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The Social Geometry of Death:
Social Structure and Capital Punishment in Georgia, 1993 – 2000

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B.A., University of California, Davis, 1997
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An abstract of
A dissertation submitted to the Faculty of the Graduate School of Emory University
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**Abstract**

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In 1976 the U.S. Supreme Court lifted its four year moratorium on executions after deciding the modified death penalty statutes introduced by Florida, Georgia, and Texas contained constitutionally acceptable safeguards to significantly reduce the rampant arbitrariness, capriciousness, and bias that previously plagued the capital punishment process in America. Nonetheless, empirical studies at both the state and federal levels conducted since the death penalty was reinstated have consistently discovered that the administration of capital punishment remains both highly inconsistent and discriminatory. Not only do researchers continue to find that the death penalty is not exclusively reserved for the most heinous murder cases, but also that race/ethnicity, gender, and geography significantly influence the likelihood that a defendant is charged with a capital offense and receives the death penalty. These studies have resulted in considerable debate among legal scholars as to why three decades of procedural reforms to the capital punishment process have failed to satisfactorily reduce the very problems that initially led the Court to invalidate existing death penalty statutes. In a departure from most death penalty analysts, this project argues that previous attempts to reform the capital punishment system have been largely unsuccessful because they do not adequately identify and explain the complex ways in which legally legitimate and illegitimate factors impact legal decision-making. Drawing heavily from the socio-legal and social control literatures, this study advances a theory of legal behavior operating solely at the sociological level to explain capital charging-and-sentencing patterns and tests hypotheses derived from the theory using recent death penalty data from Georgia.

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I don’t recall and benefit from the wisdom of these two extraordinary men.  I am just beginning to truly understand and appreciate how important they were in making me the person I am.

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## Chapter 1: Introduction

Capital punishment is at the center of much public debate in the United States and recent evidence suggests that the nation is evenly split over the appropriateness of the "ultimate penalty." When given the option of sentencing convicted murderers to life in prison without the possibility of parole, a recent Gallup Poll discovered that only 55 percent of respondents supported capital punishment (Jones 2005). A similar survey conducted by CBS News one month prior to the aforementioned Gallup Poll revealed that 39 percent of Americans supported the death penalty, 39 percent supported life without the possibility of parole, and six percent supported life imprisonment with the possibility of parole (CBS News Polls 2005).[1] Current support for the death penalty is the lowest in over 30 years, having peaked at nearly 75 percent in the mid-1990s (see Baumer, Messner, and Rosenfeld 2003; Ellsworth and Gross 1994).

The decline in support for capital punishment has been primarily attributed to the growing worldwide abolitionist movement *and* the American public's increasing concern over the risk of executing an innocent person (Bright 2001; Dieter 2003; Unnever and Cullen 2005). International opposition to capital punishment first took center stage in 1966 when the United Nations (UN) General Assembly adopted the International Covenant on Civil and Political Rights and advocated restricting the use of the death penalty.[2] Five years later, with strong encouragement from Amnesty International, the UN adopted another resolution calling for the progressive restriction of capital offenses

[1] Several academic studies published in peer-reviewed journals have also discovered that support for the death penalty declines considerably when life without parole is offered as an alternative sentencing option (see, e.g., Bowers 1993; McGarrell and Sandys 1996; Moon *et al.* 2000; Sandys and McGarrell 1995).
[2] G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (December 16, 1966).

and the eventual abolition of the death penalty.[3] When Amnesty International convened a global conference on capital punishment in Stockholm, Sweden in 1977, sixteen nations had abolished capital punishment for all crimes. The goal of progressively restricting the use of the death penalty and the desirability of abolishing capital punishment was reiterated by the UN in 1977 and 1989.[4] Each year since 1997, the UN Commission on Human Rights has passed resolutions calling on countries that have not abolished the death penalty to establish a moratorium on executions.[5] In 1999, the UN began urging countries not to extradite individuals to nations without the assurance that these individuals would not be subject to the death penalty.[6] The UN also requested death penalty nations to make information regarding the imposition of the death penalty and the scheduling of executions available to the public. The United States remains the only Western industrialized nation to retain the death penalty for ordinary crimes (i.e., for crimes other than treason and violations of military law) and the vast majority of executions occur in just a few nations: China, Iran, Saudi Arabia, the United States, and Vietnam (Hood 2003).

With respect to the risk of executing the innocent, 118 inmates were released from death row between 1973 and 2004 because of evidence of their innocence, compared to

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[3] G.A. Res. 2857 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (December 20, 1971).
[4] G.A. Res. 32/61, U.N. GAOR, 32d Sess., Supp. No. 45, U.N. Doc. A/32/45 (December 8, 1977); G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, Annex., U.N. Doc. A/44/49 (December 15, 1989).
[5] C.H.R. Res. 1997/12, 53d Sess., U.N.Doc. E/CN.4/RES/1997/12 (April 3, 1997); C.H.R. Res. 1998/8, 54th Sess., U.N. Doc. E/CN.4/RES/1998/8 (April 3, 1998); C.H.R. Res. 1999/61, 55th Sess., U.N. Doc. E/CN.4/RES/1999/61 (April 28, 1999); C.H.R. Res. 2000/65, 56th Sess., U.N. Doc. E/CN.4/RES/2000/65 (April 26, 2000); C.H.R. Res. 2001/68, 57th Sess., U.N. Doc. E/CN.4/RES/2001/68 (April 25, 2001); C.H.R. Res. 2002/77, 58th Sess., U.N. Doc. E/CN.4/RES/2002/77 (April 25, 2002); C.H.R. Res. 2003/67, 59th Sess., U.N. Doc. E/CN.4/RES/2003/67 (April 24, 2003); C.H.R. Res. 2004/67, 60th Sess., UN Doc. E/CN.4/RES/2004/67 (April 21, 2004); C.H.R. Res. 2005/59 61st Sess., UN Doc. E/CN.4/2005/59 (April 20, 2005).
[6] C.H.R. Res. 1999/61. In 2001, the Supreme Court of Canada refused to extradite two defendants to the United States without assurances that the death penalty would not be imposed, noting significant problems with the American capital punishment system (see *United States of America v. Burns*, [2001] S.C.R. 283, 360).

944 executed inmates during the same time period—a ratio of one exoneration for every eight executions (Death Penalty Information Center 2008). Particularly troubling to death penalty opponents is the fact that the number of annual exonerations has dramatically increased over the past several years, suggesting the risk of executing the innocent may be as great as ever. From 1973 to 1988—the first half of the modern death penalty era—there were an average of 2.2 exonerations per year. During the second half of this period, 1989 to 2004, the average number of annual exonerations increased to slightly over five. Between 2000 and 2004, inclusive, the average number exonerations climbed to 7.2 per year (Death Penalty Information Center 2008).[7] Several analysts have noted that these figures underestimate the prevalence of wrongful death sentences because they only capture the individuals who are able to show evidence of their innocence while on death row. Excluded from these statistics are individuals who did not receive a full acquittal, but were nevertheless released from death row because of probable or possible innocence (Death Penalty Information Center 2008). Also excluded from these figures are individuals who were sentenced to death, but should have been convicted of second-degree murder or manslaughter and, therefore, ineligible for the death penalty in the first place. A recent study of the all death sentences handed down between 1973 and 1995 revealed that 68 percent of these sentences were eventually overturned because of serious error and 82 percent of those cases resulted in a sentence other than death upon retrial (see Chapter Three).[8]

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[7] The rate of exonerations for non-capital crimes has risen sharply during this time period as well (see Gross *et al.* 2005).

[8] Seven percent of these cases resulted in the defendant ultimately being found innocent of the capital crime for which she or he was originally sentenced (Liebman *et al.* 2000c).

Illinois Governor George Ryan's growing concern over the possible execution of the wrongfully convicted compelled him to place a moratorium on executions in January 2000.[9] Governor Ryan noted that 12 individuals had been executed in Illinois since 1977, while 13 had been exonerated during the same time period. Two years later, in May 2002, outgoing Maryland Governor Paris Glendening followed Governor Ryan's lead and imposed a moratorium on executions in Maryland until the completion of a study he commissioned to examine potential arbitrariness and discrimination in the administration of Maryland's death penalty.[10] The study—conducted by researchers at the University of Maryland—uncovered substantial racial and geographic disparities in the state's capital punishment system. After taking into account numerous legally legitimate and illegitimate case characteristics, the study revealed that offenders accused of murdering

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[9] After placing the moratorium on the death penalty, Governor Ryan—a proponent of the death penalty—appointed a special commission to study how the death penalty system in Illinois could be reformed, and not to debate whether or not the death penalty should be abolished. Ryan's executive order stated: "The Commission, upon concluding its examination and analysis of the capital punishment process, shall submit to the Governor a written report detailing its findings and providing comprehensive advice and recommendations to the Governor that will further ensure the administration of capital punishment in the State of Illinois will be fair and accurate" (see Exec. Order No. 424 Ill. Reg. 7439, March 4, 2000). In April 2002, the Governor's Commission—comprised of members across the political spectrum (see Sanger 2003, p. 103 n.12)—issued its report of eighty-five specific recommendations for corrections to the Illinois death penalty system, supported by over 200 pages of analyses and appended materials. The commission was unanimous in its belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee that no innocent person is ever again sentenced to death.

[10] In January 2006, outgoing New Jersey Governor Richard J. Codey signed legislation requiring a temporary suspension of all executions in his State and creating a study commission to evaluate New Jersey's capital punishment system. The bill passed in the New Jersey General Assembly (H.R. 2347 & S. 709, 211th Leg., Reg. Sess. [N.J. 2004]), and called for the establishment of a thirteen member bipartisan commission to examine critical issues such as racial and regional disparities, costs, risk of erroneous executions, and whether alternatives to the death penalty are feasible. Governor Codey's signing of the bill marked the first time in the nation's history that a State imposed a moratorium on executions via legislation (Post 2006). One week later, the California Assembly Appropriations Committee sidelined a similar bill (H.R. 1121, 2005 Reg. Sess., [Cal. 2005]) that would have imposed a 24-month moratorium on executions so that the Legislature could review the recommendations of the blue-ribbon panel study evaluating the effectiveness, accuracy, and fairness of the State's capital punishment system (Marshall 2006). In December 2007, New Jersey lawmakers voted to abolish the death penalty (H.R. 3716 & S. 171, 212th Leg., Reg. Sess. [N.J. 2006]), and Governor Jon Corzine subsequently signed the bill into law and commuted the death sentences of eight death row inmates to life without the possibility of parole (Peters 2007).

white victims were significantly more likely to be noticed for the death penalty and receive a death sentence at trial. The study also discovered that black offenders accused of murdering white victims had the greatest likelihood of prosecutors seeking the death penalty against them and juries sentencing them to death (Paternoster *et al.* 2004). At the time the study was released, all of Maryland's 13 death row inmates were convicted of murdering white victims, although more than three-quarters of all homicide victims in the state were non-white (Paternoster and Brame 2003). Despite these findings, newly elected Maryland Governor Robert Ehrlich lifted the moratorium upon taking office as he had promised to do during his campaign.[11] Race may have also played an important role in the administration of capital punishment in Illinois. Of the 18 death row inmates in Illinois who have been exonerated since 1977, fourteen (78 percent) were racial/ethnic minorities (12 blacks and 2 Hispanics).[12] Partly as a result of these dramatic racial disparities, Governor Ryan commuted the death sentences of all 167 inmates sentenced to death in Illinois to life without the possibility of parole two days before he left office.[13] At a speech delivered at Northwestern University, Governor Ryan remarked, "Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die. What effect was race having? What

[11] Governor Ehrlich's successor, Martin O'Malley, called for a repeal of the death penalty during this third State of the State address in January 2009. Governor O'Malley, a vocal opponent of capital punishment, personally sponsored a bill to abolish the death penalty in Maryland. He justified his opposition to the death penalty on the grounds that it does not deter potential murderers, wastes resources that could better spent fighting crime, and leaves the state open to the possibility of executing the innocent (Wagner 2009).
[12] Nine of the twelve (75 percent) individuals executed in Illinois since the state's death penalty was reinstated in 1977 were convicted of murdering white victims, although the vast majority of homicide victims in Illinois during this same period were black (Death Penalty Information Center 2008; Fox 2005).
[13] There were actually 156 inmates on death row at the time of Governor Ryan's blanket commutation. Eleven additional inmates had recently been sentenced to death, but were not physically on death row at the time of Governor Ryan's commutation (Possley and Mills 2003).

effect was poverty having? Because of all these reasons, today I am commuting the sentences of all death row inmates" (Possley and Mills 2003).[14]

While the arbitrary, capricious, discriminatory, and error prone administration of the death penalty in Maryland and Illinois may have come as a shock to many Americans, death penalty scholars and abolitionists have highlighted significant problems with the capital charging-and-sentencing process for over six decades. In fact, the capital defense bar began collecting and using data on the racially discriminatory application of the death penalty for rape cases in the early 1950s to challenge the constitutionality of capital punishment (see Chapter Two). Since that time, a large research literature has accumulated documenting the influence of race, gender,[15] region, and other legally illegitimate factors on the death penalty system across the nation. Despite the substantial evidence demonstrating the serious flaws in the administration of death penalty at every stage of the capital charging-and-sentencing process and at all levels of government, thirty-five states, the U.S. Government, and the U.S. Armed Forces still retain the death penalty. Even more troubling for death penalty abolitionists is the fact that more than three decades of procedural modifications in the modern era of the death penalty have been ineffective at eliminating the rampant arbitrariness, caprice, and discrimination that plagued previous eras (Liebman 2007; Ogletree 2002).

Why, despite the efforts of the state legislatures and courts to develop procedural rules to make the imposition of the death penalty fair and consistent, is the capital punishment system still fraught with arbitrariness, caprice, discrimination, and mistake?

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[14] Blacks comprise 42 percent of inmates currently on death row in the United States, but account for half (50.4 percent) of all exonerations since 1973 (Death Penalty Information Center 2008).

[15] Throughout the text, the term "gender" refers to "biological sex"—an ascribed characteristic—and not sexual identity, and achieved characteristic. This distinction is important because the focus of this project is on external, observable aspects of social structure, not largely unobservable internal states.

Possible answers to this question have been heavily debated. At one extreme are the pessimistic appraisals of U.S. Supreme Court Justices John Harlan and Antonin Scalia in the landmark *McGautha* and *McCleskey* cases, respectively. Both Justices concluded that unconscious biases—including racial bias—in prosecutorial, judicial, and jury discretion in capital cases are real, inescapable, and ineradicable (see Chapter Two).[16] Chief Justice William Rehnquist even doubted the ability of state supreme courts to conduct adequate comparative proportionality review of death sentences handed down by the trial courts to detect and eliminate (or significantly reduce) arbitrariness and bias (cf. Kaufman-Osborn 2004).[17] The inevitability of racial discrimination in the death penalty process and the impossibility of its prevention, however, have been seriously challenged by both death penalty abolitionists and retentionists, members of federal and state legislatures, and legal scholars (see Chapters 4 and 5). In fact, several studies suggest that the levels of arbitrariness and discrimination in the administration of the death penalty were moderately reduced, but not eliminated, because of the capital-sentencing reforms mandated by the U.S. Supreme Court in the early- and mid-1970s (see Baldus, Woodworth, and Pulaski 1990, Chapter 5). At the opposite extreme is the optimistic

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[16] See *McGautha v. California*, 402 U.S. 183, 204 (1971) and *McCleskey v. Kemp*, 481 U.S. 279 (1987). Justice Harlan believed that there was no practical way to guide a jury's ultimate decision whether to impose the death sentence. Justice Scalia, although acknowledging the clear patterns of bias in the capital punishment system, believed that the "unconscious" sympathies and antipathies of jurors were an irreversible evil of the capital punishment process (see Davis 1998, p. 50). While recognizing the problems of arbitrariness and bias the death penalty system, both Justices supported States' rights to continue administering capital punishment in the same fashion that allowed such patterns of bias to develop in the first place.

[17] "The plurality seems to believe […] that provision for appellate review will afford a check upon the instances of juror arbitrariness in a discretionary system. But it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was not imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion. All that such review of death sentences can provide is a comparison of fact situations which must, in their nature, be highly particularized, if not unique, and the only relief which it can afford is to single out the occasional death sentence which, in the view of the reviewing court, does not conform to the standards established by the legislature" (*Woodson v. North Carolina*, 428 U.S. 280, 316 [1976]) (Rehnquist, J., dissenting).

view that the arbitrariness, caprice, and bias in the administration of capital punishment is detectable and repairable, although new procedural protections must be developed to significantly reduce or eliminate bias and error because existing rules have been inadequate (Baldus, Pulaski, and Woodworth 1994b; Berger 1991; Liebman 2000).[18] However, numerous death penalty analysts and socio-legal scholars are doubtful of the ability of proposed procedural safeguards to satisfactorily purge arbitrariness and bias from the capital punishment process (see, e.g., Kan and Phillips 2003; Liebman 2007; Ogletree 2002).[19]

Much of the debate (and confusion) over how to best identify and remedy problems with the administration of the death penalty stems from the inability of death penalty analysts to adequately explain the complex ways in which legally legitimate and illegitimate factors influence legal decision-making. Modifications to death penalty statutes are likely to be ineffective at eliminating these problems if they do not address the underlying sources of these disparate patterns (Black 1989).[20] Unfortunately research on the capital punishment system has been dominated by evaluation studies (i.e., studies of legal effectiveness) and, as a result, most death penalty scholars have failed to specifically develop or test theoretical propositions aimed at ordering, predicting, and

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[18] Based on interviews with 1,201 former capital jurors from 354 trials in fourteen states (Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia), Bowers and Foglia (2003) conclude that the constitutionally mandated requirements established to guide jury discretion and to eliminate arbitrary sentencing are not working.

[19] There are some death penalty analysts who argue that the current capital-sentencing systems of the state and federal governments are, in fact, producing even-handed justice by limiting the death penalty to only the most heinous cases (see, e.g., Carrington 1978; Cassell 2003). The vast majority of empirical studies suggest, however, that nearly all jurisdictions with death penalty statutes administer capital punishment in an arbitrary or discriminatory fashion (see Chapter Four).

[20] Problems with adequately identifying the sources of disparate charging-and-sentencing patterns are not unique to capital murder cases. Nearly twenty years of sentencing reform efforts for non-capital crimes at the federal and state levels have been largely unsuccessful at eliminating the influence of legally illegitimate case characteristics on legal decision-making (see Chapter Four).

explaining variation in legal behavior in the capital charging-and-sentencing process (see, generally, Black 1972; Mears 1998a).

The current project presents an examination of the capital charging-and-sentencing process in Georgia from 1993 through 2000. Unlike previous studies of capital punishment, this study derives and tests specific research hypotheses from a general theory of law operating solely at the sociological level—that is, without reference to psychology (Black 1976). While this type of theorizing was at the foundation of early sociological thought (e.g., Durkheim [1895] 1962; Simmel 1909), it has been largely (and prematurely) abandoned by many contemporary socio-legal theorists. Georgia's capital punishment system was selected for these analyses for three important reasons. First, Georgia is one of the leading death-sentencing jurisdictions in the nation, ranking fifth in total number of executions since the practice of capital punishment officially began in America in 1608 (Espy and Smykla 2004). Second, Georgia has been the most influential state in shaping death penalty policy in the United States in the modern era of the death penalty. Well over a dozen cases originating in Georgia have set legal precedent with respect to the administration of capital punishment (Cook 1996). Third, Georgia's capital punishment system has received the most scholarly attention, allowing for a comparison of charging-and-sentencing patterns in the jurisdiction across various time periods (see also Chapter Five).

Chapter Two offers a historical overview of the practice of capital punishment in America. The history of the death penalty is divided into three eras: (1) the early colonial period through the Civil War; (2) the period following the Civil War through the 1960s; and (3) the 1970s to the present period. The chapter discusses the major developments

that occurred in each period with respect to the administration of the death penalty and the enduring impact of these changes on the death penalty process. Chapter Three presents a detailed discussion of the major issues surrounding the use of the death penalty and how social science research has influenced the debate over capital punishment in America. Chapter Four provides an extensive review of the literature on the use of the death penalty and the influence of legally legitimate and illegitimate case characteristics on the capital charging-and-sentencing process at both the state and federal levels, with a particular emphasis on the role of race/ethnicity and region. To provide context, the chapter begins with a brief overview of the history of the discriminatory treatment of racial/ethnic minorities—particularly blacks—in the American legal system.

Chapter Five discusses the history of the administration of capital punishment in Georgia. The chapter is divided into several subsections: (1) an overview of the racially disproportionate application of the death penalty in Georgia and the American South, (2) a discussion of the landmark U.S. Supreme Court cases originating in Georgia and their impact on the current capital charging-and-sentencing system nationwide, (3) a description of the impact of race/ethnicity, gender, and region on administration of capital punishment in Georgia in the modern era, (4) an examination of the prevalence of miscarriages of justice (i.e., wrongful convictions and prejudicial error) in Georgia's modern death penalty system, and (5) a description of Georgia's capital charging-and-sentencing process and a discussion of the state's life without the possibility of parole legislation and its possible impact on the capital charging-and-sentencing process.

Chapter Six discusses the minimal role that theory has played in research on the impact of legally legitimate and illegitimate factors on the criminal sentencing process

and suggests that this relative inattention to theory has undermined sentencing reform efforts for both capital and non-capital crimes. The chapter provides an overview of the three dominant theoretical perspectives employed in sentencing research and evaluates these theories according to widely accepted scientific standards. After arguing that all three perspectives fail to successfully satisfy these established scientific criteria, a fourth perspective is presented that is believed to more completely realize the goals of scientific theory. The chapter also discusses the problems that the dominant theoretical perspectives have with conceptualizing race/ethnicity, gender, and region, and how these shortcomings undermine the ability of these theories to explain the continuing significance of race/ethnicity, gender, and region in the criminal sentencing process despite the efforts of state and federal governments to purge the effects of these factors from the criminal justice process. It is argued that the fourth theoretical perspective more completely captures the social significance of race/ethnicity, gender, and region on administration of law, in general, and on the capital charging-and-sentencing process more specifically. The chapter concludes by presenting several research hypotheses that are subsequently subject to empirical examination.

Chapter Seven describes how the data on Georgia's capital charging-and-sentencing process were collected for this study and the analytical techniques used. Particular attention is given to why the analytical approach employed in this study is well suited for the research questions posed in the previous chapter. Methodological problems that have plagued previous empirical research on the capital charging-and-sentencing process in Georgia and other jurisdictions across the United States are highlighted and a discussion of how this study addresses those problems is presented. Chapter Eight

reports the results from the empirical analyses and Chapter Nine summarizes the study's major findings, offers directions for future research, and discusses the tenability of current capital-sentencing reform efforts to eliminate racial/ethnic, gender, and regional bias in light of the study's results.

## Chapter 2: Background on Capital Punishment in the United States

Capital punishment has been a stable feature of social policy in this nation for nearly four centuries.[21] The first recorded execution—in what ultimately would become the United States—was that of Captain George Kendall in the Jamestown Colony of Virginia in 1608 (see Espy and Smykla 2004).[22] Since that time, more than fifteen thousand individuals have been legally executed in the United States (Espy and Smykla 2004). While the death penalty has been fixture in American society, it has also been wrought with controversy and debate (Banner 2002). A brief overview of the legal history of the death penalty in the United States is provided below.

Death penalty scholars have divided the history of capital punishment in the United States into several different eras (see, e.g., Bedau 1997a; Haines 1996). Although these eras vary considerably with respect to duration and importance, and the lines of demarcation are somewhat blurred, they are all marked by significant changes in the administration of capital punishment in this country. For the purposes of this discussion, the history of the death penalty is divided into three periods: (1) the early colonial period through the Civil War; (2) the period following the Civil War through the 1960s; and (3) the 1970s to the present.

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[21] Although the U.S. Supreme Court imposed an official moratorium on capital punishment on June 29, 1972 (see Section 2.3), the actual practice of sentencing individuals to death was interrupted for less than six months (Haines 1996, pp. 45–46).

[22] Kendall, who was of the leader of the seven member governing council of the Jamestown Colony, was accused of mutiny, tried in front a jury of his peers, and shot to death. Twenty-fours later, in 1632, Jane Champion became the first woman executed in the colonies for an unknown offense.

## 2.1 Early Colonial Period Through the Civil War

The early capital punishment statutes of the original thirteen colonies varied considerably. Several colonies, modeling their statutes directly from English law, authorized capital punishment for a wide variety of crimes against the state, persons, and property (Banner 2002). Other colonies developed more restrictive capital laws, authorizing executions for a very limited number of crimes. Regardless of the scope of their capital statutes, all colonies authorized public execution by hanging as the mandatory punishment for certain crimes.

Prior to the American Revolution, public opposition to capital punishment was confined to a very small segment of society, namely religious groups such as the Quakers (Bedau 1997a). Following the Revolution, however, a growing prison reform movement provided fertile ground for death penalty abolitionists (Haines 1996). During this period, many vocal critics of capital punishment began to emerge, advocating either a complete repeal of the death penalty or severe restrictions on its use. Largely drawing inspiration from Cesare Beccaria's ([1764] 1819) seminal work, *On Crimes and Punishments*, abolitionists began gaining an audience, arguing that the death penalty did not provide a greater deterrent than life imprisonment coupled with hard labor.[23] As a result of the pressure from the abolitionists, several important reforms were made to the capital punishment statutes following the adoption of the U.S. Constitution through the Civil War. The earliest of these reforms was the creation of "degrees of murder." Departing from English legal tradition, many of the former colonies began dividing murder into two

[23] The centerpiece of Beccaria's argument was that the certainty, not the severity, of punishment was most important in deterring crime. He believed that juries were more likely to feel sympathy for those facing a death sentence, feeling that the punishment was too harsh, and therefore may decide to acquit the defendant rather than impose the ultimate penalty.

categories: first- and second-degree, and reserved the death penalty for individuals convicted of first-degree homicide (Banner 2002). In 1793, Pennsylvania was the first jurisdiction to make the distinction, which resulted from a compromise between abolitionists (mostly Quakers) and retentionists, and most other states quickly followed suit (Keedy 1949). As a result, all jurisdictions that currently have capital punishment statutes reserve the death penalty for first-degree murder (or, equivalently, "capital murder").

