *supra* note 4, at 27; *see supra* text accompanying note 26.

212. *See supra* text accompanying notes 25 & 27.

statistical correlations such as this and the more contemporary correlations observed in this study can — and should — form the basis of an assessment of whether capital punishment is applied fairly and justly.

The inability of even strong statistical correlations to prove intentional racial discrimination in a given case led the United States Supreme Court to deny by one vote a challenge to the death penalty based on the Baldus data.[213] In *McClesky v. Kemp*,[214] the Court held that those who allege an equal protection violation must prove "purposeful" discrimination. Thus, they must prove that the decisionmakers in the case acted with "discriminatory purpose."[215] Just as a smoker dying from cancer or heart disease cannot definitively prove that his or her condition was caused by smoking cigarettes, a victim of intentional discrimination has a nearly impossible burden of proof. "At most," the Court concluded, "the Baldus study indicates a discrepancy that appears to correlate with race."[216]

Hence, the Court suggested that the remedy for such disparate sentences rests with legislative, not judicial, bodies.[217] Thus, the battleground has shifted to Congress. In 1991, the United States Congress was asked to pass the "Racial Justice Act," which would authorize courts to accept statistical patterns as proof of discrimination in capital cases.[218]

Furthermore, discrimination does not necessarily require conscious intent.[219] For example, a grade school math teacher may claim and believe that he or she treats male and female students equally, but might be surprised, however, if videotapes of the class revealed that while lecturing he or she looked more frequently at the boys than at

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213. *McCleskey*, 481 U.S. at 282.

214. *Id.* at 292.

215. *Id.*

216. *Id.* at 312.

217. *Id.* at 319.

218. The Racial Justice Act was first introduced in Congress in 1988 as a response to the *McCleskey* decision. In 1990 it passed the House, but died in a joint Senate/House conference committee at the end of the session.

In 1991, a Racial Justice Act was included with an Omnibus Crime Bill in the Senate. After a motion to strike by Senator Graham of Florida, the Racial Justice Act was stricken from the Omnibus Crime Bill. In the House, a Fairness in Death Sentencing bill was introduced on July 10, 1991. H.R. 2851, 101st Cong., 1st Sess. (1991). A vote in the House is expected in September, 1991.

219. Sadker & Sadker, *Sexism in the Schoolroom of the '80s*, 19 PSYCHOLOGY TODAY 54, 54-57 (Mar. 1985).

the girls.[220] Thus, the assertion that discrimination may exist in death sentencing does not necessitate charging individual actors, including judges and prosecutors, with conscious or intentional discrimination. The racial disparities revealed in this study result from an examination of the forest, not individual trees.

Under current case law, proving intent to discriminate or purposeful discrimination in a given case is nearly impossible. For example, a Florida trial judge in a 1985 capital case referred to a black defendant's family as "niggers."[221] The Florida Supreme Court did not strongly condemn such racism, but instead reminded the judge that the "image of impartiality" must always be maintained.[222] Thus, unless judges — no matter how racist — err by using words such as "nigger" (and in some cases even if they do), defendants are unable to prove discrimination.

One potential remedy for racial discrimination in capital sentencing is executive clemency. However, executive clemency has ceased to be a remedy in Florida in recent years. Historically, the most frequent reasons for extending mercy in capital cases were issues such as the fairness of the trial, the disparities in sentences, and the geographic equalization of sentences, all of which may relate to racial disparities.[223]

Margaret Vandiver found that between 1924 and 1964, governors awarded executive clemency in 23% (59 of 255) of the cases reviewed.[224] In fact, between 1925 and 1978, every Florida governor who reviewed death penalty cases awarded clemency, in rates ranging from 10.3%

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220. *See id.* One writer suggested that white teachers were not "intentionally" discriminating against black students by requiring their classes to read *Little Black Sambo*. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987) (criticizing the doctrine of "discriminatory purpose," which "requires plaintiffs challenging the constitutionality of a facially neutral law to prove racially discriminatory purpose on the part of those responsible for the law's enactment or administration").

221. Peek v. State, 488 So. 2d 52, 56 (Fla. 1986). Despite the racist comment, the trial court did not permit testimony about research on race and the death penalty in Florida during the penalty phase of the trial. *Death Penalty: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 29-30 (1987) (statement of Michael L. Radelet, Associate Professor of Sociology, University of Florida). At the original trial, Peek was sentenced to death, however, Peek won a new trial due to the improper use of a collateral crime, and at the retrial, Peek was acquitted. *Id.* at 30-31.

222. *Peek*, 488 So. 2d at 56.

223. Abramowitz & Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 159-65 (1964).

224. *See* M. Vandiver, *supra* note 4, at 84.

to 42.1% of the cases reviewed.[225] Governor Bob Graham, however, granted executive clemency in only 4.1% of the cases he reviewed.[226]

Governor Robert Martinez was the first governor in the history of the state who, given the chance, failed to use his clemency powers in any of the capital cases he reviewed.[227] Among the cases in which Martinez refused to grant clemency was the case of Willie Darden.[228] Darden's case attracted worldwide protest because of alleged due process violations, racial discrimination, and lingering doubts about his guilt.[229]

VI. CONCLUSION

The best evidence available provides strong support for the argument that, to this day, race influences the decision of who will die in Florida's electric chair. The pre-1972 historical record shows that the defendant's race and victim's race were both strong predictors of who was awarded clemency and who was executed in the electric chair.[230] The post-*Furman* death penalty statutes supposedly were designed to remedy this disparity. The eleven studies of death sentencing reviewed by the GAO, however, showed that this effort has failed.[231]

The research summarized in this study, which now represents the most comprehensive post-*Furman* study of Florida death sentencing patterns, finds similar disparities. The question now is whether courts and legislators will ignore this evidence or use it to design a criminal justice system in which race does not determine who will live or die. Until blacks and whites share a similar social and economic status in society, continued use of the death penalty will, in all likelihood, continue to add to the problems of racial inequality.

Warren McCleskey presented similar evidence to the United States Supreme Court in 1987.[232] The observations of Justice Brennan (joined by Justices Marshall, Blackmun, and Stevens) are a fitting conclusion to this article:

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225. Miami Herald, July 12, 1988, at 12A.

226. *Id.*

227. Martinez reviewed 90 death penalty cases without ever granting clemency. Statistics available at Florida Office of Executive Clemency; (904)488-2952.

228. *Id.*

229. Death Row U.S.A., *supra* note 55. United States Supreme Court Justice Harry Blackmun stated that, "[i]f ever a man received an unfair trial, Darden did." Tallahassee Democrat, July 27, 1986 at 12A, col. 2. *See* Darden v. Wainwright, 477 U.S. 168 (1986). Darden was executed on March 15, 1987. Death Row U.S.A., *supra* note 55.

230. *See supra* notes 187-202 and accompanying text.

231. *See supra* text accompanying note 169.

232. *McCleskey*, 481 U.S. at 286.

> Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.[233]

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233. *Id.* at 344.