The second major development during this period was the elimination of public executions (Haines 1996). As death penalty historians have noted, public executions were well-attended, highly formalized and highly symbolic events (Banner 2002; Bessler 1997; Frazier 2006). Individuals awaiting execution were often dressed in formal attire (i.e., dresses for females and suits for males) and openly transported from the jail to the execution site through the middle of town in order to attract spectators. After arriving at the execution site, religious leaders would offer sermons, followed by an official reading of the death warrant or some other statement by the sheriff or another high ranking legal authority (e.g., the judge who presided over the case). Individuals condemned to death would often be allowed to make a final speech before a prayer was offered and the execution was performed. Depending on the particularities of the crime (e.g., its severity/heinousness and the social status of the victim) and the background of the executed (e.g., her or his race/ethnicity and social status), the corpse was either prepared for burial, displayed publicly, mutilated, or turned over to medical authorities for dissection (Bessler 1997).

Beginning in early nineteenth century, many legal authorities and middle- and upper-class Americans joined abolitionists in opposing public executions. This was truly an unlikely alliance because most legal authorities and middle- and upper-class individuals generally approved of the death penalty; however they strongly believed that public executions were "uncivilized," "revolting," and "sadistic" (Bessler 1997, p. 67; cf. Johnson 2006b). Indeed, many death penalty proponents in state legislatures believed that executions posed a growing threat to the legitimacy of the death penalty, primarily through provoking sympathy for the condemned, leading to unruliness that threatened the public order, and brutalizing the entire community with the visibility of botched executions (e.g., decapitations and slow strangulations) (Banner 2002; Bessler 1997). Although pressure against public executions dates as far back as 1787,[24] it was not until nearly a half-century later in 1830 when Connecticut enacted the first laws to end public executions (Bessler 1997).[25] Soon after Connecticut's adoption of private hangings, similar laws were enacted in Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island (Bessler 1997; Haines 1996). Fifteen additional states restricted executions to prisons (or prison yards) by 1849 (Haines 1996). The adoption of private executions, however, took much longer in other parts of the nation. In fact, an

[24] Perhaps the most vocal critic of public executions at this time was Dr. Benjamin Rush, a signer of the Declaration of Independence. In a 1787 speech delivered in the home of Benjamin Franklin, Rush declared that "crimes should be punished in private, or not punished at all" (Bessler 1997, p. 40)

[25] In 1828, New York passed a law permitting, but not mandating, sheriffs to conduct private executions. The law, however, was completely ineffective and executions remained public in New York until they were officially banned in 1835 (Bessler 1997, p. 41). Similar "discretionary" laws were passed in Alabama (1840), Georgia (1859), and Virginia (1856) and these three states did not mandate private executions until the end of the nineteenth century (Bessler 1997, p. 228 n.7).

entire century would pass before public executions were completely eliminated in the United States (Bessler 1997).[26]

The third major reform during this period was the authorization of trial juries to make binding sentencing recommendations in capital cases. Borrowing heavily from English law, most jurisdictions in the United States required a mandatory sentence of death in capital cases when a defendant was convicted of murder. Juries would often recommend that the defendant, although guilty of the capital offense, receive a sentence of life imprisonment rather than a death sentence, but judges would ignore such advice (Bedau 1997a). Beginning in the mid-nineteenth century, however, states began allowing juries to require the trial judge to grant leniency to the convicted offender. While the origins and growth of this practice are debated by legal scholars, many believe that the pressure to introduce discretion into the capital sentencing process resulted from both a general populist trend at the time and to alleviate concerns that juries would acquit capital defendants who they believed to be guilty of the crime, but whose offense did not warrant a death sentence (Banner 2002; Bedau 1997a). Some of the earliest jurisdictions to allow jury discretion in capital cases were Alabama (1841), Tennessee (1841), and Louisiana (1846). Other states began adopting discretionary jury sentencing statutes throughout the remainder of the nineteenth century, although mandatory sentences for certain crimes

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[26] By most accounts, the last public execution in the United States was that of Rainey Bethea in Owensboro, Kentucky on August 14, 1936. Bethea, a twenty-two year-old black male, was executed for the murder of an affluent seventy year-old white woman. It is estimated that nearly twenty thousand spectators hailing from five states witnessed the execution without restriction. Only 37 days had elapsed between Bethea's arrest and execution. The state of Kentucky received considerable negative publicity for the hanging, and as a result, the Kentucky General assembly mandated private executions two years later in 1938 (Bessler 1997, p. 67).

States, however, differentially define what constitutes a "public" execution, so what would be considered a private execution in one state could be considered public in another. Several executions following Bethea's, in Missouri and Kentucky, were conducted within an enclosure, but numerous witnesses were still able to view these events (Bessler 1997). More recently, the June 11, 2001 execution of Oklahoma City bomber, Timothy McVeigh, was witnessed by over 300 people (many by closed circuit television).

remained lawful well into the mid-twentieth century. As a result of a number of U.S. Supreme Court rulings in the 1970s, guided jury discretion in capital cases became a near universal feature of capital statutes in the nation (see Section 2.3).[27]

The fourth major development during this period was the significant narrowing of the scope of capital offenses.[28] While the scope of capital statutes varied considerably across the nation, many jurisdictions in the early nineteenth century began significantly limiting the number of crimes that were punishable by death. In contrast to English criminal law during this period that encompassed wide range of capital offenses (e.g., burglary, armed robbery, arson, blasphemy, witchcraft, bestiality, sodomy, and idolatry), many jurisdictions began limiting capital punishment to offenders convicted of murder, kidnapping, rape, treason, or espionage (Banner 2002). Although some jurisdictions did authorize the death penalty for crimes other than the aforementioned offenses, they rarely, if ever, executed individuals for those crimes (Bedau 1997a). There were, however, some important exceptions. Jurisdictions in the West and South tended to enact much broader capital statutes than other jurisdictions. For example, horse thievery, claim jumping, and cattle rustling were often punished by death in jurisdictions in the West (Bedau 1997a). In the South, stealing hogs, receiving certain stolen goods (e.g., horses), minor theft, and embezzling tobacco were all capital offenses (Banner 2002).

Southern jurisdictions also enacted "slave codes" that authorized a death sentence against slaves for a wide variety of offenses, many of which were nonviolent (see

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[27] Some states (e.g., Florida) allowed the trial judge to overrule the sentencing recommendation of the jury if she or he desired. Although most judges overruled jury sentences in favor of more lenient punishments, this was not always the case. In fact, it was not until *Ring v. Arizona* (536 U.S. 584 [2002]) that the U.S. Supreme Court finally ruled that juries were solely authorized to decide critical issues in death penalty cases (see Section 2.3).

[28] At the time of the American Revolution, every colony, save Rhode Island, had ten or more capital crimes listed in their statutes (Acker and Lanier 2003).

Chapter Four). Moreover, in several of these jurisdictions, the killing of a slave by a white person was not prosecutable as criminal murder until the American Revolution (Spindel 1989) and slave owners faced basically no legal risk when they killed their slaves (Hindus 1980; Schwartz 1988). As a result of the plantation economy in the South, whites were also subject to the death penalty for a variety of nonviolent offenses. For example, whites convicted of aiding slaves to escape, stealing slaves, and inciting insurrection among slaves were subject to the death penalty (Banner 2002). And while rape was a capital offense in many jurisdictions across the United States until the late 1970s, the death penalty was disproportionately applied to blacks convicted of raping white women (see LaFree 1989; Wolfgang and Riedel 1973, 1975). In recent years, legislators in many states have frequently introduced bills that would authorize capital punishment for a host of non-homicide offenses (Bedau 1997a; Sack 1997). In fact in 1994, the U.S. Congress enacted the Federal Death Penalty Act, authorizing the death penalty for several dozen crimes, including four non-homicide offenses.[29]

The fifth important reform during this period was the actual repeal of death penalty statutes in a limited number of jurisdictions. Opponents of capital punishment, with a few qualifications, succeeded in abolishing the death penalty in Michigan (1847), Rhode Island (1852), and Wisconsin (1853). Repeals of the death penalty in Michigan and Rhode Island were partial, however, because Michigan retained the death penalty for treason and Rhode Island retained the death penalty for the killing of a prison guard by

[29] The non-homicide crimes which may result in a federal death sentence are: espionage (18 U.S.C. § 794), treason (18 U.S.C. § 2381), trafficking large quantities of drugs (18 U.S.C. § 3591(b)), and "attempting, authorizing or advising the killing of any officer, juror, or witness in cases involving a continual criminal enterprise, regardless of whether such a killing actually occurs" (18 U.S.C. § 3591(b)(2)).

someone serving a life-term prison sentence (Bedau 1997a).[30] The momentum to repeal the death penalty in other jurisdictions would come to an abrupt halt, however, as the nation became embroiled in civil war (Banner 2002). During the American Civil War, a conflict that would last more than five years and claim over 600,000 lives, there were no significant changes in the administration of the death penalty and virtually no mention of debate over capital punishment in legislative journals (Davis 1957).

Well over 3,000 executions were carried out during the first era of capital punishment in America (Espy and Smykla 2004). This period, encompassing more than 250 years of executions, and nearly 100 years of reform, also witnessed some profound changes in the administration of the death penalty. In particular, five major developments occurred during this era: (1) the advent of degrees of murder; (2) the widespread, though incomplete, elimination of public executions; (3) the authorization of capital juries to make *binding* sentencing recommendations; (4) the narrowing of capital offenses, particularly with respect to non-violent and religious offenses; and (5) the complete or partial repeal of death penalty statutes in a limited number of jurisdictions. Death penalty opponents and reformers would have wait until the Post-Civil War period before any significant reform would occur again.

## 2.2 Post-Civil War Period Through the 1960s

Following the Civil War, several states quickly abolished the death penalty, only to reinstate it shortly thereafter. For example, the death penalty was abolished for six years in Iowa (1872 – 1877), seven years in Maine (1876 – 1882), and four years in

[30] Michigan would completely reinstate the death penalty in 1963 (Bowers 1984).

Colorado (1897 – 1900) (Bowers 1984).[31] In the early twentieth century, more jurisdictions abolished the death penalty. Similar to Iowa, Maine, and Colorado, many of these jurisdictions would reinstate capital punishment just a few years later. Washington abolished its death penalty in 1913 and reinstated six years later in 1919. Repeals of the death penalty were also short-lived in Oregon (1914 – 1920), Tennessee (1915 – 1919), Arizona (1916 – 1918), and Missouri (1917 – 1919). Both Kansas (1907) and South Dakota (1915) abolished their death penalties, reinstating them less than three decades later in 1935 and 1939, respectively.[32] Some legal historians have argued that the reinstatement of capital punishment in these states resulted from fear and anxiety over rising crime during Prohibition (1916 – 1932) and the Great Depression (1929 – 1940) (see Bedau 1997a). There were some jurisdictions during this period, however, that abolished the death penalty for a significant number of years. Minnesota, for example,

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[31] Maine would re-abolish the death penalty in 1887, as would Iowa in 1965 (Bedau 1997a).

[32] The U.S. Supreme Court lifted the nationwide moratorium on the death penalty in 1976, but Kansas did not reinstate its death penalty until 1994. In December 2004, by a vote of four to three, the Kansas Supreme Court ruled that state's death penalty statute was unconstitutional because of the manner in which it required juries to weigh aggravating and mitigating factors (*State v. Marsh*, 102 P.3d 445 [Kan. 2004]). The Kansas law required jurors to impose a death sentence when aggravating and mitigating factors were completely balanced. The court held that the requirement that a "tie" automatically benefit the prosecution constituted cruel and unusual punishment. The decision overturned the death sentences of all six individuals on Kansas' death row. The court did not rule, however, that the death penalty was unconstitutional, per se, and simply held that the current statute needed to be modified such that a tie would benefit the defendant (Liptak 2004). Two years later, the U.S. Supreme Court reversed the Kansas Supreme Court's decision, ruling that the state's death penalty statute was constitutional (*Kansas v. Marsh*, 548 U.S. 163 [2006]).

Six months prior to the Kansas Supreme Court's decision, the New York Court of Appeals (the highest state court in New York) ruled that the state's death penalty statute was unconstitutional because of its "deadlock" provision (see *People v. Lavalle*, 817 N.E.2d 341 [N.Y. Ct. App. 2004]). This provision required judges to inform capital jurors that the judge was required to impose a sentence that may permit the defendant to be released on parole in 20 to 25 years if the juror was deadlocked as to whether to impose the death sentence. The court held, by a margin of four to three, that the provision violated the state constitution's due process clause (Glaberson 2004). At the time of the court's decision, four individuals were on death row in the state. Like the Kansas court, the New York court did not hold that the death penalty statute was inherently unconstitutional, but merely the deadlock provision must be modified to the satisfaction of the court. New York reinstated its death penalty in 1995, some 19 years after the U.S. Supreme Court lifted its nationwide band on the death penalty.

abolished the death penalty in 1911 and has yet to reinstate it (Bessler 2003).[33] North Dakota, in 1915, limited the death penalty to individuals convicted of first-degree murder while *already* serving a life sentence for first-degree murder and completely abolished in the death penalty in 1975 (Bowers 1984). Up through 1960s, many other jurisdictions would abolish the death penalty. Alaska (1957), Hawaii (1957), West Virginia (1965), and Iowa (1965)[34] permanently abolished their death penalties, whereas Vermont (1964) and New Mexico (1969) enacted partial repeals.[35] Several jurisdictions would also experience brief repeals of the death penalty in the 1950s and 1960s. Delaware's repeal, for example, lasted only three years (1958 – 1961) and Oregon's *second* repeal in 1964 would last two decades.

In addition to the cycle of abolition and restatement of the death penalty during the period following the American Civil War through the 1960s, several other interesting developments occurred. Perhaps the first major issue to take the national stage was the method of execution employed by jurisdictions with the death penalty (Paternoster, Brame, and Bacon 2007). Prior to the late 1880s, the dominant method of execution was hanging, although many jurisdictions also used firing squads to execute individuals

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[33] The last official execution in Minnesota occurred in Ramsey County in 1906. Nearly a century later, in December 2003, Minnesota Governor Tim Pawlenty began a public campaign to reinstate the death penalty in his jurisdiction. Pawlenty announced that he supported a statewide referendum for a constitutional amendment to reinstate capital punishment. Although such a referendum would take the decision to reinstate the death penalty out of the hands of the legislature and place it in the hands of voters, the legislature is still required to authorize the inclusion of such a referendum on the ballot. Bills to reinstate the death penalty by simply legislative action were also introduced in both houses of the legislature (H.R. 1602, 83rd Reg. Sess. [Minn. 2003]; S. 1860, 83rd Reg. Sess. [Minn. 2003]), however both bills died in committee.

[34] This was the second time that Iowa abolished the death penalty (see above), and it has yet to be reinstated.

[35] Both Vermont and New Mexico's partial repeals in 1964 and 1969, respectively, authorized the death penalty for the killing of an on-duty law officer and a killing committed by someone who already convicted of murder. Vermont completely abolished the death penalty in 1987 (Bedau 1997a) and New Mexico repealed its death penalty in 2009 (Associated Press 2009).

convicted of capital crimes (Bessler 1997).[36] Hangings, however, were often viewed as inhumane and barbaric, and they would frequently result in decapitation, slow strangulation, and disfigurement of the executed (see Driggs 1993; Moran 2002). For several decades leading up to the 1880s, legal authorities in New York debated the efficacy and humaneness of hanging individuals condemned to death. In 1886, a commission was appointed by New York Governor David Bennett Hill to explore alternative methods of execution. The Gerry Commission, as it was to be called, queried numerous experts, medical and otherwise, as to the most appropriate method of execution. Over thirty-four different alternatives were presented to the commission, with the most popular methods being lethal injection and electrocution. While lethal injection appeared to be the most painless alternative, many medical professionals strongly objected to using medical technology to kill convicted criminals.[37] One of the commission members, a New York dentist by the name of Alfred Southwick, began to strongly advocate for establishing electrocution as the preferred alternative to the rope and enlisted the support of electrical pioneer Thomas Edison (Denno 1994). The push towards execution by electrocution indirectly developed out of an earlier movement to provide a painless way to kill cattle before they were slaughtered and Southwick's personal belief that death by electrocution was quick and painless (Moran 2002).[38] Southwick, along with the support of Edison, convinced the Gerry Commission to

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[36] In the case of *Wilkerson v. Utah* (99 U.S. 130 [1878]), the U.S. Supreme Court rejected claims that death by firing squad violated the Eighth Amendment protection against cruel and unusual punishment.

[37] The humaneness of lethal injection was underscored by the fact that some proponents of the death penalty, including individuals in the medical community, objected to the use of lethal injection as a means of execution because they believed it to be "too painless" (Moran 2002, p. 79)

[38] It is reported that Southwick became a vocal supporter of death by electrocution after witnessing an accidental electrocution of a man who made contact with a live wire in Buffalo, New York. After witnessing this event, Southwick began performing similar experiments on animals which further solidified his belief that death by execution was quick and relatively painless (Denno 1994; Moran 2002).

endorse electrocution as the preferable method of execution and the Commission presented its report to the New York legislature in 1888. Later that year, the New York legislature passed the Electrical Execution Act mandating death by electrocution for anyone sentenced to death in the state and became the first jurisdiction to abolish execution by hanging (Moran 2002). The first scheduled execution by electrocution in New York was that of William Kemmler, convicted of murdering his girlfriend during an intoxicated rage and sentenced to death. Kemmler challenged New York's use of the electric chair on the grounds that it violated his Eighth Amendment right to protection from cruel and unusual punishment (*In re Kemmler*, 136 U.S. 436 [1890]). Similar to the *Wilkerson* decision twelve years earlier (see *supra*, note 36), in which U.S. Supreme Court denied the defendant's claim that Utah's firing squad was cruel and unusual punishment, the court held that the electric chair did not violate Kemmler's Eighth Amendment right. The execution of Kemmler, however, did not exhibit the quick and painless character that proponents of electrocution guaranteed. On August 6, 1890, Kemmler was initially given a surge of electricity lasting 17 seconds and pronounced dead by an attending physician. Shortly after the doctor's pronouncement, however, Kemmler's body began to twitch and other physicians on site discovered that Kemmler still had a pulse and immediately recommended that Kemmler be given another current of electricity. After the second current was applied, it is reported that the scent of burnt

flesh filled the death chamber (Moran 2002).[39] Nonetheless, execution by electrocution was eventually adopted by more that three dozen states (Banner 2002).[40]

By the 1920s, however, the electric chair increasingly came under attack. In response to criticism over the use of electrocution to execute those convicted of capital crimes, states began adopting lethal gas as the dominant method of execution. Proponents of lethal gas argued that it was a much more humane method of execution than the firing squad, hanging, and the electric chair. Nevada, which was one of the few states to authorize the use of the firing squad, was the first state to authorize the use of lethal gas in 1923, although a decade would elapse before other states would follow suit (see Denno 1994).[41] But while adopting "advances" in methods of execution that appeared to be more humane, many states retained and employed older methods of executions. For example, while lethal injection had been authorized for some time in all death penalty states, save Nebraska, firing squads were used in Utah in the mid-1990s, hangings were carried out in Delaware and Washington in the mid-1990s, and the electric chair remains authorized in ten states.[42]

The second major development in this period was the passing of control of executions from local authorities to state authorities. In the early twentieth century, local authorities began relinquishing control of executions to state authorities and the trend was

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[39] Nearly sixty years after *Kemmler*, in *Louisiana ex rel. Francis v. Resweber* (329 U.S. 459 [1947]), the Supreme Court ruled that a second electrocution of a 15 year old boy, six days after the initial botched attempt to electrocute him failed, was neither cruel and unusual punishment nor constituted double jeopardy.

[40] By 1912, seven states had switched from hanging to electrocution: Ohio (1896), Massachusetts (1898), New Jersey (1908), Virginia (1908), North Carolina (1909), Kentucky (1910), and South Carolina (1912). By 1929, 68 percent of all executions were by electrocution.

[41] In 1933, both Colorado and Arizona officially adopted the gas chamber as the preferred method of execution in their jurisdictions. Over the next 20 years, eight other states—all in the West and South—switched to lethal gas, with New Mexico being the last in 1955 (Banner 2002).

[42] The eight states that currently authorize the use of the electric chair are: Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia (Death Penalty Information Center 2008).

basically completed by the 1960s (Banner 2002; Bessler 1997). Several factors were responsible for this shift, among them being: (1) an attempt by state authorities to increase the legitimacy of capital punishment by centralizing executions, (2) a concern over the prevalence of botched executions resulting from the inexperience of local executioners, (3) the expense associated with changing the method of execution in most states from hanging to electrocution, and (4) the elimination of executions from the public eye (recall, by most accounts, the last official public execution occurred in 1936). But while state authorities assumed responsibility for executing individuals condemned to death, the actual administration of the death penalty—the entire capital process leading up to execution—remained under local control (Banner 2002). Local prosecutors continued to exercise discretion in selecting cases for the death penalty and local judges/juries continued to exercise discretion in sentencing defendants charged with capital crimes to death. The administration of capital punishment, then, remained highly variable within and between death penalty states (see Chapter Four), with the executioner being the only uniform feature of the entire process.

The third major change during this period was the expansion of the role of federal appellate courts. Beginning in the early nineteenth century, it was fairly common for capital defendants to receive at least perfunctory review of their death sentence by state appellate courts, although very few states enacted laws mandating appellate review in every death penalty case (Bedau 1997a). In the 1920s, state prisoners on death row began receiving relief in federal courts based on violations of constitutional protections by state criminal courts. Rather than challenging the constitutionality of the death penalty in general, however, state death row inmates attacked the death penalty on a case-

by-case basis, claiming that their constitutional rights had been violated by the state criminal proceedings in capital cases (Bedau 1997a). These appeals, however, were rather infrequent until the expansion of federal habeas corpus during the early 1960s (Haines 1996). Nonetheless, the significant drop in annual executions beginning in the 1950s has been partly attributed to the "increasing sensitivity of the federal courts to post-conviction appellate litigation on behalf of capital defendants" (Bedau 1997a, p. 13). Whereas executions were relatively frequent and stable in the 1930s and 1940s (148 per year), they dropped to half the annual average in the 1950s (72 per year) and one-quarter the annual average in 1960s (38 per year). In fact, there were only twenty-one executions in 1963, fifteen in 1964, seven in 1965, one in 1966, two in 1967, and no executions from 1968 to 1972, when the U.S. Supreme Court placed a moratorium on capital punishment (more below) (Espy and Smykla 2004).[43]

A fourth major development during this period was a shift in strategy by anti-death penalty attorneys. Prior to the 1960s, abolitionists mainly attacked capital punishment by lobbying for the repeal of death penalty statutes, pursuing clemency for individual convicts, and attempting to educate the general public regarding the inhumanity of the death penalty (Banner 2002; Haines 1996). Beginning in the 1950s, however, attorneys associated with the National Association for the Advancement of Colored People Legal Defense and Educational Fund (hereinafter, LDF),[44] a civil rights law firm founded in 1939 focusing primarily on protecting and preserving the rights of blacks in the United States, began attacking the constitutionality of capital punishment based upon racial disparities in the administration of the death penalty in southern states

[43] There would not be another "legal" execution in the United States until 1977 (more below).
[44] The LDF made use of a wide network of cooperating attorneys across the nation to challenge discriminatory practices against blacks (Haines 1996).

for the crime of rape (see also Chapter Four). This effort would be fueled several years later by the Supreme Court's decision to deny granting certiorari in a case that challenged the constitutionality of the death penalty for rape in which no life is taken (*Rudolph v. Alabama*, 375 U.S. 889 [1963]). Although the court voted six to three against granting certiorari, Justice Arthur Goldberg—with Justices William Brennan and William Douglas concurring—filed a dissenting opinion questioning whether: (1) the death penalty for rape was a violation of "evolving standards of decency" in view of the worldwide trend against the death penalty for rape;[45] (2) the death sentence is a disproportionate penalty for any crime in which no life is taken; and (3) lesser punishments can serve the same legal purpose as execution, therefore making the death penalty for rape unnecessarily cruel (Kirchmeier 2002). Two years later in 1965, the LDF broadened the scope of their attack and began a "multi-issue assault on the constitutionality of capital punishment in general, that is, for white as well as black offenders and in murder as well as rape cases" (Haines 1996, p. 14). In the same year, the American Civil Liberties Union (hereinafter, ACLU), an organization established in 1920 that directed its efforts at preserving the liberties guaranteed by the Bill of Rights, allied itself with the LDF after adopting an abolitionist policy (Haines 1996). This would mark the first serious attempt by death penalty opponents to challenge the very constitutionality of the death penalty in the courts (Bedau 1997a).[46]

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[45] In *Trop v. Dulles* (365 U.S. 86, 100–101 [1958]), the Supreme Court first articulated the "evolving standards of decency" test when interpreting the Eighth Amendment's prohibition against cruel and unusual punishment, noting that such an interpretation "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Although the Court did not articulate any specific criteria, the Court did look to current practices in the international community (Glass 2006, p. 1344).

[46] As noted above, death penalty opponents previously challenged the constitutionality of the *method* of execution employed by death penalty states in *Wilkerson* (firing squad) and *In re Kemmler* (electrocution); however the very constitutionality of capital punishment, itself, was never seriously challenged (Bedau 1997a).

The LDF had previously, albeit unsuccessfully, challenged the racially discriminatory application of the death penalty for rape cases in Virginia in 1950 (*Hampton v. Commonwealth*, 58 S.E.2d 288 [Va. 1950]) and had prepared to raise the issue again until the defendant's sentence was reduced to a life sentence (*Hamilton v. Alabama*, 386 U.S. 52 [1961]) (Haines 1996). The LDF, recognizing the importance of gathering information on sentencing patterns in rape cases in the South, funded a study during the summer of 1965 to collect such data (see Wolfgang and Riedel 1973). This data was subsequently presented to the court in *Maxwell v. Bishop* (398 F.2d 138 [8th Cir. 1968]) to challenge discrimination in the imposition of the death penalty for rape in the South. William Maxwell, a black male, was convicted in 1962 and sentenced to death for the rape of a white woman in Arkansas. Maxwell's attorneys argued that Arkansas juries disproportionately sentenced black males convicted of raping white women to death. After refusing to hear the case, the Eighth Circuit Court of Appeals was ordered to do so by the U.S. Supreme Court. On appeal, Maxwell's attorneys raised two additional issues, namely that (1) the trial was unconstitutional because the court combined the guilt/innocence and sentencing decisions into one phase (called a single-verdict jury) and (2) the death penalty process lacked sentencing standards. The court, while acknowledging that the data clearly demonstrated a historical pattern of biased sentencing, rejected the claim on the grounds that the data did not prove discrimination by the jury that convicted and sentenced Maxwell. (As will be discussed below, the U.S. Supreme Court would reject future evidence of racial discrimination in the administration of the death penalty on similar grounds.) The court avoided the single-verdict procedure and sentencing standards questions altogether.[47]

[47] The U.S. Supreme Court would later grant Maxwell a new trial, but it avoided the central constitutional

In another case in the late 1960s, *Boykin v. Alabama* (395 U.S. 238 [1969]), involving a man who was sentenced to death after pleading guilty to several armed robberies in which no one was killed, the LDF directly challenged capital punishment for armed robbery as "cruel and unusual punishment" because it was so infrequently and arbitrarily applied in such cases. Similar to *Maxwell*, Boykin's attorneys also challenged his sentence on grounds that Alabama juries lacked sentencing standards on which to base their decision. The U.S. Supreme court granted Boykin a new trial based on a procedural issue (Boykin had been allowed to plead guilty without understanding he would still be eligible for the death penalty), but avoided the LDF's two key arguments: (1) execution for armed robbery in which no one is killed constituted cruel and unusual punishment and, therefore, was a violation of the Eighth Amendment and (2) the absence of sentencing standards. In light of the court's focus on the narrowest of issues in *Maxwell* and *Boykin* and its complete silence on the central Eighth Amendment issue, opponents of capital punishment grew increasingly doubtful that the "cruel and unusual punishment" argument would ever be an effective attack on the death penalty (Haines 1996).

The LDF did experience some partial victories with respect to their procedural assault on the death penalty in the late 1960s. In *United States v. Jackson* (390 U.S. 570 [1968]), the defendant was sentenced to death for kidnapping under the "Lindbergh Law," which allowed defendants accused of kidnapping eligible for the death penalty only if their case went before a jury (Haines 1996, p. 32). The Lindbergh Law was overturned in a U.S. District Court because it unduly coerced defendants to waive their

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arguments raised in the case, preferring to grant a new trial based upon a jury nullification issue (Haines 1996).

Fifth (self-incrimination) and Sixth (trial by jury) Amendment rights. On appeal, the U.S. Supreme Court upheld the constitutionality of the death penalty for kidnapping, but ruled that portions of the law violated the accused constitutional rights. In *Witherspoon v. Illinois* (391 U.S. 510 [1968]), the LDF and ACLU challenged the constitutionality of "death qualification" of jurors in capital cases. They presented the court with evidence suggesting that "death qualified" juries were more likely to convict than non-death qualified juries (see also Dieter 2005; Ellsworth 1988; Fitzgerald and Ellsworth 1984; Oberer 1961; Young 2004) and that this placed capital defendants at an unfair risk of conviction. The U.S. Supreme Court held that courts would only be allowed to excuse potential jurors who expressed absolute opposition to the death penalty (Haines 1996, p. 33).[48]

The second era of capital punishment in America, lasting an entire century and responsible for nearly 10,000 executions, began with several shortly lived repeals of capital statutes in several states. Opponents and reformers of capital punishment were able to successfully lobby states to change their method of execution from hanging to electrocution, although use of the electric chair was not without strong criticism from the very beginning. Two other significant administrative changes occurred during this period as well, namely local authorities relinquishing control of executions to state authorities and the expansion of the role of federal appellate courts in the capital punishment process. State control of executions offered the promise of significantly reducing the likelihood of botched executions at the hands of inexperienced local authorities and

[48] Abolitionists originally perceived *Witherspoon* to be a tremendous victory because the ruling was retroactive; that is, it applied to past cases in which jury selection did not meet the standard established by the court. Subsequent lower court rulings, however, significantly diluted the impact of *Witherspoon* (Haines 1996, p. 211 n.8)

further legitimating the practice capital punishment. The expansion of the role of the federal appellate courts allowed defendants convicted of capital crimes in state courts to challenge the constitutionality of their particular conviction and sentence and provided another avenue of relief for those facing the death penalty (see also Liebman *et al.* 2000c). Finally, the end of this era witnessed a significant shift in strategy by anti-death penalty attorneys in which conventional approaches of legislative lobbying, public education, and pressure for executive clemency were largely abandoned in favor of mounting a direct assault on the constitutionality of the death penalty, which included attacks based on racial and procedural grounds, as well capital punishment's apparent incompatibility with contemporary standards of decency (Haines 1996). While the Supreme Court would repeatedly refuse to address the constitutionality of the death penalty, itself, and the two key procedural flaws raised by anti-death penalty attorneys (i.e., single-verdict jury and the lack of sentencing standards), instead opting to decide cases on narrow procedural grounds, it did provide some hope to anti-death penalty attorneys at the end of the 1960s when it agreed to hear two additional cases in which similar constitutional arguments were central and that both involved the crime of murder.

## 2.3 THE 1970S TO THE PRESENT

As noted above, at the close of the 1960s, the Supreme Court failed to resolve the two central issues raised in *Maxwell* and *Boykin*: (1) single-verdict juries and (2) the absence of sentencing standards. The court did, however, offer some hope to death penalty opponents and reformers when it agreed to hear two new death penalty cases in which these issues were central. In 1970, when the Supreme Court issued its final ruling

in *Maxwell v. Bishop* (398 U.S. 262 [1970]) which sidestepped the central issues in *Maxwell* and *Boykin*, it also announced on the same day that to hear two cases, *Crampton v. Ohio* and *McGautha v. California*; the cases were consolidated as *McGautha v. California* (402 U.S. 183 [1971]).

In *Crampton*, the defendant was tried and convicted under the single-verdict jury trial in Ohio, which allowed juries to make two decisions—the first with respect to guilt/innocence and the second with respect to sentencing—after one deliberation. In an argument similar to *United States v. Jackson*, Crampton's attorneys objected to the single-verdict jury because they believed that such a system forced defendants to make a choice between two constitutional rights: the Fifth and Fourteenth Amendments. On the one hand, if a defendant decided to exercise her or his right against self-incrimination at the conviction phase, she or he would also have to forfeit the right to speak to the jury about the appropriateness of the death sentence in her or his case and would be prevented from illuminating aspects of her or his character, background, and the crime that might warrant a sentence less than death. Surrendering the right to remain silent at the conviction phase, on the other hand, would allow the defendant to introduce mitigating evidence that might lessen the severity of her or his sentence, but such testimony would likely dramatically increase the likelihood of conviction by introducing (or allowing the prosecution to introduce) evidence that was not directly relevant to the question of guilt/innocence. Crampton's attorneys argued that the only solution that was constitutionally acceptable was to mandate bifurcated capital trials in which there would be two separate hearings. Under this system, the first hearing would address the issue of guilt/innocence and only allow evidence relevant to this issue. The second hearing

(assuming that the first phase resulted in a capital conviction) would determine the appropriate punishment of the convicted defendant and allow a broader range of evidence that was usually not permissible at the guilt phase.

Unlike the *Crampton* case in Ohio, *McGautha* was tried in California, a state which had bifurcated capital trials; however in both *Crampton* and *McGautha*, capital juries were given a great deal of discretion in choosing the appropriate sentence and very little guidance as to how they should arrive at such a decision. That is, outside vague warnings indicating that the law forbids jurors from acting on conjecture or prejudice, juries were not told what factors *should* and *should not* be considered. Crampton's and McGautha's attorneys strongly objected to the absence of sentencing guidelines and the wide discretion enjoyed by capital jurors, suggesting that such broad discretion invited decisions based on caprice or bias. They further argued that the absence of sentencing guidelines violated their clients' Fourteenth Amendment rights to equal protection under the law because under such a system, defendants who committed equally serious crimes could be treated differently—particularly members of minority groups and the economically disadvantaged.

Both Crampton and McGautha's cases were handled by private attorneys, but LDF attorneys filed amicus curiae briefs in both cases and were extremely hopeful that their six years of constitutional attacks on capital punishment will finally score a major victory (Haines 1996). The U.S. Supreme Court, however, in a six-to-three vote, decided against both issues, ruling that neither the absence of sentencing guidelines nor single-verdict trial procedures were in violation of the Fourteenth Amendment. Justice John Harlan, the author of the majority opinion, wrote, with respect to sentencing guidelines,

that it was both unwise and futile to attempt to determine, *a priori*, the factors that would warrant a death sentence. Furthermore, he stated that the "truly awesome responsibility" of taking a human life could not be reduced to legal formulae.[49] With respect to bifurcated trials, Justice Harlan believed that a defendant's decision to testify during trial is a strategic one, similar to all other decisions that must be made during trial, and is not without risk. He also commented that while he believed that bifurcated trials were superior means of dealing with capital cases, neither the Supreme Court nor the U.S. Constitution guaranteed trial procedures that were the best of both worlds.

With the rulings in *McGautha*, death penalty abolitionists feared that the *de facto* moratorium on the death penalty, which had began in 1967, would soon come to an end.[50] This would be particularly true if the Supreme Court refused to hear a direct Eighth Amendment challenge, a fact that seemed very likely considering the court's decision with respect to this issue two years earlier in *Boykin* and Justice Hugo Black's concurring opinion in *McGautha* which stated executions were common when the U.S. Constitution was written, and therefore, the cruel and unusual punishment clause was irrelevant to the question of the death penalty (Haines 1996).

However, while things were looking bleak for abolitionists with respect to an Eighth Amendment assault on capital punishment, several events occurred that increased the likelihood that the U.S. Supreme Court would have to hear the issue at least once more. First, on the very day that the *McGautha* decision was handed down, governors in

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[49] The majority's position in *McGautha* was at odds with the American Law Institute's (hereinafter, ALI) Model Penal Code that provided a list of factors for judges and juries to consider when sentencing convicted capital defendants. According to the ALI, the determination of factors that should influence the appropriate sentence in a death penalty case, *a priori*, was within human capacity and the best available option.

[50] The hanging of Louis Jose Monge in Colorado on June 2, 1967 was the last execution before the *de facto* moratorium.

Ohio and Maryland announced that they would maintain a moratorium on executions until the Supreme Court resolved the issue as to whether the death penalty was cruel and unusual punishment. Second, the Fourth Circuit Court of Appeals ruled in late 1970 that death sentences for rape in which the crimes neither took nor endangered human lives were cruel and unusual punishment (*Ralph v. Warden*, 438 F.2d 786 [4th Cir. 1970]). In response to the Fourth Circuit's ruling, attorneys general of Maryland, the Carolinas, and Virginia filed appeals with U.S. Supreme Court. Third, Arkansas governor Winthrop Rockefeller commuted sentences of all the state's death row before leaving office and Pennsylvania's attorney general, Fred Speaker, unilaterally ordered the removal of the electric chair from the state's death chamber. Fourth, anti-death penalty bills reached the floor of state legislatures in California, Massachusetts, and the U.S. House of Representatives. And finally, by 1971, nine states had abolished the death penalty and four more had no one actively on death row. Collectively, these events added considerable pressure on the Supreme Court to issue a definitive ruling on the constitutionality of the death penalty (Haines 1996).

Less than two months after the *McGautha* ruling, partly in response to this pressure, the Supreme Court agreed to hear a package of four appeals and to issue a conclusive decision as to the constitutionality of capital punishment. All of these cases, in slightly different ways, challenged the constitutionality of their respective state's death penalty based on the belief that it violated the defendants' Eighth Amendment rights. Two of the cases, *Aikens v. California* and *Furman v. Georgia*, were murder cases. The other two, *Branch v. Texas* and *Jackson v. Georgia* were rape cases in which no life was

taken. All of the defendants were black and all of the victims were white. The cases were consolidated as *Furman v. Georgia* (408 U.S. 238 [1972]).[51]

The legal challenges made by this group of cases were very similar to those in *McGautha*, and the issue at hand was whether capital punishment, *as administered under existing state law*, constituted cruel and unusual punishment. Attorneys for the appellants were well aware of the court's belief that the capital punishment, in of itself, was not cruel and unusual, so they elected to attack the respective states' implementation of capital punishment instead. The central question in *Furman* was whether the broad discretion afforded to capital juries was unconstitutional. LDF attorneys would specifically argue that the death penalty, as administered in the second half of the twentieth century, was inconsistent with evolving standards of decency resulting from its extremely infrequent application, extended delays between trial and execution that resulted in psychological torture of death-sentenced inmates, the arbitrariness and capriciousness of death noticed and death sentence cases, and the strong possibility of racial and economic bias in sentencing (see also Gottlieb 1961).

On June 29, 1972, approximately one year after the *McGautha* decision, the U.S. Supreme Court voted to strike down capital statutes that lacked sentencing guidelines for juries by the thinnest possible majority of five-to-four. This was somewhat surprising considering that the very same court—comprised of the same judges—had decided that the absence of sentencing standards was not a violation of the Fourteenth Amendment one year earlier in *McGautha*. Each Supreme Court Justice wrote a separate opinion,

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[51] The California Supreme Court struck down the death penalty as a violation of the California state constitution before the U.S. Supreme court ruled on the case (see *People v. Anderson*, 493 P.2d 880 [Cal. 1972], *cert. denied*, 406 U.S. 958). Aiken's sentence was commuted to life imprisonment and the appeal was dropped (*Aiken v. California*, 406 U.S. 813 [1971]). Nine months later, however, a public referendum was passed reinstating the death penalty in California.

citing different reasons for their decision, in what would be the longest Supreme Court opinion ever written. Although not entirely clear, it appears that the court believed that the Eighth and Fourteenth Amendments applied to capital punishment in very different ways. Whereas the Fourteenth Amendment argument presented in *McGautha* applied to the process of sentencing defendants without guidelines, the Eighth Amendment argument in *Furman* applied to the actual outcome. While the court believed that standardless juries were permissible under the due process clause of the Fourteenth Amendment, the product of this process was in violation of the Eight Amendment. In other words, the court appeared to believe that a constitutional process could still produce an unconstitutional result.

Only Justices William Brennan and Thurgood Marshall believed that capital punishment could not be considered constitutional in any form. Justice Brennan thought the capital punishment was an affront to human dignity because of its severity, arbitrariness and infrequency, incompatibility with contemporary standards of decency, and excessiveness. Justice Marshall, too, believed that capital punishment was excessive and that the same goals of capital punishment could be achieved with long-term imprisonment. He also thought that society had morally and socially progressed to the point that it viewed the death penalty as cruel and barbaric. Recognizing public support of capital punishment, Justice Marshall argued that this support was based upon citizens' lack of information about problems with the actual administration of the death penalty. In particular, he believed that if the public knew that the death penalty was no more of an effective deterrent than life imprisonment, was frequently imposed in a discriminatory manner, and that there was a strong likelihood that innocent persons are executed, then

they would find the death penalty morally objectionable as well (Bedau 1997b, pp. 189–95; Haines 1996).

The other Justices joining the majority, however, did not agree that capital punishment was inherently unconstitutional. Justice William Douglas rejected the "involving standards of decency" claim and cautioned that such an argument was dangerous in that it made the Eighth Amendment historically relative, potentially making the other nine amendments susceptible to reinterpretation as well. According to Justice Douglas, the flaw of the death penalty lies in the fact that it was so discretionary that discrimination against the poor and racial/ethnic minorities was inevitable. He believed that the absence of sentencing standards provided juries with the opportunity to act in a discriminatory manner and produce a pattern of death sentences that reflect the current social hierarchy that disadvantages individuals at the bottom of this hierarchy.[52] Justice Potter Stewart also argued that it was the arbitrary and capricious nature of the death penalty that violated the Eighth and Fourteenth Amendments, not capital punishment, *per se*. But while recognizing the randomness of the death penalty, he also believed that this problem was correctable and that racial discrimination in the administration of the death penalty had *not* been successfully demonstrated. In fact, Justice Stewart believed that current death sentencing patterns were completely unpredictable and could not be explained by any rational process, including intentional discrimination. Justice Byron White argued that the infrequent and arbitrary application of the death penalty undermined the deterrent effect of the punishment, therefore negating any legitimate

[52] "We know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he [*sic*] is poor and despised, and lacking political clout, or if he [*sic*] is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Furman v. Georgia*, 408 U.S. 238, 255 (Douglas, J., concurring).

function that the penalty might otherwise serve. According to Justice White, if the death penalty serves no other legitimate state function than the extinction of human life, it is cruel and unusual. Similar to Justices Douglas and Stewart, Justice White did not believe that capital punishment was inherently cruel and unusual, only that the justification for the punishment lay in its effectiveness in controlling crime and serving justice (Haines 1996). This effectiveness, then, was undermined by the lack uniformity in death sentencing decisions—a problem, in his opinion, that was correctable.

The immediate effect of *Furman* was that approximately 558 death row inmates had their sentences commuted to life imprisonment. Although there was widespread speculation by death penalty proponents that many of these inmates would kill again once released from prison, subsequent research revealed that only one of the 239 *Furman*-commuted inmates released from prison committed a second murder in the fifteen years following the *Furman* decision (see Marquart and Sorensen 1989). Following the ruling, many supporters and critics of capital punishment initially believed that *Furman* signaled the eventual abolition of the death penalty, although others were less certain (Banner 2002; Haines 1996). The fragile majority in *Furman*—only two of the Justices believed that the death penalty was inherently unconstitutional—left open the possibility for states to develop constitutionally acceptable capital statutes. In fact, in his dissent, Chief Justice Warren Burger suggested capital statutes that guided sentencing discretion, or eliminated discretion altogether for specific crimes, would meet the court's approval. In response to *Furman*, several state legislatures and the federal government crafted new capital statutes, adopting systems that either structured or eliminated discretion in capital sentencing.

On December 8, 1972, less than six months after *Furman*, Florida became the first state to officially restore capital punishment when Governor Reubin Askew signed new death penalty legislation (Haines 1996). Within six months, twelve more states had restored capital punishment and a total of thirty-five states and the federal government had reinstated capital punishment by 1976 (Banner 2002; Gillers 1980; Jacobs and Carmichael 2002).[53] Since the *Furman* decision left it unclear as to what type of capital punishment system would pass constitution muster, two forms of capital statues emerged: *mandatory* and *guided discretion*.

In an attempt to eliminate all arbitrariness from death penalty sentencing, several states enacted mandatory capital statutes requiring a death sentence for defendants convicted of certain types of offenses. As noted earlier, mandatory death sentences were a common feature of death penalty statutes in the first era of capital punishment, but they began to disappear in the mid-nineteenth century and had all but vanished by the time the Supreme Court began examining the constitutionality of the death penalty.[54] Recall that the original mandatory capital statutes were criticized because legislatures and judges feared that juries would rather find a defendant not guilty of the crime, although they actually believed that the defendant committed the crime, than convict the defendant if the jury believed that the defendant did not deserve a death sentence. Nonetheless, sixteen states responded to *Furman* by enacting mandatory death penalty laws: the Carolinas, Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nevada, New

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[53] The federal government passed legislation authorizing the death penalty for individuals convicted of aircraft hijacking resulting in death (Haines 1996).

[54] A few instances of mandatory death penalties were present in Post-World War II America. Massachusetts authorized mandatory death sentences for persons convicted of rape-murders in 1951. Both Rhode Island and New York had laws that required death for individuals convicted of murder while currently serving prison sentences (Haines 1996). Although these laws were "on the books" in their respective states, it appears that they were rarely, if ever, applied to actual cases.

Hampshire, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, and Wyoming (Haines 1996, p. 46). These statutes typically mandated the death penalty for the killing of law enforcement officials, murders-for-hire, murders committed by individuals already serving a life sentence, and multiple-victim homicides.

Other state legislatures elected to develop capital statutes with formalized sentencing guidelines—an approach that had been previously rejected by the Supreme Court in *McGautha*. These guided discretion statutes were of three basic types. The first type—adopted by Georgia, Illinois, Montana, Texas, and Utah—specified several aggravating circumstances and only permitted death sentences in cases where at least one of these factors was present. Most of the aggravating factors were borrowed from the ALI's Model Penal Code (see *supra*, note 49) and were very similar to the factors identified in the mandatory statutes. The second type of capital statute—developed by Arkansas, Colorado, Florida, and Nebraska—specified *both* aggravating and mitigating circumstances that judges and juries were required to consider. In these sentencing schemes, decision makers were required to weigh aggravating factors against mitigating factors, such as mental impairment, youthfulness at the time of the crime, emotional disturbance, *et cetera*, when deciding upon the appropriate sentence. Legislatures in California, Connecticut, Ohio, and Pennsylvania adopted the third type of guided discretion statute, which was actually a hybrid of mandatory and guided discretion systems. These sentencing schemes—sometimes referred to as "quasi-mandatory" statutes—also identified both aggravating and mitigating factors; however no "weighing" of these factors had to be done by the sentencer. Instead, these statutes required a death sentence in cases when aggravating, but no mitigating, factors were present.

Soon after the new death penalty laws were passed in their respective states, death rows began being populated by inmates condemned to death. Before any executions could occur, however, the Supreme Court had to decide whether these new sentencing schemes met the requirements of the *Furman* decision. As the differences in the newly minted capital sentencing schemes indicated, no one was entirely clear as to what type of capital statute, if any, would be considered constitutional.

Nearly four years after the *Furman* decision, the Supreme Court agreed to hear its first death penalty case: *Fowler v. North Carolina*, 428 U.S. 904 (1976). The case involved a defendant sentenced to death under North Carolina's new mandatory death penalty law. The North Carolina statute required a death sentence for defendants convicted of first-degree murder in which arson, rape, robbery, kidnapping, burglary, or any other felony was also committed or attempted.[55] Because mandatory death penalty laws were the most common type of post-*Furman* death penalty scheme adopted by states, *Fowler* would have widespread implications for inmates sentenced to death since the *Furman* decision. In a surprising twist, Solicitor General Robert Bork filed an amicus curiae brief in support of North Carolina's death penalty statute and cited a recent study by economist Isaac Ehrlich suggesting that the death penalty had a strong deterrent effect on homicide (see Ehrlich 1975). Opponents of capital punishment viewed Bork's involvement in the case as indication of the federal government's interest in—and support of—the death penalty (Haines 1996). *Fowler*, however, did not resolve the matter because the illness (and subsequent retirement) of Justice William Douglas left the court split four to four on the death penalty. Rather than rehear *Fowler* before a fully constituted court, the court agreed to rule on a package of five other cases after Douglas's

[55] N.C. Gen. Statute § 14-17 (Cum. Supp. 1975).

successor had been confirmed. Three of the cases—*Gregg v. Georgia* (428 U.S. 123 [1976]), *Proffit v. Florida* (428 U.S. 242 [1976]), and *Jurek v. Texas* (428 U.S. 262 [1976])—involved statutes that authorized guided discretion, while the remaining two cases (*Woodson v. North Carolina,* 428 U.S. 280 [1976] and *Roberts v. Louisiana,* 428 U.S. 325 [1976]) involved mandatory death penalty laws. These five cases were considered "unusual" in two respects. First, unlike the vast majority of homicides at the time, each of the defendants in these cases had been sentenced to death for "felony murder," i.e., a homicide during the commission of another serious crime. Felony murders constituted less than one-third of all homicides during this period (Haines 1996). Second, all of the victims in these cases were white, although the majority of homicide victims in the United States were black. It was believed that these specific cases were chosen because no "side issues" (e.g., racial discrimination, mental retardation, *et cetera*) and the difference among them reflected the differences in the actual death penalty laws from their respective jurisdictions (Haines 1996).

Attorneys representing Gregg, Proffit, and Jurek filed briefs arguing that the new guided discretion death penalty laws were still unconstitutional under *Furman* because the aggravating factors specified in various statutes were defined too vaguely to rationalize the sentencing process *and* they had only minimal impact on one of the many decision points in the capital punishment process (Haines 1996). These attorneys also argued that, regardless of the procedural modifications made to pre-*Furman* death penalty statutes, capital punishment violated contemporary standards of decency and, therefore, was in violation of the Eighth Amendment.

On the other side of the aisle, state attorneys from Georgia, Florida, and Texas claimed that the remaining discretion in their states' new death penalty laws was necessary and justifiable, that racial discrimination was *not* a significant factor in the capital charging-and-sentencing process, and that capital punishment was not inherently cruel and unusual punishment. In addition to the briefs filed by the state attorneys, Solicitor General Robert Bork, again, submitted an amicus brief claiming that the death penalty was not cruel and unusual punishment and that capital punishment was an effective deterrent to would be murderers (Haines 1996).

In the three guided discretion cases—collectively know as the *Gregg* decision—the court voted seven-to-two that the death penalty for murder did not by itself violate the Eighth Amendment. The majority opinion (authored by Justice Stewart) stated that the rapid response by state legislatures to reenact death penalty legislation after *Furman*, along with recent public opinion poll evidence citing widespread support for the death penalty, clearly indicated that the American people did not view the death penalty as cruel, barbaric, or morally reprehensible (Justices Brennan and Marshall dissented). This, of course, was of little surprise because all but two of the justices held this belief in the *Furman* decision. More importantly, the court held that all three of the capital statutes contained sufficient procedural reforms to warrant them constitutional under *Furman*. Interestingly, the court had no evidence suggesting that the new statutes eliminated arbitrariness and bias in capital sentencing; rather the court based its decision on whether the procedural reforms enacted in each statute were capable of producing outcomes different from those produced under the pre-*Furman* statutes.

The death penalty statutes offered under *Gregg*, *Proffit*, and *Jurek*, although all guided discretion statutes, varied considerably. Georgia's statute in *Gregg* offered three procedural reforms that the court believed would be effective in producing fair death sentences: (1) a bifurcated hearing which split guilt/innocence and sentencing decisions into two separate phases; (2) a list statutory aggravating factors that judges and juries were required to consider; and (3) automatic review of death sentences by the Georgia Supreme Court to determine the appropriateness of the sentence (see also Chapter Five). Although Georgia's death penalty law did not explicitly list mitigating factors for the sentencer to consider, the statute allowed such factors to be presented to, and considered by, the sentencer.

Similar to Georgia's statute, Florida's statute under review in *Proffit* specified a list of aggravating circumstances that the sentencer must consider when deciding the appropriate punishment, required that capital trials to be bifurcated, and mandated the Florida Supreme Court to review all death sentences.[56] Florida's statute, however, differed from the Georgia's in two important ways. First, Florida law specified a list of mitigating factors that the trial court was to consider and weigh against the aggravating circumstances of the case when deciding upon an appropriate sentence. Second, Florida's statute allowed the trial judge to override the sentencing recommendation of the jury. Although the sentencing decision of the jury was presumed to be correct, the trial

[56] Whereas Georgia's death penalty statute required the Georgia Supreme Court to consider specific factors when determining the appropriateness of a death sentence (see Chapter Five), Florida's death penalty law did not. The U.S. Supreme Court deemed this omission to be acceptable, however, because the Florida Supreme Court had previously defined several criteria necessary for comparative case review (see *State v. Dixon*, 283 So. 2d 1, 10 [Fla. 1973]). Shortly after the Florida's new death penalty statute was validated in *Proffit*, the U.S. Court of Appeals ruled that comparative proportionality review of death penalty cases was reserved for the Florida state courts, and should not be intruded upon by the federal judiciary (*Spinkellink v. Wainwright*, 578 F.2d 582, 613 [5th Cir. 1978]).

judge could increase or decrease the severity of the punishment suggested by the jury if she or he believed that jury's recommendation was inappropriate.

The death penalty statute developed by Texas and reviewed in *Jurek* represented the hybrid death sentencing system mentioned earlier. Similar to both Georgia and Florida, Texas required separate hearings for the determination of guilt/innocence and sentencing and all death sentences were subject to review by a court with statewide jurisdiction (i.e., the Texas Court of Criminal Appeals). Texas's statute differed from the other two sentencing systems in that following a determination of guilt during the first phase, the decision-maker was required to answer three specific questions in the penalty phase: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[57] If the sentencer answered yes *beyond a reasonable doubt* to all three of these questions, a death sentence was mandatory. The majority in *Gregg* believed that Texas's death penalty law did not constitute a mandatory sentencing system because the "future dangerousness" of the defendant (question #2) required the sentencer to consider both the aggravating and mitigating factors of the case. According the court, it was the consideration of the unique *legitimate* aspects of the case that was a critical feature of a constitutionally permissible capital statute.

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[57] Tex. Code Crim. Proc. Art. 37.071 (Supp. 1975 – 1976).

The two remaining cases reviewed by the Supreme Court—*Woodson v. North Carolina* and *Roberts v. Louisiana*—involved mandatory capital statutes. As noted earlier, the constitutionality of mandatory sentencing systems was the central issue in *Fowler*, however Justice Douglas's illness and subsequent retirement from the court left the court dead-locked. States adopting mandatory death penalty laws drafted legislation that narrowly defined capital murder and required the death penalty for all individuals convicted of such crimes. Attorneys for Woodson and Roberts argued that these mandatory statues failed to adequately address the problems of arbitrariness and capriciousness in the administration of the death penalty that the Supreme Court identified in *Furman*. Similar to the arguments made by anti-death penalty attorneys in the guided discretion cases, attorneys for Woodson and Roberts argued that mandatory sentencing schemes did not eliminate discretion, but merely shifted discretion from juries to other actors (and other stages) in the capital charging-and-sentencing process. Under mandatory systems, prosecutors still retained broad discretion in charging defendants and making plea offers, judges wielded broad discretion in accepting or rejecting plea bargains in potentially capital cases, and juries—although denied discretion in the penalty phase—were still able to arbitrarily or discriminately decide who received the death sentences by deciding whether or not to convict the defendant of capital murder.

In a five-to-four decision, the Supreme Court held that mandatory death penalty laws were unconstitutional, as they violated the Eighth Amendment.[58] In particular, the court claimed that these sentencing schemes exhibited three major flaws. First, these statues violated contemporary standards of decency because, historically, most states had

[58] Justices Stewart, Powell, Stevens, Brennan (concurring in judgment), and Marshall (concurring in judgment) formed the majority, with Chief Justice Burger and Justices Whites, Rehnquist, and Blackmun dissenting.

abolished mandatory penalties and preferred the "individualization" of punishment. These new mandatory laws, according to the court, were in response to crafting constitutionally acceptable statutes after *Furman*, rather than society's preference for them. Second, similar to the criticism of mandatory schemes in the mid-nineteenth century, the court believed that these laws still allowed considerable unguided discretion by juries by simply allowing them to refuse to convict the defendant of capital murder. And third, mandatory sentences failed to allow juries to consider the unique culpability of the defendant. The court believed that not all individuals convicted of capital murder deserved to die, therefore sentencers needed to be authorized to take into account the particular aspects of the defendant and the crime when deciding upon the appropriate punishment.

With the death penalty laws in Georgia, Florida, and Texas deemed constitutional by *Gregg*, lifting the official moratorium on executions established in *Furman*, both proponents and opponents of the death penalty believed that executions would be back in full swing. To the surprise of both sides of the debate, however, executions remained relatively infrequent until the mid-1980s. The first execution to take place in America since the *de facto* moratorium began in the middle of 1967 would be that of Gary Gilmore in Utah. Gilmore, who waived his judicial appeals and volunteered to be executed, was shot to death by a Utah firing squad on January 17, 1977, nearly ten years after the last execution in the United States. Executions per year would remain in the single digits for the next seven years: there were no executions in 1978, two in 1979, none in 1980, one in 1981, two in 1982, and five in 1983.

A major factor contributing to the infrequency of executions was the ambiguity of the *Gregg* decision. As in the *Furman* ruling, the Supreme Court left many important questions unanswered in *Gregg*. In attempt to reconcile the *Gregg* ruling with the *McGautha* decision that held single-verdict juries and the absence of sentencing standard were not in violation of the Fourteenth Amendment, the court stressed in *Gregg* that these two procedural modifications were not an absolute requirement of death penalty systems, merely that they were constitutional (Haines 1996). What, then, did the constitution require of death penalty statutes? Over the next several years following *Gregg*, the Supreme Court would continually wrestle with this and related questions, ultimately limiting the scope of these death statutes and expanding due process rights (Foley 2003, Chapter 4).

Shortly after the *Gregg* ruling, the Supreme Court considered the constitutionality of the death penalty for crimes in which no life was taken. Although this issue had been previously brought before the court, it had repeatedly sidestepped the issue. In *Coker v. Georgia* (433 U.S. 584 [1977]) and *Eberheart v. Georgia* (433 U.S. 917 [1977]), the court ruled that the death penalty was unconstitutional for the crimes of rape and kidnapping, respectively, when no killing occurred (see also Chapter Five). The following year, the court ruled that statutory restrictions on the types of mitigation evidence that a defendant could present on her or his behalf during sentencing were unconstitutional (*Lockett v. Ohio*, 438 U.S. 586 [1978])[59] and that the sentencer must find

[59] Sandra Lockett was a getaway driver in an armed robbery of a pawn shop and while she was in the car, one of her accomplices killed the robbery victim. At her sentencing hearing, Lockett attempted to introduce mitigation evidence that she was neither the cause of the victim's death nor had she intended the victim's death. At the time of her trial, the Ohio death penalty statute enumerated three mitigating circumstances that the jury was allowed to consider: (1) the victim helped cause her or his own death; (2) the defendant acted under duress, coercion, or strong provocation; and (3) the offense primarily resulted from the defendant's mental impairment. The *Lockett* opinion included an limiting footnote stating that the

that there are legally valid aggravating circumstances to warrant a death sentence (*Presnell v. Georgia*, 439 U.S. 637 [1978]). Over the next few years the court ruled that juries were prohibited from basing death sentences on vaguely defined aggravating circumstances (*Godfrey v. Georgia*, 446 U.S. 420 [1980]), that a defendant could not be sentenced to death on retrial when the original trial resulted in a life sentence (*Bullington v. Missouri*, 451 U.S. 430 [1981]), and that a death sentence was unconstitutionally excessive for defendants who were not killers and who did not intend to kill (*Enmund v. Florida*, 458 U.S. 782 [1982]). In fact, in the first seven years after *Gregg*, the Supreme Court ruled in favor of 14 out of 15 death-sentenced inmates whose appeals were fully heard (Haines 1996). This trend, however, would soon end.

Beginning in 1983, the court's decisions in a series of death penalty cases signaled its growing uneasiness with telling states how to constitutionally administer the death penalty (Foley 2003). One of the first of these cases was *Barefoot v. Estelle* (463 U.S. 880 [1983]), in which the court ruled that it was not unconstitutional for juries to base their life or death decision on unreliable or questionable evidence regarding the defendants' "future dangerousness" *and* that federal circuit courts were not required to

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holding did not limit "the traditional authority of the court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense" (438 U.S. at 604 n.12). In *Franklin v. Lynaugh*, (487 U.S. 164 [1988]), the court held that a defendant did not have an Eighth Amendment right to a jury instruction allowing the jury to consider as a mitigating factor at the sentencing phase any residual doubt concerning the defendant's guilt that carried over from the guilt phase. Most states, however, tend allow the introduction of a broad range of mitigation evidence at the penalty phase and the Supreme Court has held that juries must be allowed "to exercise wide discretion," but states must also ensure that the process is "neutral and principled as to guard against bias or caprice in the sentencing decision" (*Tuilaepa v. California*, 512 U.S. 967, 973–74 [1994]).

Zimring (2003, pp. 53–55) suggests, somewhat paradoxically, that the *Lockett* decision has actually harmed capital defendants by setting the stage for subsequent rulings allowing the inclusion the victim impact evidence in the penalty phase of death penalty trials. According to Zimring, the penalty phase of capital trials have become "status competitions" between the offender and the victim's family, and therefore a "zero-sum" game between two private parties rather than a dispute between the defendant and the state. Under these circumstances, Zimring believes that jurors may feel that voting for mercy is, in effect, voting against the victim (cf. Kleck 1991).

grant stays of execution to death sentenced inmates until all of their appeals were completed. That same year the court would reverse its previous position in *Godfrey* and rule that juries could rely on an aggravating circumstance not specified in the actual death statute to sentence a defendant to death (*Wainwright v. Goode*, 464 U.S. 78 [1983]) and that trial judges may constitutionally overrule a jury's recommendation of a life sentence and impose a sentence of death (*Barclay v. Florida*, 463 U.S. 939 [1983]). The following year, the court ruled that proportionality review of death sentences to insure that the penalty was being applied in a consistent manner was not mandatory (*Pulley v. Harris*, 465 U.S. 37 [1984])[60] and it significantly narrowed the scope of ineffective assistance of trial counsel claims that could be made by defendants condemned to death (*Strickland v. Washington*, 466 U.S. 668 [1984]).

While all of these decisions were damaging to the death penalty defense bar, perhaps the biggest blow occurred in 1987 when the Supreme Court issued its ruling in *McCleskey v. Kemp*, (481 U.S. 279 [1987]). Prior to *McCleskey*, death penalty opponents primarily focused their efforts on two constitutional challenges to the capital-sentencing systems *as they were being applied* in the post-*Furman* era: (1) the comparative excessiveness of death sentences and (2) the lack of comparative-proportionality review in the supreme courts of some death penalty states (Baldus *et al.* 1990, p. 306). As noted above, the Supreme Court's early rulings were favorable to the death penalty defense bar, but became increasingly unsympathetic to these challenges starting in 1983. Not only did the court begin to refuse to hear many of these appeals, but it also began narrowly redefining its prior rulings that extended constitutional protections to defendants

[60] The same year as the *Pulley* ruling, in *Cape v. Francis* (741 F.2d 1287 [11th Cir. 1984]), the U.S. Court of Appeals ruled that adequate proportionality review by the Georgia Supreme Court's did *not* require the Court to consider decisions in which a life sentence had been imposed.

sentenced to death. The court did, however, suggest a third avenue by which anti-death penalty attorneys could challenge the constitutionality of post-*Furman* statutes: racial discrimination (Baldus *et al.* 1990; Haines 1996). Although the majority in *Furman* believed that claims of racial discrimination had been unproven, their opinions suggested that such proof of purposeful discrimination would constitute cruel and unusual punishment.[61] Indeed, in the 1960s and 1970s, the Supreme Court had frequently applied the equal protection clause of the Fourteenth Amendment to condemn state discrimination on racial grounds, so there was a strong possibility that these decisions would also extend to the death penalty *if* the burden of proof could be meet (Baldus *et al.* 1990, p. 308; Blume, Eisenberg, and Johnson 1998). Almost immediately following the *Furman* decision, death penalty opponents began stressing the importance of "developing an arsenal of solid social science evidence on pivotal issues" (Haines 1996, p. 47) because very few empirical studies on capital punishment had been conducted at the time (see, e.g., Bedau 1964, 1965; Carter and Smith 1969; Garfinkel 1949; Johnson 1941; Koeninger 1969; Wolfgang, Kelly, and Nolde 1962). To be sure, death penalty opponents did not believe that this evidence would influence judges' decisions and settle the myriad of legal issues; however, they did believe that social science evidence would provide a solid foundation on which judges could justify their decisions (Haines 1996).[62] The *McCleskey* case provided the opportunity for such evidence to be heard.

Warren McCleskey, a black male, was sentenced to death in Atlanta, Georgia in 1978 for the murder of a white police officer, Frank Schlatt, while attempting to

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[61] In fact, in *Zant v. Stephens* (462 U.S. 862 [1983]), the court held that race-of-defendant or race-of-victim discrimination, whether overt or covert, is constitutionally impermissible.

[62] In *Furman*, both Justice Douglas and Justice Marshall cited social scientific studies conducted in California (Carter and Smith 1969), New Jersey (Bedau 1964), Oregon (Bedau 1965), and Texas (Koeninger 1969) documenting racial disparities in the administration of capital punishment.

burglarize a furniture store. Following his conviction, McCleskey claimed that his death sentence was unconstitutional because it had been imposed in discriminatory manner, based on the race of the defendant and of the victim. McCleskey's appeal was handled by attorneys working for the LDF, the very organization that had been challenging the racially discriminatory application of the death penalty for over thirty-five years. McCleskey's attorneys presented evidence from a large-scale, methodological sophisticated statistical study indicating that Georgia's death penalty purposefully discriminated against black defendants accused of murdering white victims, therefore violating their client's Fourteenth Amendment right to equal protection. McCleskey's attorneys also argued that the discriminatory application of the death penalty constituted an arbitrary and capricious application of the death sentence and violated their client's Eighth Amendment right to protection from cruel and unusual punishment (Baldus *et al.* 1990).

In particular, the evidence presented in *McCleskey* was based on data collected for two separate studies on Georgia's capital charging-and-sentencing system (see also Chapter Four). The first study—The Procedural Reform Study (PRS)—was conducted solely for academic purposes, receiving financial support from the National Institute of Justice, the University of Iowa Law School, and Syracuse Law School's Center for Interdisciplinary Legal Studies. The PRS contained data on 700 murder convictions occurring in Georgia from 1969 to 1978 (156 pre-Furman cases and 594 post-Furman cases) and examined the last two decision phases in the capital charging-and-sentencing process: the prosecutor's decision to seek the death penalty following a conviction for a capital crime *and* the jury's decision to impose a life or death sentence after the penalty

trial. The second study—The Charging and Sentencing Study (CSS)—was sponsored by the LDF through a grant from the Edna McConnell Clark Foundation, with the expectation that the study would be used to challenge the constitutionality of Georgia's capital-sentencing system (Baldus *et al.* 1990, p. 44; Haines 1996, p. 76). The CSS gathered data on a random sample of 1,066 defendants (out of a total of 2,484 defendants) convicted of murder or voluntary manslaughter in Georgia from 1973 to 1979 and examined five decision points in the capital punishment process: grand jury indictment; prosecutorial plea bargaining; guilt/innocence trial; prosecutorial discretion in seeking the death sentence after a guilty verdict; and jury penalty trial (Baldus *et al.* 1990, p. 45). Both studies were conducted under the direction of University of Iowa Law Professor David Baldus, considered an expert in the quantitative analysis of legal phenomena—particularly discrimination cases. The two studies, although differing in scope and time period under consideration, had over 300 cases in common (Baldus *et al.* 1990, p. 45).

Baldus and colleagues' data demonstrated that prosecutors sought the death penalty in 70 percent of cases involving black defendants and white victims, 32 percent of cases involving both white defendants and victims, 19 percent of cases involving white defendants and black victims, and 15 percent of cases involving both black defendants and victims. With respect to jury discretion, juries imposed the death sentence in 22 percent of cases involving black defendants and white victims, 8 percent of cases involving white defendants and victims, 3 percent of cases involving white defendants and black victims, and one percent of cases involving both black defendants and victims (p. 315).

The CSS, which examined over 230 legitimate and illegitimate case characteristics, constituted the bulk of the LDF's evidence on Georgia's capital punishment system. The core analysis of the CSS data simultaneously examined 39 case factors and discovered that defendants convicted of murdering white victims were 4.3 times more likely to be sentenced to death than defendants convicted of murdering black victims with similar levels of culpability (p. 316). Identical to the results from the CSS, analysis of the PRS data also revealed that—after simultaneously controlling for 23 case factors—defendants convicted of murdering white victims were 4.3 times more likely to receive a death sentence than defendants convicted of murdering black victims (p. 143). According Baldus *et al.*, "the race-of-victim effects in death sentencing observed among defendants indicted for murder were attributable principally to prosecutorial decisions made both before and after [guilt/innocence] trial" (p. 328). That is, prosecutors' decisions to seek the death penalty and make plea offers to defendants benefited killers of blacks.

The statistical evidence presented in *McCleskey* was twice rejected by the lower federal courts in Georgia. First, Federal District Court Judge Owen Forrester rejected McCleskey's claims, doubting the validity of the data, the statistical procedures employed to analyze the data, and the validity of the inferences drawn from such procedures (*McCleskey v. Zant*, 580 F. Supp. 338 [N.D. Ga. 1984]) (for a detailed discussion of Judge Forrester's critique, see Baldus *et al.* 1990, pp. 340–42, 450–78). The LDF's appeal to the Eleventh Circuit Court of Appeals was also rejected by a nine-to-three vote. Although the court did not question the validity of the data, it believed that the statistical analyses were: (1) insufficient to demonstrate that racially bias decision-

making was present in McCleskey's particular case; (2) incapable of taking into consideration the countless quantitative and qualitative differences between capital crimes and capital defendants; and (3) "insufficient to demonstrate discriminatory intent or unconstitutional discrimination in the Fourteenth Amendment context, [and] insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis" (*McCleskey v. Kemp*, 753 F.2d 891 [11th Cir. 1985]).[63]

The U.S. Supreme Court granted certiorari on April 22, 1987, and by a vote of five-to-four, the court affirmed the Eleventh Circuit's ruling rejecting the Eighth and Fourteenth Amendment challenges raised in *McCleskey*. Similar to the Court of Appeals, the majority in *McCleskey* believed the study was statistically valid, although Justice Powell—authoring the majority opinion—believed the data were incomplete and "failed to establish by a preponderance of the evidence that the data was [*sic*] trustworthy" (*McCleskey v. Kemp*, 481 U.S. at 288). Perhaps more damaging to McCleskey's case was the majority's belief that the standard methods for proving purposeful discrimination under the Fourteenth Amendment used in employment and jury discrimination cases did not apply in the capital-sentencing context (Baldus *et al.* 1990, p. 346; Gross and Mauro 1989). The majority held that capital-sentencing decisions and "the relationship of the statistics to that decision" were "fundamentally different" from others types of discrimination claims (*McCleskey v. Kemp*, 481 U.S. at 280). According to Justice Powell, the capital charging-and-sentencing process differed because it involved several relatively autonomous decision-makers *and* capital juries are unique in their composition

[63] The court did decide, seven-to-five, to reverse the district court's decision and grant McCleskey a new trial because the prosecutor failed to inform the jury that a jailhouse informant who testified against McCleskey was promised favorable treatment by the state in exchanged for his testimony.

and are constitutionally required to consider innumerable factors about the defendant and the offense.

The court also rejected McCleskey's Eighth Amendment challenge on two grounds. First, the majority ruled that McCleskey failed to prove his claim that his death sentence was "comparatively excessive." The court argued that McCleskey could not prove that his sentence was excessive by merely identifying other similarly situated defendants who did not receive the death sentence. According to Justice Powell, "[t]he Constitution is not offended by inconsistency in results based on the objective circumstances of the crime" because there is substantial variation in many importance factors that influence the manner in which these circumstances are viewed (*McCleskey v. Kemp*, 481 U.S. at 307 n.28). As Baldus and colleagues (1990, p. 348) note, however, McCleskey never claimed that his sentence was excessive, merely that his sentence was likely the product of racial discrimination. Second, the court held that the evidence presented in *McCleskey* did not prove that racial considerations actually entered into the decision-making process; rather it only showed that race was a risk factor in some capital-sentencing decisions. According to the majority, although a discrepancy in sentencing appeared to be correlated with race, McCleskey did not demonstrate that race was the causal factor.

In addition to the majority's rejection of McCleskey's Eighth and Fourteenth Amendment challenges, it also cautioned that a ruling in favor of McCleskey's Eighth Amendment claim would result in a wave of Eighth Amendment challenges in both capital and non-capital cases on both racial and non-racial grounds (Baldus *et al.* 1990, p.

349) and concluded that McCleskey's arguments would be best presented to legislative bodies rather than the court.[64]

As with *Furman*, the court reached its decision in *McCleskey* with the thinnest possible majority. Justices Brennan, Blackmun, and Stevens all filed dissenting opinions, with Justice Marshall joining to varying degrees. Three of the dissenting justices—Brennan, Blackmun, and Marshall—believed that McCleskey established by a preponderance of evidence that race had been an influential factor in his *own* case. Justice Stevens believed that the evidence established a "strong probability" that McCleskey was sentenced to death because of race. Although Justices Brennan and Marshall held that the entire Georgia capital charging-and-sentencing process violated the Eighth Amendment, Justices Blackmun and Stevens did not believe that the evidence invalidated Georgia's capital punishment system. Justice Blackmun believed that the appropriate solution was to significantly narrow death eligibility to the most highly aggravated cases in which there was no evidence of a race effect. Justice Stevens suggested that the case be remanded to ascertain whether McCleskey's case was within the range of cases that presented an unacceptable risk that race played an important role in his particular case.

The court's decision in *McCleskey* marked the defeat of the last broad-based constitutional attack on the death penalty. After the ruling, many death penalty opponents believed that an ideological realignment of the Supreme Court would need to

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[64] According to Bright (1995a, p. 482), the U.S. Supreme Court's assertion in *McCleskey* that racial discrimination in the capital punishment system is an issue for state legislatures is ill advised. "[L]egislators respond to powerful interests. The poor person accused of a crime has no political action committee, no lobby, and often no effective advocate even in the court where his life is at stake…The constitutional buck of equal protection under law stops with the Supreme Court and with judges on lower courts throughout the land who have taken oaths to uphold the Constitution and the Bill of Rights even against the passions of the moment and the prejudices that have endured for centuries" (see also Cole 1994; but cf. Sunstein 1993).

occur if capital punishment was to be abolished as the result of litigation (Haines 1996). Over the next several years, the court displayed its continuing reluctance to interfere with the decisions of the lower courts in capital cases. The court would uphold the constitutionality of death sentences for accomplices who neither killed nor intended to kill (*Tison v. Arizona*, 481 U.S. 137 [1987]),[65] defendants with mental retardation (*Penry v. Lynaugh*, 492 U.S. 302 [1989]), and juveniles as young as sixteen (*Stanford v. Kentucky*, 492 U.S. 361 [1989]; *Wilkins v. Missouri*, 492 U.S. 361 [1989]).[66] It would also rule that—despite their mandatory nature—laws *requiring* juries to impose the death sentence if at least one aggravating circumstance and no mitigating factors were present were constitutional (*Blystone v. Pennsylvania*, 494 U.S. 299 [1990])[67] and inmates sentenced to death were not guaranteed the right to present new evidence proving their innocence that had not been available at the time of the original trial (*Herrera v. Collins*, 506 U.S. 390 [1993]).[68]

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[65] In *Tison v. Arizona* (481 U.S. 137 [1987]), two co-defendants were sentenced to death although they were not at the scene when the murders took place. The court upheld their sentences, ruling that the death penalty was constitutional for individuals who neither murdered, attempted to murder, nor intend to murder when these individuals demonstrated a "reckless disregard for human life." The court's reckless disregard for human life standard, however, was extremely vague and *Tison* had the effect of significantly broadening the scope of individuals subject to the death sentence.

[66] In 1988, the Supreme Court ruled that the death penalty was unconstitutional for juveniles under the age of 16 (*Thompson v. Oklahoma* 487 U.S. 815 [1988]). The common law tradition at the time of the adoption of the Eighth Amendment in 1791 permitted children over seven years old to be tried as adults for capital felonies, although a rebuttable presumption of incapacity existed for children between the ages of seven and fourteen depending on the child's maturity and experiences (Hale [1736] 1800).

[67] The *Blystone* ruling was somewhat surprising considering that just three years earlier, in *Sumner v. Shuman* (483 U.S. 66 [1987]), the Supreme Court ruled that Nevada's capital punishment statute mandating the death penalty for individuals convicted of murder while already serving a life without the possibility of parole sentence was unconstitutional.

[68] In *Herrera v. Collins*, the Court held that affidavits supporting the defendant's claim of innocence were insufficient to entitle the accused to federal habeas corpus relief from the death sentence. Particularly troubling to death penalty opponents was Chief Justice Rehnquist's remark, "due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. To conclude otherwise would all but paralyze our system for enforcement of the criminal law" (p. 399).

Perhaps even more damaging to the capital defense bar than the Supreme Court's string of unfavorable rulings was the Anti-Terrorism and Effective Death Penalty Act of 1996, which included "the

Nearly twenty years would elapse between rulings by the Supreme Court that were favorable to the capital defense bar and that had broad application. On June 20, 2002, by a vote of six-to-three, the court reversed its earlier decision in *Penry v. Lynaugh* and ruled that it was unconstitutional to execute defendants suffering from mental retardation because it violated the Eighth Amendment ban on cruel and unusual punishment (*Atkins v. Virginia*, 536 U.S. 304 [2002]).[69] At the time of the *Penry* decision, only two states—Georgia and Maryland—prohibited the execution of mentally retarded individuals.[70] By the time of *Atkins*, eighteen states and the federal government had enacted laws prohibiting such executions.[71] The Supreme Court, however, allowed states to individually determine the evidentiary standard necessary for defendants to present an *Atkins* claim. While over half of death penalty states required defendants to meet the "preponderance of evidence" or "clear and convincing evidence" standard, other states required a "beyond a reasonable doubt" evidentiary standard. It has been argued that the "beyond a reasonable doubt" standard greatly increases the probability that

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most far-reaching assault on habeas corpus since its expansion to the states in 1867" (Haines 1996, p. 198). The new law imposed a one-year time limit for filing petitions for habeas corpus following the completion of the inmates' state appeals *and* prohibits federal judges from overruling state court decisions in death penalty cases unless the those decisions clearly contradict established rulings of the Supreme Court.

[69] Research also suggests that race may play a role in the execution of individuals with mental retardation. From 1976 to 2000, 34 inmates with mental retardation were executed: 22 blacks, 9 whites, and 3 Hispanics. Over 75 percent of the executions were for white victim cases (Death Penalty Information Center 2008; Reed 1993).

[70] In *Penry*, the court held that execution of the mentally retarded did not violate the constitution, but mental retardation is a mitigating factor that jurors should consider when reaching a sentence in a capital case.

[71] The eighteen states prohibiting executions at the time of *Atkins* were: Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Montana, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington.

mentally retarded defendants will still be executed (see *Head v. Hill*, 587 S.E.2d 613 [Ga. 2003]).[72]

Four days following the *Atkins* decision the Supreme Court again reversed an earlier ruling (*Walton v. Arizona*, 497 U.S. 639 [1990]) and, by a vote of seven-to-two, held that juries, rather than judges, must decide the critical issues in a death penalty case (*Ring v. Arizona*, 536 U.S. 584 [2002]), including the existence of aggravating circumstances.[73] Following the *Furman* decision, nine states utilized judge-sentencing in one form or another: judges had sole sentencing discretion in Arizona, Idaho, and Montana; a three-judge panel was used in Colorado and Nebraska; and Alabama, Delaware, Florida, and Indiana authorized the trial judge to make a sentencing decision following a jury recommendation. The *Ring* decision invalidated the death sentencing laws in Arizona, Colorado, Idaho, Nebraska and Montana, and these states subsequently revised their statutes to comply with the ruling. Delaware and Indiana also revised their death penalty statutes following the *Ring* decision, although their laws were not deemed unconstitutional under the ruling. But while *Ring* clearly applied to all future death cases, the court was unclear as to whether the ruling would retroactively apply to everyone on death row sentenced under judge-sentencing statutes and, as a result, lower courts have

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[72] Following *Atkins*, the U.S. Court of Appeals for the Seventh Circuit held that life imprisonment for individuals suffering from mental retardation did not violate the Eighth Amendment (*Harris v. McAdory*, 334 F.3d 665 [7th Cir. 2003]).

[73] A decade after *Walton*, in *Apprendi v. New Jersey* (530 U.S. 466 [2000]), the court ruled that a judge could not make findings that would increase a defendant's sentence beyond the maximum because such a finding would, in effect, be an additional conviction; therefore decisions that had the potential of increasing the sentence must be submitted to a jury and require proof beyond a reasonable doubt. The court, however, stated that its ruling in *Apprendi* did not apply to death penalty cases (see also *Blakely v. Washington*, 542 U.S. 296 [2004]). Three years after the *Ring* ruling, in a five-to-four decision, the court ruled that mandatory federal sentencing guidelines that allowed judges in enhance sentences based on facts not decided by juries violated the Sixth Amendment (see *United States v. Booker* 543 U.S. 220 [2005]). The court held that judges may only base sentences on facts decided by the jury. Any additional evidence not initially presented to juries that would increase the severity of a sentence must be presented to a jury at a separate hearing.

issued different interpretations on the retroactivity of *Ring*. The Supreme Court subsequently agreed to clarify the impact of *Ring*, and on June 24, 2004 the court ruled five-to-four that *Ring* did not apply retroactively to cases that had received final direct review (*Schriro v. Summerlin*, 542 U.S. 348 [2004]).[74]

With its rulings in *Atkins* and *Ring*, the Supreme Court went against its twenty-year trend of almost exclusively deciding in favor of states over capital defendants with respect to broader constitutional challenges to the administration of the death penalty. Perhaps most surprisingly, no "ideological realignment" had occurred—the court was considered more conservative at the time of *Atkins* and *Ring* than it was during the mid- to late-1980s and early-1990s. What had occurred, however, was increased public debate over specific issues concerning the administration of the death penalty and legislative responses to these debates (Dieter 1996; Haines 1996). It is almost certain that the growing number of death penalty states that prohibited the execution of mentally retarded individuals strongly influenced the court's decision in *Atkins* (Death Penalty Information Center 2008). Death penalty opponents also used the legal precedent established in *Atkins* to challenge the death penalty for individuals who were juveniles at the time of the crime: the death penalty for juveniles violates current standards of decency, constituting cruel and unusual punishment (Greenhouse 2004).[75] Citing strong public opposition to

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[74] Following *Ring*, many believed that ruling could possibly affect 800 death sentences in nine states (see Death Penalty Information Center 2008). It is unlikely, however, that the ruling would have influenced that many death sentences even if the Supreme Court had allowed *Ring* to be applied retroactively because the court only invalidated the death penalty laws of five states. The remaining four states that utilized judge sentencing but authorized juries to make sentencing recommendations (Alabama, Delaware, Florida, and Indiana) constituted nearly 80 percent of those 800 death sentences. Death sentences handed down in these states would have most likely been subject to *Ring* only if the jury recommended a life sentence, but the trial judge elected to impose a death sentence—a small percentage of the overall death sentences in those four states.

[75] As of June 30, 2002, 83 juveniles were on death row across the United States. Seventy-five percent (75%) of these juveniles were 17 at the time of their crimes, the remaining 25 percent were 16 at the time

executing juveniles, as well as the fact that 19 of the 38 death penalty states and the federal death penalty did not allow individuals under the age of 18 at the time of their crime to be sentenced to death, and five other states set the minimum age for the death penalty at seventeen (Fagan and West 2005), opponents of the juvenile death penalty waged a massive public and legal campaign against the execution of juvenile offenders (Glass 2006).[76] On January 26, 2004, primarily in response to this tremendous public and legal pressure, the Supreme Court granted certiorari in a juvenile capital case involving a 17 year-old male sentenced to death in Missouri and announced that it would reconsider the constitutionality of the death penalty for defendants under the age of eighteen (*Roper v. Simmons*, 540 U.S. 1160 [2004]). Slightly over a year later on March 1, 2005, by a vote of five-to-four, the Court reversed the legal precedent established 15 years earlier in *Stanford v. Kentucky* and forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed, holding that such a penalty violated the Eighth and Fourteenth Amendments (see *Roper v. Simmons*, 543 U.S. 551 [2005]).[77]

The modern era of the death penalty, spanning over thirty years and responsible for more than 1,000 executions,[78] has clearly been the most bazaar and unpredictable period since the colonies began executing individuals at the beginning of the seventeenth

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of their crimes. Although two-thirds of juvenile death row inmates are members of minority groups (47 percent black and 18 percent Hispanic), two-thirds of the victims of these juvenile offenders are white (65 percent) (see Streib 2002b).

[76] At the time of the *Roper* decision, nineteen states did not allow juveniles to be sentenced to death (California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, South Dakota, Tennessee, Washington, Wyoming), five states set the minimum age to 17 (Florida, Georgia, New Hampshire, North Carolina, Texas), and 14 states set the minimum age at 16 (Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Nevada, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia).

[77] Justices Kennedy, Souter, Ginsburg, Breyer, and Stevens (concurring) formed the majority, with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas dissenting.

[78] On December 5, 2008, Joseph Gardner became the 1,136th inmate executed since the death penalty was reinstated in 1976 (Death Penalty Information Center 2008).

century. The period began with a crushing blow to death penalty abolitionists when, after sidestepping these issues for years, the Supreme Court decided in *McGautha* that neither single-verdict juries nor the absence of sentencing standards were unconstitutional under the Fourteenth Amendment. The following year, in *Furman*, the court would rule that the death penalty was unconstitutional *as applied* under the Eighth Amendment, mainly because of single-verdict juries and the absence of sentencing standards. The *Furman* decision resulted in the commutation of all death sentences in the country to life imprisonment and an official moratorium on the death penalty. Four years later in *Gregg*, the court approved three different "guided discretion" death penalty statutes enacted in Florida, Georgia, and Texas and ruled the mandatory death sentencing statutes enacted in Louisiana and North Carolina unconstitutional. Over the next several years, the court would extend many constitutional protections to capital defendants, only to repeal most of them a few years later. After receiving favorable rulings in the Supreme Court in 14 of 15 cases following *Gregg*, the capital defense bar would not receive a significant victory in the Supreme Court for nearly two decades.

Although death penalty abolitionists in the United States appeared to be losing ground in the modern era, the abolitionist movement was gaining significant momentum in the international community (Haines 1996; Whitman 2003).[79] Since the death penalty was reinstated in the United States after the *Gregg* decision, capital punishment has been either completely abolished or abolished for ordinary crimes in such notable countries as: Portugal ([1867] 1976), Denmark ([1933] 1978), Brazil (1979), Peru (1979), Norway ([1905] 1979), France (1981), The Netherlands ([1870] 1982), Argentina (1984),

[79] Some of the first nations to abolish the death penalty include Venezuela (1863), San Marino (1865), and Costa Rica (1877).

Australia ([1984] 1985), Haiti (1987), Germany (1987),[80] New Zealand ([1961] 1989), Ireland (1990), Switzerland ([1942] 1992), Greece ([1993] 2004), Italy ([1947] 1994), Spain ([1978] 1995), Belgium (1996), Poland (1997), South Africa ([1995] 1997), Canada ([1976] 1998), United Kingdom ([1973] 1998), Chile (2001), Serbia (2002), Turkey ([2002] 2004), Mexico (2005), and Philippines (2006) (Amnesty International 2006; Simon and Blaskovich 2002).[81] Currently 89 countries have abolished the death penalty for all crimes, 10 nations abolished the death penalty for ordinary crimes, and 30 nations retain death penalty laws but have not carried out an execution in the past 10 years (Amnesty International 2006). In 2006, the United States was one of only twenty-six nations to carry out executions (Amnesty International 2006). Moreover, just a few of these nations were responsible for the vast majority (90 percent) of these executions: China (1,010), Iran (177), Pakistan (82), Iraq (65), Sudan (65), and the United States (53) (Amnesty International 2006).[82]

Foreign nations have also been very critical of the U.S. Supreme Court's continuing dismissal of challenges to the execution of foreign nationals in the United States based on the Vienna Convention (Dieter 2003). At the close of 2003, there were approximately 118 foreign nationals from 30 different countries on death row in the United States, many of whom were not informed of their right obtain legal counsel from their home nations (Dieter 2003). The United States' continued use of the death penalty and its refusal to honor the rights foreign nationals established by international treaty has

[80] West Germany abolished capital punishment in 1949.
[81] Several nations retain the death penalty for exceptional crimes, such as crimes under military law. If a nation initially abolished its death penalty for ordinary crimes and then abolished its death penalty for all crimes at a later date, the year is listed in brackets.
[82] According to Amnesty International, there were 1,591 reported executions worldwide in 2006. The 1,010 reported executions in China is an extremely low estimate, and it is suspected that the actual number may approach 8,000.

made many nations reluctant to extradite individuals arrested in their countries who are wanted for capital crimes in the United States (Bedau 1997b, pp. 246–48; Dieter 2003). Recall from Chapter One that, in 1999, the United Nations Commission on Human Rights passed a resolution calling for a moratorium death sentencing and asking all non-death penalty nations to refuse to extradite suspects to countries that use capital punishment (Radelet and Borg 2000). The tension between the United States and the global community on the death penalty came to a head in 2002 when the president of Mexico, Vincenté Fox, cancelled a visit with President George W. Bush in protest of the execution of a Mexican national, Javier Suárez Medina, who was denied his rights under international treaty (Dieter 2003).[83]

The victories for death penalty opponents in *Atkins*, *Ring*, and *Roper*, as well as the broader success they have enjoyed in influencing public opinion and state legislatures, has been attributed to the reemergence of focused political activism (see Haines 1996) and the impact of social scientific scholarship on nearly every issue in the death penalty debate (Baldus 1995; Radelet and Borg 2000). As noted earlier, death penalty opponents recognized the need to collect solid social scientific evidence with respect to the actual administration of the death penalty in the early 1970s, and believed that such evidence would provide judges with a solid foundation on which to base their decisions. Death penalty opponents, however, never prevailed in a racial discrimination claim in a capital case, although the court has found racial discrimination in other types of cases with far less evidence (Blume *et al.* 1998). While several scholars have argued

[83] Although Mexico officially abolished its death penalty in 2005, the last execution carried in the country was in 1937. Mexican Foreign Minister Jorge Castaneda noted that the forty-five Mexican nationals on death rows in the United States are "an important strain on bilateral relations" between Mexico and the United States (Shapiro 2001, p. 14).

that the court is unreceptive of social science evidence of racial discrimination in capital cases (see, e.g., Acker 1993; Ellsworth 1988; Gross 1985; Radelet and Vandiver 1986), neither *McCleskey* nor any other subsequent decision of the court precludes capital defendants from raising similar race-based challenges (Blume *et al.* 1998; Sorensen and Wallace 1999). The major obstacle to these challenges, however, is the level of proof necessary to "trigger the imposition of a burden on county-level decision makers" (Blume *et al.* 1998, p. 1808). In *Furman*, Justice Douglas and Justice Marshall cited numerous empirical studies documenting racial and economic disparities in the imposition death penalty (see Bedau 1964, 1965; Carter and Smith 1969; Koeninger 1969; Wolfgang *et al.* 1962). When the Supreme Court rejected McCleskey's racial discrimination claim by the thinnest of margins (five-to-four), three of the dissenting Justices—Brennan, Blackmun, and Marshall—believed by a preponderance of evidence that race had been an influential factor in McCleskey's particular case. The fourth dissenting judge—Justice Stevens—believed that the evidence presented by *McCleskey* established a "strong probability" that his death sentence was attributable to his race. The failure of racial discrimination claims in the Supreme Court did not result from the majority of court's belief that social scientific evidence was invalid, inappropriate, or unreliable, but rather how "stark" such evidence needed to be.[84] The capital defense bar may have also erred in forgoing a well-

[84] Justice Powell, writing for the majority in *McCleskey*, believed that stronger evidence of racial discrimination would warrant a reversal of a death sentence under similar circumstances. Years after the *McCleskey* decision, Justice Powell admitted that he had little understanding of statistics and he had come to believe that the death penalty continues to operate in an arbitrary and capricious manner and regretted his vote (Jeffries 1994, pp. 439, 451). Justice Antonin Scalia, on the other hand, did not agree with Justice Powell's position concerning the strength of statistical evidence demonstrating racial discrimination (Baldus *et al.* 1994b). Scalia, who also joined the majority in *McCleskey*, wrote a memorandum to then-Justice Marshall stating:

> I do not share the view, implicit in the opinion [of Justice Lewis Powell], that an effect of racial factors upon sentencing, if it could be shown by sufficiently strong statistical evidence, would require reversal. Since it is my view that the unconscious operation of

organized public education campaign, opting, instead, to present the empirical evidence directly to the courts. The racial discrimination claims presented in *McCleskey* may have been successful had the evidence been used to attack the death penalty on the legislative and public education fronts (but see Bobo and Johnson 2004; Bright 1995a).

The constitutional challenge raised in *Atkins* was largely successful because of the public education and legislative lobbying efforts of anti-death penalty activists opposing the execution defendants with mental retardation. A tremendous amount of scientific evidence—indicating that capital defendants suffering from mental retardation have "diminished capacities" due to their impaired brain functioning—was used to pressure state legislatures to prohibit the execution of defendants with mental retardation. The court's recent decision in *Roper*, invalidating the death penalty for juveniles, primarily resulted from public pressure over the issue and the successful repeal of capital punishment for juveniles in 19 of 38 states with death penalty laws. Opponents of the juvenile death penalty also heavily relied on scientific evidence suggesting that, similar to individuals with mental retardation, juveniles have impaired brain functioning that contributes impulsive and irrational behavior and the inability to appreciate the gravity of the offense committed (Streib 2003, pp. 106–108).[85]

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> irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof (Davis 1998, p. 50).

[85] At the time of the *Roper* decision, the following organizations had called for a repeal of the juvenile death penalty: American Academy of Child and Adolescent Psychiatry, American Academy of Psychiatry and the Law, American Bar Association, American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, and National Mental Health Association.

Fifteen years earlier, writing for the majority in *Stanford*, Justice Scalia rejected scientific evidence that 16-year-olds were not "adequately responsible or significantly deterred" by the death penalty, claiming that "socioscientific, ethicoscientific, or even purely scientific evidence [was] not an available weapon" against the juvenile death penalty and the Court had "no power under the Eighth Amendment to substitute [its] belief in [] scientific evidence for the society's apparent skepticism" (492 U.S. at 378) .

To be sure, "traditional" scientific evidence such as the brain functioning of individuals with mental retardation played a pivotal role in the *Atkins* and *Roper*. Nonetheless, social science research also played an important role in the debate over the execution of individuals with mental retardation and juveniles. Social science evidence documenting the public's growing uneasiness with the execution of individuals with mental retardation figured prominently in *Atkins* and evidence of public disapproval with executing juveniles had a strong influence in *Roper*.[86] In fact, social science research has significantly influenced the entire death penalty debate in the current era (Baldus 1995; Radelet and Borg 2000). The next chapter discusses the major areas of the death penalty debate where social scientific scholarship has had a significant impact.

[86] In the *Roper* decision, the Supreme Court held that although *Stanford v. Kentucky* rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18, a national consensus had developed against the execution of juveniles since *Stanford*.

# Chapter 3: Social Science and the Debate Over Capital Punishment

Legal scholars have noted that social science research is changing the way Americans debate the death penalty (Baldus 1995; Bedau 1997b). Social scientists have been conducting empirical research on various aspects of the death penalty for more than 75 years, and over the last 30 years, socio-legal research has figured prominently into the debate over the appropriateness and effectiveness of capital punishment in the United States (see Radelet and Borg 2000). In fact, following the U.S. Supreme Court's 1972 *Furman* ruling, death penalty scholars have devoted substantial time and resources to collecting social science evidence on key death penalty issues (see Chapter Two). As a result, considerable social research has been conducted on the six major issues that now dominate the death penalty debate in America: (1) deterrence, (2) incapacitation, (3) cost, (4) wrongful convictions/error rates, (5) retribution, and (6) caprice and bias (Baldus 1995; Dieter 1996; Lanier and Acker 2004; Radelet and Borg 2000; Zimring 2005). A discussion of these issues, as well as a review of the relevant empirical research, is presented below.

## 3.1 Major Issues Surrounding the Death Penalty

### *3.1.1 Deterrence*

Perhaps the major justification for the death penalty is its perceived ability to deter "would-be" murderers from killing. According to deterrence theory, criminal sanctions are most effective at preventing crime when the sanctions outweigh the benefits/gains from engaging in particular criminal activity (*severity*), there is a high probability that the offender will be caught if she or he engages in criminal activity

(*certainty*), and the sanction is administered promptly so there is a close connection between the criminal activity and the punishment (*celerity*) (Beccaria [1764] 1819; Bentham [1780] 1948; Gibbs 1975).[87] While death penalty proponents argue that capital punishment is a more effective deterrent than alternative sanctions (see, e.g., Carrington 1978; van den Haag 1975), death penalty abolitionists maintain that executions are no more effective than long-term imprisonment (Dieter 1996). As a result of this debate, no other issue related to the death penalty has received more systematic attention in legal and academic communities (Bailey and Peterson 1997, p. 135).

Early research was largely unsupportive of the deterrent effect of capital punishment (see, e.g., Sellin 1959; Sutherland 1925). Researchers comparing homicide rates of similar states with and without the death penalty and the homicide rates in jurisdictions before and after the abolition/reinstatement of the death penalty discovered that either the death penalty had no effect on murder rates or that homicide rates were often higher in death penalty states than non-death penalty states (Bailey and Peterson 1997). The debate on the deterrent effect of capital punishment appeared to be resolved

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[87] Robinson and Darley (2003, pp. 954–55) are highly skeptical about the ability to deter crime through the manipulation of criminal law rules and penalties. While they concede that having a punishment system does have a general effect on the conduct of potential offenders, the conditions under which criminal law manipulation can influence behavior (severity, certainty, and celerity) are unusual, rather than typical, in criminal justice systems in modern society: "We suggest that the infrequency of being able to achieve a meaningful deterrent effect through doctrinal manipulation reveals the deterrent-analysis tradition of modern criminal law scholars, judges, and law-makers to be seriously out of touch with the reality of its limitations [...] the tendency of system participants to undercut the deviation rules—be it through the exercise of prosecutorial or enforcement discretion, sentencing discretion, jury nullification, or other means—means, obviously, that the planned deterrence program will be frustrated" (pp. 1001–1002). There is also disagreement among criminologists as to whether criminal propensity is irrelevant for deterrence (Wright *et al.* 2004). Classical deterrence theorists posit that the motivation to commit crime is to be taken as a constant across persons, and individual differences in offending can be attributed differences between the perceived costs and benefits of crime rather than differences in personality, peer group association, and so forth (e.g., Becker 1968; Cornish and Clarke 1986). Other scholars, however, have suggested that the deterrent effect of criminal sanctions will vary depending on individuals' level of motivation or propensity to commit crime, although there is considerable disagreement as to whether criminally-prone persons are *more* or *less* likely to be deterred (Akers 1990; Baier and Wright 2001; Gottfredson and Hirschi 1990; Piquero and Tibbetts 1996; Sherman 1993; Stafford and Warr 1993; Wilson and Herrnstein 1985).

in the *academic* community until the mid-1970s when economist Isaac Ehrlich challenged earlier comparative studies that found no deterrent effect for capital punishment. He criticized these studies on numerous grounds, most notably their failure to take into account the certainty of execution and to control for numerous criminal justice and sociodemographic variables that were correlated with homicide rates. Ehrlich (1975) conducted his own study which corrected for the shortcomings of previous deterrence research and concluded that each execution prevented, on average, seven to eight homicides. His work received national attention when, as noted in Chapter Two, Solicitor General Bork cited his research in his amicus brief in *Fowler*, but was harshly criticized on a host of substantive and methodological grounds (see Baldus and Cole 1975). Critics faulted Ehrlich's work because he: (1) aggregated his data to the national level, ignoring the significant variations between states; (2) failed to differentiate between death penalty and non-death penalty states; (3) did not control for many relevant variables in his models; (4) chose to emphasize models finding a deterrent effect over models that did not report a deterrent effect without providing proper justification;[88] and (5) only found a deterrent effect from 1962 to 1969, but not from 1933 to 1961 (Bowers and Pierce 1975; Fox and Radelet 1989, pp. 39, 42). Although Ehrlich (1977) vigorously defended his work and attempted to address the aggregation bias problem by presenting additional analyses showing a deterrent effect at the state-level (see Ehrlich 1977), replications of his study failed to find a deterrent effect (see, e.g., Albert 1999; Bowers

[88] According to McManus (1985, pp. 417–18), there is considerable uncertainty as to the "correct" empirical model that should be used to draw inferences in deterrence studies, and as a result, researchers typically try numerous alternative specifications before selecting and reporting a small subset that usually makes the strongest case for the analyst's prior hypothesis. Building on the work of Leamer (1978), McManus advocates using a Bayesian approach that incorporates the researcher's prior beliefs in order to examine the robustness of *ad hoc* model specifications (for an application of this approach in the death penalty charging context, see Weiss *et al.* 1999).

and Pierce 1975; Forst 1983; Leamer 1983; Passell and Taylor 1977).[89] Moreover, similar to the pre-Ehrlich studies, numerous studies discovered that executions often had a brutalization effect (Bailey 1998; Cochran and Chamblin 2000; Cochran, Chamblin, and Seth 1994; Stack 1994) on certain types of murders—that is, the number of homicides increased following an execution. Subsequent research discovered that neither the celerity of executions (Bailey 1980) nor execution publicity (Bailey 1990; Bailey and Peterson 1989; Stack 1994) had an impact on homicide rates. In fact, a survey conducted in 1996 revealed that over 80 percent of current or former presidents of the three major professional crime and law organizations—the Academy of Criminal Justice Sciences, the American Society of Criminology, and the Law and Society Association—believed that existing research failed to support a deterrence justification for capital punishment (Radelet and Akers 1996). Empirical research on the deterrent effect of the death penalty also appears to have had a strong impact on public opinion: 62 percent of Americans do not believe that the death penalty is a deterrent, up 21 percent from 1991 (Moore 2004).

It is important to note that, over the past several years, a handful of econometric studies have emerged, again challenging conventional wisdom and reporting a deterrent effect for executions (e.g., Cloninger and Marchesini 2001; Dezhbakhsh, Rubin, and Shepherd 2003; Ehrlich and Liu 1999; Mocan and Gittings 2003; Shepherd 2004; Yunker 2001; Zimmerman 2004). These studies suggest that each execution deters anywhere between five (Mocan and Gittings 2003; Shepherd 2004) and eighteen (Dezhbakhsh *et al.* 2003) homicides. Numerous analysts have noted, however, that these recent studies suffer from *at least* three serious problems that undermine the validity of their results

[89] Economists John Donohue and Justin Wolfers (2006, p. 2) note that "a National Academy panel savaged Ehrlich's analysis" and "[i]t's modern-day impact beyond the University of Chicago campus is extremely limited" (see Klein, Forst, and Filatov 1978).

(Berk 2005b; Fagan 2006).[90] First, the deterrent effect identified in these studies appears to be the artifact of a few extreme cases. Data solely from Texas accounts for the deterrent effect of capital punishment, although Texas constitutes only two percent of the data points on executions from 1977 through 1997.[91] When Texas is removed from the analysis, there is no deterrent effect for 98 percent of the data (Berk 2005b, pp. 320–21). Not only are the deterrent effects based on the inclusion of Texas data not generalizable to the other states (or the nation as whole), but evidence for a deterrent effect in the state of Texas is also questionable because of the limited amount of data available to make reliable statistical inferences (see also Katz, Levitt, and Shustorovich 2003; but cf. Cloninger and Marchesini 2001). Second, misspecification of the functional form of the relationship between executions and subsequent homicides erroneously suggests a deterrent effect. An exploratory analysis of the bivariate relationship between executions and homicides reveals a nonlinear effect: executions have both slightly positive (suggesting brutalization) and slightly negative (suggesting deterrence) effects on homicides (Berk 2005b).[92] Specifically, the relationship is slightly positive for five executions or less and negative for more than five executions.[93] By incorrectly imposing

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[90] Fagan (2006, p. 316) notes that the new deterrence studies by these economists "us[e] core elements of identical data sets on executions, death sentences, and murders, and submit[] their papers to peer reviewed journals in economics and non-peer reviewed law reviews," but typically dismiss the contributions of sociologists to the empirical literature on the death penalty as ideological driven (see, e.g., Shepherd 2005; but cf. McManus 1985).

[91] There were a total of 1,000 data points analyzed in most of these studies: 20 years multiplied by 50 states ($20 \times 50 = 1000$). The 20 years of Texas data constitute two percent of the total data points ($20 \div 1000 = 0.02$). (Technically, data for 21 years of data for each of the 50 states were available, resulting in 1050 observations, but the one-year lag for execution required all observations for 1977 to be discarded.

[92] In particular, Berk (2005b) employs a generalized additive modeling (GAM) approach that allows each predictor variable to have its own functional relationship with the endogenous variable (see Hastie and Tibshirani 1990). GAMs allow the analyst to also "control" for the effect of potential confounding variables. Other research suggests that the deterrent effect of punishment on non-capital crimes may be *both* nonlinear and race-specific (see Yu and Liska 1993).

[93] Berk (2005b, p. 313) notes that the relationship between executions and homicides becomes extremely unstable beyond seven executions because of the tiny sub-sample and could essentially be flat beyond

a linear relationship between executions and homicides, these studies allow a small number of extreme outliers to generate the appearance of a deterrent effect when, if fact, no such relationship exists (Berk 2005b; Donohue and Wolfers 2005). In particular, five or more executions occurred in only 11 of the 21 years of Texas data (ranging from 7 to 18 in any given year); therefore slightly over one percent of the data (11 ÷ 1050 = 0.0104) account for the deterrent effect discovered by these economists (Berk 2005b, p. 305). Third, these analysts incorrectly assume that using county-level and monthly execution and homicide data sufficiently correct for the distributional problems associated with analyzing the effect of executions (pp. 324–27). While these modifications do permit the analyst to investigate significantly more data points and potentially capture the ephemeral effects of the executions on subsequent homicide activity (see Shepherd 2004), they still reflect the same reality: executions are extremely infrequent and geographically concentrated events. The problems mentioned above seriously undermine the ability of these recent econometric studies to challenge the opinions of most criminal justice experts and the increasing number of Americans who doubt the deterrent value of the death penalty (Weisberg 2005).[94]

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seven executions. Analyzing state-level data from the twenty-seven states that carried out at least one execution between 1977 and 1996, economist Joanna Shepherd (2005, p. 205) posits that executions deter future homicides when states carried out at least nine executions, but have an opposite or neutral effect when states execute less than nine individuals. According to Shepherd, capital punishment decreased murders in six states (Delaware, Florida, Georgia, Nevada, South Carolina, and Texas), increased murders in thirteen states (Arizona, Arkansas, California, Idaho, Illinois, Indiana, Louisiana, Maryland, Oklahoma, Oregon, Utah, Virginia, and Washington), and had no effect in eight states (Alabama, Mississippi, Missouri, Montana, Nebraska, North Carolina, Pennsylvania, and Wyoming). It should be noted, however, that economists John Donohue and Justin Wolfers (2005, p. 829) challenge the appropriateness of Shepherd's models, suggesting that her instrumental-variable estimates are invalid.

[94] Like Ehrlich's earlier studies, Dezhbakhsh *et al*.'s analysis also misuses a sophisticated econometric technique—instrumental variables estimation—and the resulting misspecifications yield extremely misleading results (Donohue and Wolfers 2005, p. 827). With minor alternative model specifications, the impact of each execution ranges from 429 lives saved to 86 lives lost. Even when employing the same model specifications as Dezhbakhsh *et al.*, but properly adjusting for the correlations across counties within a state or the correlation of relevant variables through time (i.e., clustering), their models suggests that the

### *3.1.2 Incapacitation*

Even if some supporters of capital punishment are willing to concede that research on the deterrent effect of executions is largely unsupportive, they maintain that the specific deterrent effect of capital punishment is undeniable: executed murderers will not be able to kill again (van den Haag 1975). In fact, most public opinion polls indicate that incapacitation is the one of the most popular reasons for favoring the death penalty (Ellsworth and Gross 1994; Ellsworth and Ross 1983; Warr and Stafford 1984). As noted earlier, there was widespread concern that the *Furman* commuted inmates would kill again once released from prison. Subsequent research indicated, however, that *Furman*-commuted inmates were no more likely to re-offend for murder than the general inmate population: only 1.3 percent of *Furman*-commuted inmates committed a subsequent murder (Marquart and Sorensen 1989). Research also suggests that individuals convicted of homicide make significantly better adjustments in prison and, if released, exhibit lower rates of recidivism compared to other convicted felons (Radelet and Borg 2000). For example, in 1993, slightly less than 10 percent of death row inmates had a prior murder conviction, while over one-third of death row inmates had *no* prior felony conviction (Bedau 1997d). Death penalty proponents have also argued that prison inmates and prison staff are safer in death penalty states because inmates who murder while incarcerated risk execution for their crime, whereas inmates in abolitionist states face no such penalty; however, studies comparing the likelihood of prison homicides in death penalty versus abolitionist states suggest otherwise: prison murders are more common in jurisdictions with capital punishment than those without capital punishment

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effect of each execution ranges from 119 lives saved to 82 lives lost (p. 835). Such questionable evidence has lead two well-known economists to recently remark, "The view that the death penalty deters is still the product of belief, not evidence" (Donohue and Wolfers 2006, p. 5).

(Bedau 1997d). Finally, supporters of capital punishment have commented that individuals sentenced to life imprisonment for murder only spend a few years behind bars. Interviews with jurors serving on capital trials in fourteen death penalty states across the nation also suggests many jurors grossly underestimate the amount of time that murder defendants will spend behind bars, leading them to vote for a sentence of death when they would have voted for a life sentence if properly informed (see, generally, Blume, Garvey, and Johnson 2001; Bowers and Steiner 1999; Eisenberg, Garvey, and Wells 2001a; Eisenberg and Wells 1993; Luginbuhl and Howe 1995; Steiner, Bowers, and Sarat 1999). This belief is echoed in the general population: public opinion polls indicate that most Americans believe that convicted murderers spend, on average, seven years in prison unless they are sentenced to death (Bedau 1997d, p. 181). This figure, however, is actually *half* of the actual amount of years, on average, that individuals sentenced to life imprisonment *with the possibility of parole* spend behind bars. Most retentionist and abolitionist jurisdictions also allow juries (and judges) to sentence inmates to life *without* the possibility of parole (LWOP). Specifically, all jurisdictions with the death penalty and 11 of the 12 states without the death penalty offer life without parole (Weisberg 2005).[95] Research suggests that 46 percent of Americans favor LWOP over the death penalty, up 14 percent from a decade ago (Dieter 1993; Moore 2004).

Proponents of capital punishment have also argued that society is much safer because of the "selective incapacitating" effect of executions (i.e., executions permanently remove individuals who have the highest risk of killing again from the

[95] Texas became the most recent state to enact LWOP legislation when Governor Rick Perry signed the bill into law in June 2005. Prior to repealing its death penalty in March 2009, New Mexico was the only death penalty state that did not offer LWOP as a sentencing option. The District of Columbia, a non-death penalty jurisdiction, also offers LWOP as a sentencing option.

community) (van den Haag 1975, 1986). Abolitionists have criticized the selective incapacitation argument on the grounds that only a small number of the most highly aggravated homicides result in a death sentence. These death penalty opponents highlight a large body of evidence that suggests—although the level of aggravation in a homicide case strongly impacts the probability that the case is noticed for death and receives the death sentence—there is considerable variation in the outcomes of the most highly aggravated homicide cases. Furthermore, they note that other illegitimate case characteristics (e.g., race, gender, region) exert a strong influence on capital charging-and-sentencing decisions even after aggravation levels are held constant (Baldus and Woodworth 2003). Because prosecutors often fail to seek the death penalty and juries fail to impose the death sentence on a non-trivial number of these highly aggravated cases, and extra-legal factors improperly influence who is charged and sentenced to death among similarly culpable murder defendants, many convicted murderers who are at high risk of killing again are released back into the community. According to abolitionists, any benefit society may receive from executing an individual at high risk of killing again is offset by the considerable number of similarly culpable of convicted murderers who are released back into the community (see Radelet and Borg 2000).

### *3.1.3 Cost/Expense*

The number of inmates in state and federal prisons and local jails has increased by 800 percent over the past 30 years. In 1971, there were fewer than 250,000 individuals behind bars on any given day (Currie 1998). On June 30, 2003, there were 2,078,570 prisoners incarcerated in prisons and local jails (U.S. Department of Justice 2004a). The skyrocketing criminal justice costs associated with the enormous expansion in the prison

population have placed a major strain of budgets of local, state, and federal governments (Currie 1998). For many years, death penalty proponents argued that executing convicted killers was much more cost effective than keeping them behind bars for life. In contrast, abolitionists claimed that life imprisonment was much more cost effective than the death penalty. Unfortunately this debate was rarely supported by solid research until detailed studies concerning the actual costs associated with the death penalty started being conducted in the late 1980s (Dieter 1994). Examinations of the costs associated with the death penalty in California, Colorado, Florida, Indiana, Kansas, New York, North Carolina, Texas, and the federal government all revealed that sentencing individuals to death was much more expensive than sentencing them to life imprisonment: California spends $90 million on the death penalty each year; Colorado spends an average of $2.5 million on each capital case; Florida spends an estimated $51 million a year above and beyond what it would cost to sentence all first-degree murders to LWOP, Indiana spends 38 percent more on capital cases than on LWOP sentences; Kansas spends 70 percent more on capital cases than non-capital murder cases ($1.26 million per capital case versus $740,00 for non-capital cases through the end of incarceration); Texas spends an average of $2.3 million per capital case, New York spends approximately $1.5 million on death penalty cases; and the federal capital cases cost nearly four times more than comparable non-capital cases (Dieter 1994, 1996). In one of the most thorough examinations to date, Cook and Slawson (1993, pp. 77–78) discovered that North Carolina spends an additional $216,000 per death sentence and an additional $2.16 million per *execution* compared to non-capital cases resulting in life imprisonment. They estimate that, nationally, over $1 billion more has been spent on the death penalty since 1976.[96] A more recent study

[96] According to Cook and Slawson, this is a conservative estimate because it only considers costs to the

suggests that each additional capital trial causes an increase in county spending of 1.8 percent and an increase in county taxes of 1.6 percent, resulting in an increase of more than $1.6 billion in between 1982 and 1997 (Baicker 2004). While the perceived high cost of life imprisonment, in of itself, is rarely cited by death penalty supporters as a reason for their position, these financial considerations, coupled with capital punishment's dubious deterrent effect and the fiscal crises that many states are facing, have many state and local officials rethinking their death penalty statutes (Dieter 1994; Rupp 2003).

### *3.1.4 Wrongful Convictions/Error Rates*

As noted earlier, one of the strongest criticisms of capital punishment made by death penalty opponents is that innocent people may be wrongfully executed. Although no legal or public official has admitted to a wrongful execution since 1887 (Bedau and Radelet 1987; Radelet, Bedau, and Putnam 1992), abolitionists point to the 118 individuals released from death row between 1973 and 2004 as strong evidence of the danger of mistaken executions (Dieter 2004). Abolitionists have also noted that the danger of mistaken executions has increased dramatically over the past ten years (Dieter 2004). Until a decade ago, death penalty retentionists strongly argued that mistaken executions were historical anomalies—resulting from adequate safeguards in the capital punishment process—and incapable of occurring in modern times (Cassell 1999; Radelet and Bedau 1998). More recently, however, retentionists have acknowledged the existence of such miscarriages of justice, but justify their continued support of the death penalty by contending that these miscarriages are extremely infrequent and that

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state and local government, and does not include federal and private costs (p. 79).

abolitionists have never proven that an innocent person has been executed in the modern era of the death penalty.[97] Furthermore, retentionists argue that the procedural safeguards are functioning properly by identifying mistakes and preventing the innocent from being put to death (but see Liebman 2000). Abolitionists, however, have strongly criticized all of these assertions.

In contrast to retentionists' contentions that erroneous convictions in capital cases are extremely infrequent, death penalty opponents argue the number of exonerations to date grossly underestimates the actual number of individuals wrongfully sentenced to death. Highlighting evidence of wrongful convictions in non-capital murder cases, they suggest that many more people on death row are likely to be innocent because the factors influencing wrongful convictions (e.g., eyewitness error, prosecutorial misconduct, false or coerced confessions, ineffective assistance of defense counsel, and perjury) are very similar in both capital and non-capital cases (see Garrett 2008; Gross 1998b; Harmon 2001b; Harmon and Lofquist 2005; Huff 2002; Natapoff 2006; Scheck, Neufeld, and Dwyer 2000).[98] Between 1972 and 1996, over 400 people convicted of murder in both capital and non-capital cases in the United States were later found to be innocent of the crime (Bedau and Radelet 1987; Radelet *et al.* 1992). A recent study conducted by Gross

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[97] Renowned retentionist Ernest van den Hagg (1986, p. 1665) remarked, "Despite precautions, nearly all human activities, such as trucking, lighting, or construction, cost the lives of some innocent bystanders. We do not give up these activities, because the advantages, moral or material, outweigh the unintended losses. Analogously, for those who think the death penalty just, miscarriages of justice are offset by the moral benefits and the usefulness of doing justice."

[98] In 2006, the Criminal Justice Section of the American Bar Association released a report on preventing wrongful convictions. The report was the result of a three-year research effort lead by an *ad hoc* group of defense attorneys, prosecutors, judges, academics, and representatives from the forensic and law enforcement communities, and its recommendations were adopted by the organization's policy-making body, the House of Delegates. The committee identified nine problem areas leading to wrongful convictions and made recommendations in each of these areas: (1) false (and coerced) confessions; (2) eyewitness identification procedures; (3) forensic evidence; (4) jailhouse informants (e.g., perjury); (5) defense counsel practices (i.e., ineffective assistance of counsel); (6) investigative policies and personnel; (7) prosecution practices (i.e., prosecutorial misconduct); (8) systemic remedies; and (9) compensation for the wrongfully convicted (American Bar Association 2006a).

and colleagues (2005) revealed that 61 percent of all exonerations for serious violent and non-violent crimes between 1989 and 2003 were for the crime of murder (199 exonerations). The proportion of exonerations for murder is particularly noteworthy considering that convicted murderers constitute only 13 percent of the total prison population in the United States. Moreover, death row inmates only comprise approximately 0.25 percent of the total prison population, but 22 percent of inmates exonerated.

Poveda's (2001) detailed analysis of murder convictions in New York revealed that 1.4 percent individuals convicted of murder between 1980 and 1987 were later found be innocent. If this percentage were applied to the 3,487 individuals currently on death row in the United States, 49 individuals ($3{,}487 \times .014 = 48.82$) would have been erroneously sentenced to death. Admittedly, the wrongful conviction rate for capital cases is likely to be significantly lower than for non-capital cases because of the procedural safeguards (e.g., mandatory appeals) present in death penalty cases (but see Gross 1996).[99] But even if the erroneous murder conviction rate is halved (0.7 percent), nearly 25 individuals on death row still have been erroneously convicted.[100]

Contrary to retentionists, abolitionists have also argued that innocent people have, in fact, been executed. According to abolitionists, the refusal of public and legal officials

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[99] According to Gross (1996, pp. 494–96), capital cases may lead to *more* wrongful convictions than other non-capital murder cases because most capital defendants are *not* sentenced to death. He argues that capital cases are more likely to result in a conviction because of trial publicity, death qualified jurors who are more conviction prone than non-death qualified jurors, the increased likelihood of false confessions by innocent defendants to avoid the death sentence, the decreased likelihood that the actual murderer will confess to the crime, and the heinousness of capital murders. Many capitally charged defendants who are convicted but do not receive a death sentence are believed to have "already received the benefit of whatever doubts their cases may raise" (p. 498), and as a result, their cases fail to receive the "post-conviction" attention that capital cases resulting in a death sentence receive.

[100] New York is often regarded as having one of the finest public defender systems in the nation, so the national erroneous conviction rate may be higher.

to admit executing an innocent person is not surprising, considering that such admissions would not only be professionally damaging, but it would also have serious legal and financial repercussions for the states and localities in which the wrongfully convicted are executed (Kirchmeier 2006; Radelet and Bedau 1998). Moreover, there is little incentive for prosecutors to admit wrongdoing in murder cases because misconduct is treated with great leniency—not one prosecutor has been disbarred in the 381 murder convictions that have been reversed because of misconduct (Scheck, Neufeld, and Dwyer 2000; Weinburg 2003). Nonetheless, examining 350 capital cases resulting in wrongful convictions in the United States between 1900 and 1987, Bedau and colleagues (Bedau and Radelet 1987; Radelet *et al.* 1992) discovered that 139 people were sentenced to death, 22 individuals came within 72 hours of being executed, and 23 believed to be innocent were executed (see also Radelet and Bedau 1998).[101] Since 1992, at least five individuals have been executed despite strong doubts about their guilt (Death Penalty Information Center 2008).[102] Some abolitionists contend that perhaps the best measure of the risk associated with executing the innocent is the ratio of exonerations to executions. From 1977 to 2008, 1,136 individuals were executed and 130 exonerated (Death Penalty Information Center 2008), or stated differently, one exoneration for every 8.7 executions. As noted earlier, Illinois offers the most extreme example of the risk of executing the innocent.

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[101] After a draft of the study was originally released in February 1987, then-Attorney General Edwin Meese—a strong death penalty advocate—ordered the Department of Justice to draft a response. The DOJ's response failed to offer any additional evidence to refute the initial study, instead focusing its sole attention on 10 of the 23 executions, arguing that the study was flawed because it was ideological driven, that the executed were convicted "beyond a reasonable doubt," and that no legal officials presiding over the cases admitted that the executed was innocent (Radelet and Bedau 1998). In contrast to Attorney General Meese's response, Bedau and colleagues' report was received favorably by U.S. Supreme Court Justice Harry Blackmun who cited the study as one of the reasons that he no longer supported the death penalty (see *Callins v. Collins*, 510 U.S. 1141 [1994]).

[102] The executed individuals believed to be innocent were: Roger Keith Coleman in 1992 (Virginia), Joseph O'Dell (Virginia) in 1997, David Spence in 1997 (Texas), Leo Jones 1998 (Florida), and Gary Graham in 2000 (Texas).

Since Illinois reinstated the death penalty in 1977, it has exonerated more individuals than it has executed (13 exonerations and 12 executions) (see Johnson 2000a,b; Ryan 2003).

In response to the growing number of death row exonerations, retentionists have argued that these exonerations actually prove (a) that the procedural safeguards in capital trials and appeals are functioning correctly by preventing those wrongfully convicted from being wrongly executed, (b) that such exonerations are too infrequent to justify abolition of the death penalty, or (c) that abolitionists have failed to provide evidence that an innocent person has been executed (see, e.g., Cassell 2003, p. 208).[103] In particular, they contend that capital cases are held to the highest legal standards and undergo serious judicial scrutiny. By contrast, abolitionists note that the incredibly high rate of mistakes in the capital punishment system underscores the fact that the system is not operating properly to begin with and creates serious concern as to whether the courts will catch them all (Gross 1996; Liebman *et al.* 2000c). Abolitionists also posit that the wrongful conviction of the innocent constitutes only one type of miscarriage of justice. The second (and much more frequent) type of mistake arises when individuals are sentenced to death for capital murder when, in fact, they should have been convicted of second-degree murder or manslaughter, and as result, been ineligible for the death penalty in the first place (Liebman, Fagan, and West 2000b; Radelet and Borg 2000).[104] In 1991, the U.S.

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[103] Some abolitionists have found it ironic that many of the retentionists who currently applaud the procedural safeguards in the capital charging-and-sentencing process challenged the implementation of these very safeguards decades earlier on the grounds that they believed that the safeguards were unnecessary and would undermine the capital punishment process (for a discussion, see Liebman *et al.* 2000c).

[104] This issue of "actual innocence" versus "innocent from the death penalty" was brought before the court in *Sawyer v. Whitley* (505 U.S. 333 [1992]). The petitioner in the case, Robert Wayne Sawyer, was sentenced to death in Louisiana for his participation in a murder in 1979. Sawyer was convicted of first-degree murder (i.e., "intentional murder") and the jury found two aggravating circumstances: (1) murder

Senate Committee on the Judiciary authorized Columbia University Law Professor James Liebman to conduct a study on habeas corpus relief in capital cases. Liebman and colleagues (2000c) discovered that 68 percent of the 4,578 death sentences imposed in the United States between 1973 and 1995 receiving appellate review were overturned because of serious error.[105] They also discovered that three rounds of judicial inspection (state direct appeal, state post-conviction, and federal habeas corpus) were necessary to catch a significant portion of these serious mistakes. For example, while state courts overturned 47 percent of death sentences,[106] an additional 40 percent of the death sentences upheld by state courts were later overturned by federal courts (Liebman *et al.* 2000c). The high error rates placed many individuals at risk for wrongful executions: 82 percent of the death sentences overturned resulted in a sentence less than death upon retrial and seven percent were found to be innocent of the capital crime. Similar to studies of wrongful murder conviction, the Liebman study revealed that the most common reasons for reversal were egregiously incompetent defense lawyers *and* serious police and prosecutorial misconduct (Liebman *et al.* 2000c). The Liebman study also

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occurred while the defendant was engaged in the commission of another felony; and (2) the murder was especially cruel, atrocious, and heinous. Sawyer claimed that although he was guilty of murder and the facts of the case made him "technically" eligible for the death penalty, he should have not been eligible for the death penalty because he should have not been convicted of first-degree murder, and he was not guilty of committing the contemporaneous felony of aggravated arson (the offense on which the statutory aggravating circumstances were based). Among other things, Sawyer pointed to evidence of his minimal involvement in the crime and that a witness claimed to have seen Sawyer trying to prevent his co-offender from setting the victim on fire. The Court affirmed Sawyer's death sentence, ruling unanimously ruled that Sawyer failed to satisfy the "actual innocence" exception.

[105] Liebman *et al*. (2000c) limited their analyses to "serious errors" by exclusively focusing on errors that were (1) *prejudicial* because either the defendant has shown it probably affected the outcome of her or his case *or* because it is the type of error that almost always has that effect and (2) *properly preserved* by way of a timely objection at trial, reiterate in a timely new trial motion at the end of the trial, and timely and properly asserted on appeal.

[106] Ironically, as Liebman and colleagues note, it is often the very same judge who presided over the death penalty trial in question who overturns the death conviction or sentence on appeal.

discovered that the high error rates were persistent over the entire time of the study[107] and were present across the entire nation.[108] In a follow-up study to determine why some states had higher error rates than others, Liebman and colleagues (2002) discovered that error rates were highest in states that: (1) impose the death penalty at higher rates; (2) have a homicide risk rate for whites that is near (or greater than) that of blacks; (3) have a higher proportion of blacks and welfare recipients (see also Jacobs and Carmichael 2002); (4) have a lower arrest rates for serious felony offenses (both violent and non-violent); (5) have trial judges that are subject to highly partisan popular elections (but cf. Blume 1999); and (6) impose death sentences in cases that are *not* highly aggravated. Abolitionists argue that the prevalence and frequency of serious error in capital cases—along with the incredible amount of time necessary to uncover such error (nine year national average)—clearly reveal a system in disrepair and runs the serious risk of executing the innocent (see, e.g., Liebman 2000). Death penalty opponents also note that a number of the death row exonerations in recent years have resulted from the emergence of new scientific technology (e.g., DNA testing) and the efforts of individuals and organizations working outside of the criminal justice system (e.g., journalists), rather than properly functioning legal mechanisms (Bedau 1997c; Smith 2005). The fact that several of these death sentences were affirmed during appellate review brings into question the adequacy of the current procedural safeguards in place in the capital punishment process and their ability to prevent the execution of the innocent (Dieter 2004).

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[107] Slightly over 50 percent of all death sentences reviewed in a single year were overturned in 20 of the 23 years studies and the error rate was over 60 percent in over half of the years studied.

[108] Ninety-two percent of the death-sentencing states (24 states) had error rates over 52 percent, 85 percent of the states (22 states) had error rates of 60 percent or higher, and 61 percent of the states (15 states) had error rates of 70 percent or higher.

Research suggests that the concern over capital defendant's guilt has a strong impact on jurors' decision to impose a life or death sentence (Garvey 1998). An examination of actual jurors who sat on capital cases in 15 states across the United States revealed that lingering doubt about a defendant's guilt in the first phase of a capital trial (i.e., guilt/innocence phase) was the most important factor in deciding to vote for a life sentence in the penalty phase (Bowers, Sandys, and Steiner 1998; Garvey 1998; Sandys 1995).[109]

### *3.1.5 Retribution*

In light of the increasing evidence demonstrating the growing risk of convicting and executing innocent individuals (as well as the other problems mentioned above), many death penalty advocates argue the societal benefit of the death penalty outweighs the societal harm on retributive grounds (for discussions, see Ellsworth and Gross 1994; Gross 1993; Warr and Stafford 1984).[110] Retentionists posit that the death penalty is necessary for justice and only through executing individuals who commit murder can justice be served (see, e.g., Carrington 1978; Cassell 2003; Pojman 2003; van den Haag 1975, 1986; cf. Sunstein and Vermeule 2005).[111] Unlike other debates surrounding the death penalty, retributive arguments primarily rely on a non-empirical justification (i.e., morality) and, therefore, social science research has not had much of an impact on this

[109] A recent study by Unever and Cullen's (2005) revealed that over three-quarters of Americans believed that an innocent person had been executed in the past five years. They also discovered that this belief was associated with lower levels of support for capital punishment.
[110] Citing recent Gallup Poll evidence, Radelet (2000) notes that 46 percent of respondents focused on the "eye for an eye" rationale to justify their support for capital punishment.
[111] According to van den Haag (1986, p. 1663), the "[m]aldistribution between the guilty and innocent is, by definition, unjust…[but the] maldistribution of any punishment among those who deserve it is irrelevant to is justice or morality" (but see Laufer and Hsieh 2003).

aspect of the debate (Radelet and Borg 2000; but cf. Sunstein and Vermeule 2005).[112] One notable exception is Borg's (1998, p. 537) work on vicarious homicide victimization and support for capital punishment. She notes that individuals who support capital punishment on retributive grounds argue that the death penalty is necessary because it offers the family members and close friends of homicide victims a legitimized means for exacting revenge. Borg questions this assertion on four grounds. First, she notes that less than three percent of individuals convicted of homicide in the United States are sentenced to death, so the death penalty is either an unavailable or very remote punishment strategy for the family and close friends of homicide victims. Second, the vast majority of homicide victims are either related to or acquainted with their attackers (over 75 percent of homicide victims know their attackers, see Fox 2005) and family members and close friends of homicide victims who know the offender—which is rather common if the victim and the offender know one another—may be less likely to support capital punishment. Third, the vast majority of homicides are intra-racial (approximately 95 percent black-victim and 84 percent of white-victim homicides are intra-racial, see Fox 2005) and family and close friends of victims may be less like to support capital punishment when they share a strong cultural similarity to the offender. Finally, although blacks constitute nearly half of all homicide victims (Fox 2005), they are more likely to be distrustful of the criminal justice system (Anderson 1990; Cooney 1997a; Miller 1996) and, as a result, less likely to advocate for capital punishment (Young 1991, 2004).

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[112] Sunstein and Vermeule (2005, p. 706) suggest that if, indeed, capital punishment has a deterrent effect, then the refusal to impose the death penalty "ensur[es] the deaths of a large number of innocence people" and this kind of government inaction would constitute "a serious moral wrong." (but cf. Kaufman-Osborn 2006b). The authors note that they do not take a stand on the validity of the econometric studies supporting the deterrence hypothesis, rather they simply set out to explore the moral implications of government inaction if capital punishment is an effective deterrent. For a critique of Sunstein and Vermeule's consequentialist argument, see Steiker (2005).

Analyzing survey data from a nationally representative sample of 1,312 respondents, Borg discovered that blacks who were family and close friends of homicide victims were *less* likely to support capital punishment than blacks who were not family and friends of homicide victims. This result held after controlling for education, age, gender, region of the country (i.e., South/Non-South), and religious orthodoxy. Whites who experienced vicarious victimization, on the other hand, were more likely to support the death penalty, although white males were the most likely to support capital punishment, regardless of vicarious victimization status.

In the 1970s, over 47 Christian denominations, representing more than 10 million conservative Christians, supported the death penalty on biblical grounds, primarily citing the Old Testament (see Bedau 1997b, pp. 415–28). While most Fundamentalist and Pentecostal churches continue to support capital punishment, abolitionists have noted that much of the "moral leadership" in the United States now opposes the death penalty (Radelet 2000, p. 207). In recent years, for example, the Roman Catholic Church and many Protestant denominations (e.g., Episcopalians, Lutherans, Methodists, Presbyterians, and the United Church of Christ) have called for the abolition of the death penalty (Berg 2000; Religious Organizing Against the Death Penalty Project 1998). Similarly, abolitionists have highlighted much of the international community's rejection of the death penalty as evidence that the "morality" of the death penalty is questionable and that justice can be served without capital punishment. The concern over the unnecessary suffering of the condemned and trend towards more "humane" methods of execution dating back to the eighteenth century also appears to be inconsistent with the idea that the death penalty is needed for retributive justice (Radelet and Borg 2000).

Some abolitionists have made the rather unconventional argument that the death penalty is too lenient on convicted murderers and that these offenders should spend the rest of their lives in prisons (Brownlee, McGraw, and Vest 1997; Ibrahim 2004). But perhaps the strongest argument that abolitionists have made against the death penalty on retributive grounds is that it is unjust in that it too frequently punishes those who are not deserving of the death penalty (e.g., those who are innocence of a capital offense), and therefore fails to serve any function.

While miscarriages of justice (i.e., wrongful convictions/executions and error rates) have received the most public and media attention over the past several years (Huff 2002; Unnever and Cullen 2005) and the issue of deterrence has received the most scholarly attention (Bailey and Peterson 1997), studies of potential caprice and bias in the administration of the death penalty were among the earliest conducted by social scientists (see, e.g., Garfinkel 1949; Johnson 1941) and, as noted earlier, evidence from such studies has been directly used to challenged the constitutionality of the death penalty on the grounds that it is administered in a racially discriminatory manner (see Chapter Two). In the following chapter, a detailed review of the scholarly literature concerning the influence of extra-legal factors (particularly race/ethnicity) on the capital charging-sentencing process is presented. A proper examination of the role that race has played in the capital charging-and-sentencing process, however, first requires some historical information on the relationship between race and the law (particularly criminal law) in the United States. Therefore a brief discussion of this history, followed by a close examination of the research literature, appears in the next chapter.

# Chapter 4: Extra-Legal Factors and the Death Penalty

## 4.1 Background on Race and the Law in the United States

### *4.1.1 Early Colonial Period through the Civil War*

The discriminatory treatment of blacks in the legal system has had a long history in the United States (Foner and Mahoney 1995; Williams 1991).[113] Enslaved Africans brought to the colonies enjoyed very few legal rights and almost no legal protections (David *et al.* 1976; Spindel 1989). Although white bondage also existed in the early days of the colonies in the form of indentured servitude, the legal status of white indentured servants was very different from blacks (Smith [1947] 1971). For example, unlike white endured servants, blacks were held in servitude for life, black children could be born slaves because they inherited their free/slave status from their mother, and conversion into Christianity did not alter the slave status of blacks (David *et al.* 1976; Skidmore 1993). Southern states developed statutes known as "slave codes" to legitimize the inferior legal and social status of blacks and allowed slaveholders broad discretion in controlling the slave population. First, by mandating that slaves were the legal private property of the slaveholders, slave owners had virtually unlimited power over their slaves without the threat of outside intervention (Schwartz 1988). Although some limitations were placed on these powers in later years (see Fogel and Engerman 1974; Spindel 1989), they were enforced at the discretion of the slaveholder (David *et al.* 1976). Second, slave codes prohibited blacks from enjoying nearly any constitutional protection

[113] Wacquant (1997, p. 230) suggests that societies draw and enforce racial/ethnic boundaries through five "elementary" forms of domination: (1) categorization (prejudice and stigma), (2) discrimination (differential treatment based on imputed group membership), (3) segregation (group separation in physical and social space), (4) ghettoization (the forced development of parallel social and organizational structures), and (5) exclusionary violence (ranging from interpersonal intimidation and aggression, to lynching, riots and pogroms, and climaxing with racial warfare and extermination).

afforded whites. Slaves were not allowed to vote, own property, marry a partner of their own choosing, travel off of the plantation without approval from the plantation master, or work for themselves (David *et al.* 1976; Hindus 1980). Third, slave codes established severe punishments for a wide range of offenses committed by blacks that were not considered criminal for whites. For example, slaves were often whipped, beaten, tortured, burned, mutilated, and sometimes killed for such minor infractions as making direct eye-contact with whites, arguing with whites, not moving out of the way when approaching whites, learning to read or write, attempting to vote, and (for males) speaking with a white woman (Mullin 1972). These slave codes also differentially punished the criminal behavior of blacks much more severely than the criminal behavior of whites for the same offenses (Schwartz 1988). Many offenses committed by whites that were punishable by brief imprisonment or a small fine were punishable by whipping, branding, or mutilation if committed by blacks (see e.g., State of Georgia 1848). Slave codes also protected non-slaveholding whites from criminal punishments when victimizing blacks. Many slave codes prohibited blacks from testifying against whites and bringing criminal or civil cases against whites. In North Carolina, the killing of a slave by a white could not be prosecuted as murder until 1774 (Spindel 1989, p. 48). Since slaves were property of their masters, the slave master was the offended party if her or his slave was victimized or murdered by another white person (Fogel and Engerman 1974). In these situations, it was largely a civil matter and the owner of the slave was only entitled to financial restitution for the loss of her or his property (David *et al.* 1976).

Finally, slave codes enumerated many more capital offenses for blacks than for whites and blacks were much more likely to have their offenses tried as capital cases and

be sentenced to death (Higginbotham and Jacobs 1992; Spindel 1989). Tennessee's 1858 Slave Code listed 124 capital crimes for slaves and free blacks, but only two capital offenses for whites (Vandiver, Giacopassi, and Curley 2001). In Virginia, slaves could receive the death penalty for 68 offenses, whereas whites could only be put to death for first-degree murder (Higginbotham and Jacobs 1992, p. 1022). Furthermore, in Virginia, slaves could be executed for any crime that, if committed by a white person, called for a sentenced sentence of not less than three years. From 1641 (the year of the first recorded execution of a black male) until the end of the Civil War, at least 1,890 blacks were legally executed, comprising 47.2 percent of all executions during this period (Espy and Smykla 2004). The proportion of blacks executed was 270 percent greater than their proportion of the population: from 1790 (when the federal government began collecting census data) to 1860, blacks, on average, comprised 17.5 percent of the nation's population (U.S. Bureau of the Census 2002b).

Moreover, the inferior legal status of blacks was neither limited to the institution of slavery nor the southern region of the United States (cf. Agamben [1995] 1998). In its landmark "Dredd Scott" decision (see *Scott v. Sanford*, 60 U.S. 393 [1857]), the U.S. Supreme Court ruled that free and enslaved blacks could never become U.S. citizens; therefore they had no rights that whites were required to respect. The court also held that the portion of the Missouri Comprise of 1820 that prohibited the expansion of slavery in the U.S. territories north and west of the state of Missouri was unconstitutional because enslaved blacks were the property of their owners and Congress could not prohibit slaves owners from taking their property into any territory owned by the United States.

### *4.1.2 Post Civil War Period through the 1960s*

Immediately following the Civil War and the emancipation of millions of enslaved blacks, the former Confederate states began replacing slave codes with "Black Codes" (Ayers 1984). These Codes attempted to resurrect the legal and social order established during slavery (Foner and Mahoney 1995). Similar to slave codes, Black Codes defined both the legal and social status of freed blacks. Although somewhat less restrictive than the previous slave codes (e.g., blacks were allowed to own property, enter into marriage contracts, and file legal suits), Black Codes tried to severely limit the freedoms of the newly emancipated blacks and restore the racial hierarchy that existed under the previous slavocracy. Blacks were generally prohibited from voting, holding public office, serving on juries, testifying against whites, marrying whites, and owning weapons (Ayers 1984; Foner and Mahoney 1995). Blacks were also prohibited from entering certain non-agricultural occupations and were forced to sign labor contracts that allowed southern whites to exploit them. Not only were blacks not allowed to terminate these labor contracts before they expired, but these contracts allowed blacks to be beaten for poor performance on the job and for minor infractions such as insubordination and theft. Perhaps the most repressive aspects of the Black Codes were the vagrancy laws that they established. These vagrancy laws allowed both black adults and children who were unemployed or who did not have a labor contract with a white employer to be arrested, imprisoned, and forced into labor (Oshinksky 1996). Black Codes also ensured that blacks would be punished differently from whites (Ayers 1984). Rather than explicitly mentioning race in criminal statutes, southern whites ensured that blacks would receive harsher treatment by giving legal officials and juries greater discretion in

charging and sentencing (Ayers 1984; Williamson 1984). Southern whites also differentially disciplined blacks by prescribing more severe punishments for crimes that were generally perceived to be disproportionately committed by blacks than by whites (e.g., vagrancy, rape, arson, and burglary) and limited corporal punishment to black offenders (Ayers 1984). Similar the aforementioned labor and vagrancy laws, the penal systems and "convict-lease" policies of the former slave states supplied southern planters, businessmen, and financiers with the free (and forced) black labor that existed under slavery (Oshinksky 1996; Wacquant 2000).

As a result of the blatant mistreatment of blacks in the former Confederate states, the U.S. Congress passed the Fourteenth (1868) and Fifteenth Amendments (1870), allowing the federal government to protect the constitutional rights of all citizens and extending the right to vote to black men, respectively. These new constitutional protections, however, were frequently ignored or circumvented by the southern states (Behrens, Uggen, and Manza 2003; Kennedy 1998).[114] The vast majority of former Confederate states (and former slave states that did not secede) began enacting laws that prohibited individuals convicted of crimes from voting in an attempt to deny suffrage to blacks. For example, during the Reconstruction Era, felony disenfranchisement laws

[114] Behrens and colleagues (2003) note that many Democrat-controlled Northern and Western states initially refused to ratify the Fourteenth and Fifteenth Amendments (Southern states were required to do so as a condition of readmission into the Union), and many Northern states that did support the two amendments did it primarily to punish the South rather than to achieve racial equality. Indeed, Abraham Lincoln's primary reason for going to war was not the dismantling of slavery, but rather the preservation of the Union. In his famous letter to *New York Tribune* editor, Horace Greeley, at the beginning of the Civil War, Lincoln wrote:

> If there be those who would not save the Union, unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could do it by freeing some and leaving others alone, I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union (Lincoln [1862] 1953, p. 388).

were passed in Alabama (1867), Arkansas (1868), Missouri (1875), Florida (1868), Georgia (1868), Mississippi (1868), North Carolina (1876), South Carolina (1868), Tennessee (1871), and Texas (1869) (Behrens *et al.* 2003, pp. 565–66). The remaining five former slave states—Delaware, Kentucky, Louisiana, Maryland, and Virginia—enacted felony disenfranchisement laws before the Civil War.[115] Not only were felony disenfranchisement statutes in these states among the most punitive in the country (Behrens *et al.* 2003), politicians in these states frequently made explicit appeals to the public to prevent blacks from voting (see Mendelberg 2001).[116] Southern states also began legalizing the practices of racial segregation in response to the intervention by the federal government to extend the full rights of citizenship to newly freed blacks. In response to these separatist practices and policies, blacks began challenging the constitutionality of racial segregation under the Fourteenth Amendment, but the U.S. Supreme Court consistently ruled in favor of the southern states (Williamson 1984).

The limited social, economic, and political gains made by blacks during the Reconstruction Era came to a staggering halt when Republican Rutherford B. Hayes was elected as the nation's nineteenth president (Foner and Mahoney 1995; Williamson 1984). The Reconstruction Era (1865 – 1877) effectively ended when Hayes withdrew northern military troops from the South in 1877. As a presidential hopeful, Hayes agreed

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[115] Delaware, Kentucky, Maryland, and Missouri did not leave the Union.

[116] The leading professional association in law has long opposed felon disenfranchisement beyond imprisonment, although the practice remains widespread (American Bar Association 1980, 2003b). In 2004, 48 states and the District of Columbia prohibited inmates from voting (only Maine and Vermont allow incarcerated individuals to vote). Thirty-five states prohibit parolees and 31 states prohibit probationers from voting. In 14 states, a felony conviction can result in the permanent loss of voting rights. In 2000, 4.7 million Americans were disenfranchised because of a past or current felony conviction. Similar to the felony disenfranchisement laws of the Reconstruction Era, current felony disenfranchisement laws disproportionately affect blacks males. In Georgia, for example, one out of every eight black males is disenfranchised because of a felony conviction (12.5 percent). In Georgia's capital city, Atlanta, black males are 11 times more likely to be disenfranchised than non-blacks and one-third of unregistered black males are legally ineligible to vote (or serve on juries) because of a prior or current felony conviction (see King and Mauer 2004).

to withdraw military force from the South in exchange for the support of Southern Democrats in winning the presidency. Without the presence of northern troops to ensure the recent constitutional protections granted by the U.S. Congress (i.e., the Fourteenth and Fifteenth Amendments), southern whites were free to reinstitute the racially oppressive policies and practices of the Antebellum South. Shortly after Hayes recalled the military from the South, southern states began enacting wide-sweeping "Jim Crow" laws that mandated the legal separation of blacks from whites (Delaney 1998). Twenty years after the widespread implementation of Jim Crow laws in the South, the U.S. Supreme Court upheld the legality of racial segregation in *Plessy v. Ferguson* (163 U.S. 537 [1896]), ruling that racial segregation was constitutional under the Fourteenth and Fifteenth Amendments as long as facilities for blacks were not inferior to those of whites (i.e., the "separate but equal" doctrine).[117] Shortly after *Plessy*, the Supreme Court began approving racially discriminatory systems of poll taxes and literacy tests in southern states that prevented the vast majority of blacks in these states from voting and serving on juries (see *Williams v. Mississippi*, 170 U.S. 213 [1898]). For nearly sixty years the Supreme Court would uphold the legality of racial segregation until it was finally struck down in *Brown v. Board of Education of Topeka* (347 U.S. 483 [1954]).[118] Ten years after *Brown*, Congress passed the Civil Rights Act of 1964, prohibiting discrimination

[117] Thirteen years before the *Plessy* decision, in 1883, the U.S. Supreme Court struck down the constitutionality of the Civil Rights Act of 1875 that extended the reach of the Fourteenth Amendment and offered greater protection to blacks under the U.S. Constitution (Williamson 1984).

[118] The desegregation of the U.S. Armed Forces would occur six years before the *Brown* decision when, on July 26, 1948, President Harry Truman issued Executive Order 9981, prohibiting racial discrimination in the military. For detailed discussions of *Brown v. Board of Education of Topeka* and its impact on racial integration and equality in the United States over the past 50 years, see Bell (2004), Ogletree (2004), and Rhode and Ogletree (2004).

based upon race, religion, or national origin.[119] Over the next several years, Congress passed the Voting Rights Act of 1965—making obstacles to restrict blacks from voting illegal (e.g., literacy tests)—and the Civil Rights Act of 1968, prohibiting discrimination in the sale, rental, and financing of housing (see, generally, Branch 1988).[120] It was not until 1967, however, that the Supreme Court finally outlawed anti-miscegenation statutes that had in been place since the colonies were initially established over three and a half centuries earlier (see *Loving v. Virginia*, 388 U.S. 1 [1967]).[121]

Many whites continued to violently victimize and murder blacks with very little legal risk after the Civil War—this victimization commonly came in the form of lynching (see Clarke 1998; Senechal de la Roche 1997b; Wells-Barnett 1895). Vigilante justice in the form of the lynch mob was disproportionately directed at freed blacks in the South, and used to uphold the racial social order established in slavery and preserved through Black codes and Jim Crow laws (Kaufman-Osborn 2006a). Moreover, whites participating in lynch mobs were rarely apprehended, charged, and convicted of any

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[119] Swinton (1990, p. 156) estimates the cost of labor market discrimination against blacks between 1929 and 1969 at $1.6 trillion (in 1983 dollars).

[120] Justice Stephen Breyer (2005, p. 32) remarked, "It took a civil war and eighty years of racial segregation before the slaves and their descendants could *begin* to think of the Constitution as theirs" (emphasis added) (cf. Sunstein 1993).

[121] Congressional seniority rules and powerful committee chairmanships gave the one-party South tremendous leverage over legislation for the first two-thirds of the twentieth century (Manza 2000). From the 1930s through the 1960s, Southern Democracts vigorously fought (and often undermined) social policies that potentially threatened the racial hierarchy of the South (Goldfield 1997; Quadagno 1996). For example, Southern Democrats fought to limit social security insurance, unemployment insurance, and Aid to Dependent Children (forerunner to AFDC) (Lieberman 1998). Although these were race-neutral social programs available to both blacks and whites, many Southern Democrats were able to successfully convince their constituents that such programs unnecessarily extended the scope of government (cf. Sears, Sidanius, and Bobo 2000, Chapter 8) and that undeserving blacks would disproportionately benefit from these policies to the detriment of whites (see Gilens 2000; Hancock 2004; Mendelberg 2001; Wilson 1999; but cf. Huber and Lapinski 2006). Southern Democrats would also successfully oppose or significantly weaken key policy proposals related to community action, housing reform, welfare reform, and national childcare (Quadagno 1996).

serious offense (Curriden and Phillips 1999; Tolnay and Beck 1995).[122] Between 1880 and 1930, an estimated 2,462 black men, women, and children were lynched (constituting nearly 90 percent of all lynchings during that period), 94 percent of which were done by whites (Tolnay and Beck 1995). Although evidence suggests that most blacks were lynched for allegedly committing serious offenses (most commonly, raping a white woman), blacks were also lynched for such minor offenses as gambling, voting, arguing with whites, and dating white women (Tolnay and Beck 1995). Perhaps not surprisingly, lynch mobs were primarily used as a way to circumvent the formal judicial process (Messner, Baller, and Zevenbergen 2005). Lynch mobs would often remove their victims from the custody of legal officials and carry out their own "executions." For example, 80 percent of lynch mob victims in Georgia and 94 percent lynch mob victims in Virginia were taken from legal custody (Tolnay and Beck 1995). While lynch mobs often forcibly removed individuals from legal custody, it was not uncommon for legal officials to willfully turn over these individuals to the lynch mobs (see, e.g., Curriden and Phillips 1999).[123]

Not only were blacks disproportionately subjected to illegal executions at the hands of lynch mobs from Reconstruction to the Great Depression, they were also disproportionately subjected to legal executions at the hands of criminal justices officials. During this same period, in addition to the nearly 2,500 illegal hangings of blacks, over

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[122] Professor James H. Chadbourn's (1933) seminal study, sponsored by the Southern Commission on the Study of Lynching, revealed that less than one percent of whites who participated in lynchings between 1889 and 1932 were arrested and convicted.

[123] Ogletree and Sarat (2006) note that there has been remarkable silence concerning America's history of lynching. Prior to the summer of 2005, the U.S. House of Representatives passed four anti-lynching bills and seven presidents, both Democrats and Republicans, endorsed legislation making lynching a federal crime; nonetheless these efforts were consistently opposed by southern senators who used filibuster to prevent the legislation from receiving a formal vote. It was not until June 2005 that the senate voted to formally apologize for failing to previously pass anti-lynching legislation.

three thousand blacks were legally executed (an average of over 50 per year) (Espy and Smykla 2004; Tolnay and Beck 1995). While blacks, on average, constituted 11.4 percent of the nation's population between 1870 and 1930 (U.S. Bureau of the Census 2002b), they represented 47.9 percent of all executions in the United States during same period (Espy and Smykla 2004).

The massive wave of hangings of blacks began to rapidly decline during the Great Depression, but blacks were still disproportionately subjected to death penalty from the time of the Great Depression until the official moratorium was placed on the death penalty after the *Furman* decision. In fact, Clarke (1998) and others (e.g., Kaufman-Osborn 2006a) have argued that lynching declined after the Great Depression primarily because state executioners replaced the lynch mobs in reinforcing the racial hierarchy established during slavery and preserved through various legal and non-legal mechanisms. From 1930 to 1972, 2,034 blacks were executed in the United States, constituting 52.3 percent of all executions (Espy and Smykla 2004), although they only comprised 10.4 percent of the total population during this period (U.S. Bureau of the Census 2002b).

### *4.1.3 The 1970s to the Present*

While the civil rights legislation of the mid- and late-1960s did much to improve the legal status of blacks and other racial/ethnic minorities in the United States in the civil arena,[124] the same could not be said for the criminal justice arena (Reiman 1979). Since

[124] Blacks would still face obstacles with respect to equal protection under the law well after the Civil Rights Movement. Twenty-four years after the Civil Rights Act of 1964, then-president Ronald Regan vetoed the Civil Rights Restoration Act of 1988 that expanded the reach of non-discrimination laws to private institutions receiving federal funding, although Congress would later override the veto. Three years later, then-president George H.W. Bush vetoed several versions of the Civil Rights Act of 1991—which

the early 1970s, the United States has steadily incarcerated larger proportions of its population (Currie 1998; Mauer 1999). Although the United States constitutes less than five percent of the world's population,[125] it houses nearly 25 percent of the world's incarcerated population (U.S. Department of Justice 2004a). In 1971, the incarceration rate (prison and jail) in the United States was 143 per 100,000. This rate increased to 241 per 100,000 in 1981, 482 per 100,000 in 1991, and 714 per 100,000 in 2003 (U.S. Department of Justice 2004a). In 2003, over 2 million individuals were incarcerated in prisons and local jails (U.S. Department of Justice 2004a)[126] and 4.5 million individuals were either on probation or parole (Feldman, Schiraldi, and Ziedenberg 2001).[127] The dramatic rise in incarceration has disproportionately impacted blacks and Hispanics, particularly black and Hispanic males. Blacks and Hispanics comprise nearly two-thirds (63 percent) of prison and jail inmates, although these two groups only comprise one-quarter (25 percent) of the nation's population (U.S. Department of Justice 2004a). By contrast, in the 1950s, over two-thirds individuals incarcerated in the United States were white (Tonry 1995). While currently comprising approximately 13 percent of the United States population, blacks constitute 43 percent of state prison inmates, 40 percent of federal prison inmates, and 40 percent of local jail inmates (U.S. Department of Justice 2004a). In 2003, the incarceration rates for black and Hispanic males were well above the national average of 1,331 per 100,000 males. Blacks and Hispanics males were incarcerated at rates of 4,834 per 100,000 and 1,778 per 100,000, respectively, while

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strengthened existing civil right laws and allowed individuals to receive damages in cases of intentional employment discrimination—before finally reversing himself and signing the bill into law.

[125] The current population of the United States is approximately 290 million. The world's population is estimated around 6.3 billion (U.S. Bureau of the Census, Population Division/International Programs Center 2004).

[126] In 2003, just four states—Texas, California, Florida, and New York—accounted nearly one-quarter of the total incarcerated population in the United States (U.S. Department of Justice 2004a).

[127] Over 16 million people in the United States have a felony conviction (Manza and Uggen 2005, p. 9).

white males were imprisoned at nearly half of the national average (681 per 100,000) (U.S. Department of Justice 2004a). Twelve percent of black males and 3.7 percent of Hispanic males in their twenties are in prison or jail, compared with 1.6 percent of white males (U.S. Department of Justice 2004a) and one in three black males in their twenties is either incarcerated, on probation, or on parole (Mauer 1999; Miller 1996; U.S. Department of Justice 2004a). Black and Hispanic females are also incarcerated at a significantly higher rate than white females. In 2003, both black and Hispanic females were incarcerated at rates well above the national average of 119 per 100,000 (352 and 148, respectively), while white females were incarcerated at a significantly lower rate (75 per 100,000) (U.S. Department of Justice 2004a).[128] Although the causes of these drastic racial differences in incarceration rates continue to be debated by scholars (see Arvanites and Asher 1998; Bennett, DiIulio, and Walters 1996, pp. 43–46; Brown *et al.* 2003, Chapter 4; Dilulio 1996; Greenberg and West 2001; Jacobs and Carmichael 2001; Michalowski and Pearson 1990; Pettit and Western 2004; Sampson and Lauritsen 1997b; Smith 2004; Sorensen and Stemen 2002; Tonry 1995, Chapter 2; Western 2006, Chapter 2; Wilbanks 1987), a wide range of evidence suggests that these differences cannot be completely attributed to the differential criminal involvement of blacks and Hispanics, and are partly attributable to the differential treatment that blacks and Hispanics receive in the criminal justice system (Blumstein 1993; Chambliss 1999; Sampson and Lauritsen 1997a; Wacquant 2005a). For example, examining arrest and incarceration data in Pennsylvania between 1991 and 1995, Austin and Allen (2000) discover that only 42 percent of the racial imbalance in prison admissions was explained by arrest differentials.

[128] In the 1990s, the probability of serving time in a state or federal prison was 4 percent for whites, 16 percent for Hispanics, and 29 percent for blacks (Tonry 1995).

With respect to non-violent drug offenses, they find that black arrest rates only accounted for 26 percent of the racially disproportionate drug sentences, suggesting that disparities are highest where discretion is greatest.

An enormous increase in the number of individuals on death row has also occurred since the early 1970s. In 1971 (the year before the Supreme Court commuted the all of the death sentences after the *Furman* ruling), 641 individuals were on death row (0.32 per 100,000) (Death Penalty Information Center 2008). At the end of 2003, there were 3,504 people awaiting execution in the United States (1.21 per 100,000)—an increase of 546 percent (Death Penalty Information Center 2008). Similar to the pre-moratorium years, blacks continue to be disproportionately represented among those sentenced to death and those executed since capital punishment was reinstated, although their proportion relative to whites has significantly decreased from earlier periods. Blacks constituted 12.3 percent (on average) of the total population from 1976 to 2002 (U.S. Bureau of the Census 2002b), but comprised 42 percent of death row inmates and 34 percent of total executions (281 executions) during the same time period (Death Penalty Information Center 2008).[129] Much stronger racial differences exist for the race of the victim for individuals executed since 1976. Since 1976, blacks have comprised approximately 50 percent of all homicide victims in the United States (Fox 2005), yet over 80 percent of executions have been carried out on individuals sentenced to death for killing white victims (Death Penalty Information Center 2008).

[129] Although not as pronounced, racial disparities in the capital punishment system are evident for females as well. Although black females have a homicide victimization rate that is over four times greater than white females (Fox 2005), female offenders convicted of murdering white victims are over five times more likely to be on death row than female offenders convicted of murdering black victims (.63 versus .12) (Streib 2002a). Similarly, while black females comprise approximately twelve percent of all females in the United States, they constitute 31 percent of the females currently on death row (Streib 2002a).

Although scholars acknowledge that early data on executions in the United States are far from complete, they note that there have been at least 15,645 legal executions in the United States in the past four centuries (Death Penalty Information Center 2008; Espy and Smykla 2004). Over half of these executions have been of black offenders (50.5 percent), although blacks have never comprised over 20 percent of the nation's total population in any given year since the government began collecting population statistics and they have not constituted more than 15 percent of the nation's population since 1850 (U.S. Bureau of the Census 2002b). Racial differences in the administration of capital punishment become more pronounced when examining the death penalty for rape (White 1991). As mentioned in Chapter Two, anti-death penalty attorneys and scholars began attacking the constitutionality of the death penalty based upon racial disparities in the administration of capital punishment in southern states for the crime of rape in the early 1950s (see Wolfgang and Riedel 1975). During the 400 years of capital punishment in this country, at least 947 individuals have been executed for the crime of rape. Of these individuals, 89.2 percent (843) have been black and nearly all were convicted for raping white women (Espy and Smykla 2004).

Death penalty opponents point to the history of slavery, slave codes, Black Codes, Jim Crow laws, and the uneven administration of criminal justice in this country as evidence that the death penalty has always been imposed in a racially discriminatory manner and, like lynchings of old, have been and continue to be used to enforce the legal and social superiority of whites over blacks (see Bright 1995a; Ogletree 2002). Abolitionists also point to the disproportionate arrests and incarceration of blacks (see, e.g., Chiricos and Crawford 1995), as well as laws that differentially (and deleteriously)

impact blacks offenders (see, e.g., Donziger 1996; Provine 2006), as evidence that the criminal justice system, as a whole, has yet to adopt "color-blind" practices and policies.[130] Furthermore, death penalty opponents argue continuing arbitrariness and capriciousness in the capital charging-and-sentencing process, in addition to racial bias, underscores the fact that the procedural changes implemented after *Furman* have done very little to guarantee the death penalty is being applied in a constitutionally acceptable manner (see, e.g., Bright 1995b; Nakell and Hardy 1987).

While acknowledging the existence of past problems of racial bias in the administration of criminal justice, in general, and the death penalty in the particular, proponents of capital punishment argue that capital punishment is both morally permissible and necessary (see Lakoff 2002, pp. 208–209; Pojman 2003, pp. 54–58), the procedural safeguards currently in place have eliminated arbitrariness and racial/ethnic discrimination in the criminal justice system (Wilbanks 1987), and the death penalty is

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[130] For example, in 1984 and 1988, two federal sentencing laws were enacted that made the punishment for selling crack cocaine 100 times more severe than the punishment for selling an equal amount of powder cocaine. A person convicted of selling five grams of crack cocaine received the same sentence as someone convicted of selling 500 grams of powder cocaine—a five-year mandatory minimum sentence. Although two-thirds of crack cocaine users are white or Hispanic, 84.5 percent of individuals convicted of selling crack are black (10.3 percent are white and 7.1 percent are Hispanic). In contrast, 58 percent of defendants convicted of selling powder cocaine were white, 26.7 percent were black, and 15 percent were Hispanic. In 1995, the USSC studied the racially disparate effects of these laws and recommended equalizing the punishment for powder and crack cocaine (see U.S. Sentencing Commission 1995). In response to the USSC's report, the DOJ, under then-Attorney General Janet Reno, urged Congress to reject the USSC's recommendation, citing the greater dangers associated with the trafficking of crack cocaine (U.S. Department of Justice 1995). The U.S. Congress ultimately followed the advice of the DOJ, marking the first time that Congress went against the recommendation of the commission. Following Congress's rejection of the recommendation, then-president William Jefferson Clinton signed the rejection into law (Feldman *et al.* 2001).

The deleterious impact of these differential punishments on the black community has been undeniable. Prior to 1986, the average drug sentence for blacks was 6 percent longer than that of whites, but four years later the average sentence for black drug offenders was 93 percent higher (Tonry 1995). In addition to lengthening sentences, the new "war on drugs" also had a significant impact on black imprisonment rates because police more aggressively enforced drug laws in areas where blacks and Hispanics resided, net of actual behavior (see Blumstein 1993, p. 753). For example, in 1983, the year before the aforementioned sentencing guidelines were enacted, 63 percent of the prison commitments in Virginia involved whites and 37 percent involved minorities (primarily blacks). Six years later the pattern reversed, with 65 percent of prison commitments involving minorities and 34 percent involving whites, although drug *use* by whites and minorities remained relatively constant during this period (Cross 2003).

now strictly reserved for the most heinous crimes and criminals (Cassell 2003, pp. 209–12). In response to the disproportionate number of blacks and Hispanics currently on death row and that have been executed since *Furman*, retentionists posit that blacks and Hispanics are more likely to be perpetrators of criminal homicide, their homicides tend to be more aggravated (i.e., more heinous), and they tend to have more extensive (and violent) criminal backgrounds (Cassell 2003, pp. 201–205; Wilbanks 1987). Some analysts have also argued that the heinousness of the white-victim homicides accounts for the fact that most executions carried out since *Furman* (over 80 percent) have been of defendants convicted of killing white victims and the fact that most people currently on death row have murdered white victims (83 percent) (see, e.g., Kleck 1969, 1981; Klein and Rolph 1989). Unfortunately, early debates over the impact of race on the capital charging-and-sentencing process were rarely grounded in solid empirical research, as both abolitionists and retentionists relied primarily on anecdotal evidence and aggregate raw statistics when making their claims (see, generally, Baldus 1980). This began to change in the 1930s, however, when analysts began attempting to systematically assess the role of race and other extra-legal factors in the administration of the death penalty. Since that time a large body of research literature has emerged on the role of extra legal factors in the capital charging-and-sentencing process—particularly the role of race and region (see, generally, Baldus and Woodworth 1997, 2003; U.S. General Accounting Office 1990). These studies are discussed in greater depth below and their contribution to the question of the presence of arbitrariness and bias is assessed.

## 4.2 Research on Extra-Legal Factors and Capital Punishment

### *4.2.1 Pre-Furman Empirical Studies*

Social scientists have been conducting research on the influence of extra-legal factors—particularly race/ethnicity—in criminal sentencing at least since the late 1920s (see, e.g., Sellin 1928).[131] These studies typically compared the sentence severity of white and non-white offenders (usually black offenders) for similar crimes. Although somewhat crude by contemporary scientific standards, several of these studies discovered that blacks were typically more likely to receive longer sentences than whites for similar offenses *and* that the impact of race on sentencing decisions was influenced by the region where the case was tried (see, e.g., Sellin 1935). In the 1930s, when the United States government started systematizing the collection, compilation, and publication of official crime statistics, the legal and academic communities (mainly the academic community, see Baldus *et al.* 1998) began increasingly turning their attention to apparent disparities in the administration of capital punishment. Scholars were also becoming increasingly aware that the racially discriminatory treatment of blacks in the criminal justice system appeared to be most pronounced when blacks were accused of challenging or violating the racial hierarchy—particularly victimizing whites (see Du Bois [1940] 1968; Wacquant 1997). Recognizing this fact, Johnson (1941) conducted one of the earliest studies of death penalty sentencing that simultaneously considered both the race of the offender and the race of the victim. Examining more than 300 murder cases from

[131] In fact, much evidence suggests that social scientific research on racial disparities in criminal sentencing was being conducted by black sociologists at the turn of the twentieth century; however this body of work was largely ignored or negated by mainstream criminologists at the time (Gabbidon 2001; Wright 2002a, b). The Atlanta Sociological Laboratory's study, *Some Notes on Negro Crime, Particularly in Georgia*, published in 1904, discovered inequities in the length of sentences between blacks and whites and highlighted the strong racial bias in the convict-lease system (see Du Bois 1904).

Richmond, Virginia and five counties in North Carolina between 1930 and 1940, he discovered that 32 percent of black-offender/white-victim homicides received the death sentence compared to 13 percent of white-offender/white-victim homicides. Johnson also found that death sentences were imposed in 17.5 percent of all white-victim cases, but only in four-tenths of one percent of black-victim cases.[132] Garfinkel (1949) extended Johnson's analysis by examining 673 homicide cases (821 offenders) from ten countries in North Carolina during the same time period and looking at grand jury indictments and prosecutorial charging decisions, as well as sentencing decisions. Garfinkel found that blacks accused of murdering whites were significantly more likely to be indicted for first-degree murder, charged with first-degree murder by prosecutors (only first-degree murders were eligible for the death penalty in North Carolina during this period), and sentenced to death. In particular, black-offender/white-victim homicides were nine times more likely to result in a first-degree murder conviction than black-offender/black-victim homicides (43 percent vs. 5 percent) and nearly three times more likely to result in a first-degree murder conviction than white-offender/white-victim homicides (43 percent vs. 15 percent). With respect to sentencing, black-offender/white-victim homicides were over nine times more likely to result in a death sentence than black-offender/black-victim homicides (37 percent vs. 4 percent) and over three times more likely to result in a death sentence than white-offender/white-victim homicides (37 percent vs. 11 percent). Garfinkel also discovered that white-victim homicides, regardless of the race of the offender, were significantly more likely to result a first-degree murder conviction than black-victim homicides (24 percent vs. five percent) and

[132] Johnson (1941) discovered that there was only one homicide indictment for a white-offender/black-victim homicide in Richmond, Virginia and only three homicide indictments for white-offender/black-victim homicides in North Carolina during the entire 11 year period.

significantly more likely to result in a death sentence than black-victim homicides (18 percent vs. 4 percent). Early research also suggested that racial disparities in the capital punishment system were evident outside of the South. Examining 204 homicide cases in Philadelphia, Pennsylvania in 1970, Zimring and colleagues (1976) discovered that 65 percent of defendants convicted of murdering a white victim were sentenced to either death or life imprisonment, whereas only 25 percent of defendants convicted of murdering a black victim received a death or life sentence. Moreover, black defendants convicted of murdering white victims were twice as likely to receive a death sentence or life imprisonment than black defendants convicted of murdering another black person.

Although these early studies consistently uncovered patterns of racial disparity in capital charging or sentencing, they were criticized for not being able to adequately differentiate between simple racial disparity and racial discrimination because they failed to consider the legitimate legal characteristics that could be correlated with the race of the defendant or the race of the victim. To address this shortcoming, Wolfgang and Riedel (1973, 1975) analyzed data on over 3,000 rape convictions from eleven southern states between 1945 and 1965, collecting detailed information about the offender, the victim, the facts of the crime, and the trial. They discovered that black offenders were over six times more likely to be sentenced to death for rape than white offenders and black offenders convicted of raping white victims were nearly eighteen times more likely to be sentenced to death than all other racial combinations (Wolfgang and Riedel 1973). After taking into account the presence of a contemporaneous felony (e.g., armed robbery, burglary, *et cetera*), Wolfgang and Riedel found that blacks were 20 times more likely to be sentenced to death than whites. Even after considering over two-dozen legally

relevant variables pertaining to the offender, the victim, the offense, and trial characteristics, they discovered that these racial differences remained and that race was the single most important predictor of whether a defendant received a death sentence (see also LaFree 1989).

While Wolfgang and Riedel focused on the death penalty for the crime of rape in which the victim was not killed, Baldus and colleagues (1990) investigated 300 homicide defendants in Georgia who were tried and convicted before *Furman* (see also Baldus and Woodworth 1983; Baldus, Woodworth, and Pulaski 1985). Similar to Wolfgang and Riedel's rape study, Baldus *et al*. collected data on the specific characteristics of the case in order to ascertain the heinousness of the crime and compare cases that were roughly similar with respect to their level of aggravation. In particular, they divided cases into six levels of aggravation (ranging from lowest to highest) and examined the proportion of all defendants sentenced to death at each level and then the proportion of defendants sentenced to death based on their race and the race of their victim(s) at each level. Baldus *et al*. argued that any racial differences *within* a level would be more likely attributable to the actual influence of race, rather than an important case characteristic (see, generally, Baldus 1980; Baldus and Cole 1977). They discovered that, although Georgia had one of the highest death sentencing rates in the nation, death sentences were extremely rare: only 15 percent of the 294 murder defendants under investigation received a death sentence. Without considering the level of aggravation of the case, black offenders were over twice as likely to be sentenced to death than white offenders (19 percent vs. 8 percent); killers of white victims were nearly twice as likely to be sentenced to death than killers of black victim (18 percent vs. 10 percent); and black-

offender/white-victim homicides were more than three times more likely to result in a death sentence than any other offender/victim combination. After taking into account the level of aggravation of the case, they discovered that black-offender/white-victim cases were, on average, nearly four times (3.9) more likely to result in a death sentence than white-offender/white-victim cases. The differences between black-offender/white-victim and white-offender/white-victim cases, however, were not uniform throughout the six levels of aggravation. At the lowest level of aggravation (level 1), almost no cases resulted in a death sentence and at the highest level of aggravation (level 6) almost all cases resulted in a death sentence.[133] Racial disparity, however, was greatest in the mid-range cases: at level 3, black-offender/white-victim cases were over 14 times more likely to result in a death sentence than white-offender/white-victim cases; at level 5, black-offender/white-victim cases were over twice as likely to result in a death sentence than white-offender/white-victim (Baldus *et al.* 1990, p. 144). Very few black-victim cases resulted in a death sentence—10 percent (12 out of 115 cases)—and only one white-offender/black-victim case resulted in a death sentence (at the fifth level of aggravation) (see also Baldus and Woodworth 2004).

In addition to analyzing the impact of race in charging, indictment, conviction, and sentencing decisions, scholars also examined racial differences in commutation decisions. No death sentence handed down by a judge or capital jury is absolutely final. In every death penalty state, death sentences may be commuted to a life sentence or a term of years by the governor or the state's pardons and parole board. These decisions

[133] Five percent of black-offender/white-victim cases resulted in a death sentence at level 1, whereas no white-offender/white-victim cases resulted in a death sentence at level 1. At level 2 and level 5, black-offender/white-victim cases were slightly more likely to result in a death sentence than white-offender/white-victim cases (1.3 and 1.7 times more likely, respectively).

may be influenced by a host of political and social factors, including, potentially, the race of the defendant or victim (Pridemore 2000). In one of the earliest examinations of the role of race in the commutation decisions, Mangum (1940) discovered that—over a ten year period in Florida (1928 – 1938)—75 percent of blacks defendants sentenced to death were ultimately executed, whereas 56 percent of white defendants sentenced to death were executed. (Because commutation requests are made in nearly every single case, these percentages represent the proportion of requests rejected by the governor or state pardons and parole board.) Examining executions in North Carolina between 1933 and 1939, Johnson (1941) discovered that 74 percent of defendants sentenced to death for killing white victims were executed, whereas 65 percent of defendants sentenced to death for killing black victims were executed. Moreover, he found that 81 percent of black offenders sentenced to death were ultimately executed. Analyzing commutations in Texas between 1924 and 1968, Koeninger (1969) noted that 76 percent of all commutations were of white defendants and that 99 percent of black defendants sentenced to death were executed (see also Marquart, Ekland-Olson, and Sorensen 1994). Although evidence of racial disparity in commutation decisions appear to be primarily concentrated in the southern states (see Bedau 1964, 1965; Kleck 1981), similar disparities have also been discovered outside the South. For example, Wolfgang and colleagues (1962) found that whites sentenced to death for felony-murder were nearly three times more likely to have their death sentences commuted than blacks sentenced to death for felony murder (17.4 percent vs. 6.3 percent).

As noted in Chapter Two, statistical evidence of racial disparity and racial discrimination in the administration of the death penalty was first presented in *Hampton*

*v. Commonwealth* (58 S.E.2d 288 [Va. 1950]). This case, known as the "Martinsville Seven," involved seven young black men sentenced to death for raping a white woman in Virginia in 1949.[134] Rather than attacking the death sentences on procedural grounds on appeal, the attorneys of the defendants presented statistical evidence showing 45 black men had been executed for rape between 1908 and 1949, but no white man had been executed (see Rise 1995). The attorneys also noted that twice as many black men had been sentenced to life imprisonment for rape than white men. The both the trial court and the Virginia Supreme Court of Appeals rejected the defendants' claim of racial discrimination and the U.S. Supreme Court denied certiorari (*Hampton v. Virginia* 339 U.S. 989 [1950]). One month after the Supreme Court's refusal to grant certiorari, all seven men were executed within 72 hours of one another. Although the defense's claims did not prevail, the case was largely credited for launching the NAACP's campaign against the death penalty (Rise 1995). Future attempts to use statistical evidence to challenge the constitutionality of the death penalty on racial grounds before the moratorium was placed on capital punishment would also be unsuccessful (see Chapter Two).

### *4.2.2 Post-Furman Empirical Studies*

The U.S. Supreme Court decided to commute all existing death sentences and place a moratorium on the death penalty after the *Furman* decision because it believed that capital punishment, as administered, violated the Eighth Amendment (see Chapter Two). In particular, the Supreme Court held that the existing statutes failed to distinguish capital murder from non-capital murders *and* they failed to offer jurors any guidance with

[134] The seven young men were: Joe Henry Hampton, Frances Desales Grayson, Frank Hairston, Jr., Howard Hairston, James Luther Hairston, Booker T. Millner, and John Clabon Taylor.

respect to sentencing in capital cases. Statistical evidence of the racially discriminatory administration of capital punishment was presented to the court in *Furman* (i.e., Bedau 1964, 1965; Carter and Smith 1969; Koeninger 1969; Wolfgang *et al.* 1962), but the court did not use this evidence as the basis for their decision. In fact, only Justice Douglas and Justice Marshall cited this statistical evidence in their opinions.[135] But although the majority of the Supreme Court Justices passed silently over the issue of racism in the administration of capital punishment, abolitionists were well aware that the collection of such data was still necessary because death states quickly revised their capital statutes to address the court's concerns in *Furman* and began sentencing defendants to death again (Haines 1996).

Shortly after states began reestablishing their capital punishment systems, scholars began conducting studies of the death penalty in order to determine whether the post-*Furman* capital statutes had eliminated the arbitrariness (and potential racial bias) that was rampant under the pre-*Furman* capital systems. Although some scholars found some evidence that the new statutes had eliminated or significantly reduced the amount of arbitrariness, caprice, and bias in the capital process in the years immediately following the *Furman* decision (for a discussion, see Baldus *et al.* 1990), the vast majority of studies discovered that race still had a strong influence at one or more of the decision stages in the capital charging-and-sentencing process (Baldus *et al.* 1998). In one of the first studies of post-*Furman* death sentences, Bowers and Pierce (1980) examined death sentences in Florida, Georgia, Ohio, and Texas in the five years following *Furman* (these four states were responsible for over 70 percent of the death

[135] By comparison, when the Supreme Court ruled that racial discrimination in public schooling was unconstitutional in *Brown v. Board of Education of Topeka*, nearly 20 years before the *Furman* decision, its finding was heavily influenced by seven social science studies (see Rosen 1972).

sentences during this period) and discovered that black-offender/white-victim homicide cases were still more likely to result in a death sentence than any other offender/victim racial combination. Subsequent research also discovered that white-victim homicide cases (Barnett 1985; Berk and Lowery 1985; Bienen *et al.* 1988; Ekland-Olson 1988; Foley 1987; Gross and Mauro 1984, 1989; Nakell and Hardy 1987; Paternoster 1984; Paternoster and Kazyaka 1988) and black-offender/white-victim homicide cases (Baldus and Woodworth 1983; Bowers 1983; Paternoster 1984; Radelet 1981; Vito and Keil 1988; Zeisel 1981) were more likely to be noticed for the death penalty or sentenced to the death sentence in the post-*Furman* era. Still other evidence suggested that black defendants were more likely to have their sentences affirmed by the state's high court than white defendants (see, e.g., Radelet and Vandiver 1983). Baldus and colleagues (1986a) conducted one of the most wide-sweeping analyses by examining death sentences in 24 states from 1977 through 1984.[136] Comparing cases in which a contemporaneous felony was present, they discovered that white-victim cases were significantly more likely to result in a death sentence in ten states and white-victim cases were marginally more likely to result in a death sentence in eight other states. With respect to the race of the offender, they did not find a consistent pattern of racial discrimination—in some states, black offenders were more likely to be sentenced to death, in other states white offenders where likely to be sentenced to death, and still in other states, there were no statistically significant race-of-offender effects. Gross and Mauro (1989) also conducted a multiple-state study (Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, Virginia) of the death penalty from 1976 through

[136] The 24 states were: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia (1974 – 1984), Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, and Washington.

1980 and considered the commission of a contemporaneous felony, the relationship between the offender and victim, and the number of victims when comparing cases (see also Gross and Mauro 1984). They discovered that white-victim homicides increased the likelihood of a death sentence by a factor of four in Illinois, five in Florida, and seven in Georgia. The methodological approaches of these early post-*Furman* studies significantly varied, however, and were criticized by many death penalty advocates for failing to consider a broad range of legal case characteristics that could be correlated with race and legitimately account for these racial patterns.

In an attempt to address these concerns, Baldus and colleagues (1990) conducted what was considered the most comprehensive study of the death at that time (see Kennedy 1988). As mentioned in Chapter Two, Baldus *et al*. collected data for two separate studies on Georgia's capital charging-and-sentencing process and these data were presented in to the U.S. Supreme Court in *McCleskey* (for a detailed description of the study, see Chapter Two). The first study, the Procedural Reform Study (PRS) contained data on 700 murder cases in Georgia from 1969 through 1978. The second study, the Charging-and-Sentencing Study (CSS) collected data on 1,066 murder and voluntary manslaughter convictions in Georgia from 1973 through 1979. Baldus *et al*. simultaneously considered 23 cases factors in the PRS and discovered that white-victim cases were 4.3 times more likely to result in a death sentence than black-victim cases. The larger of the two studies, the CSS, collected data on over 230 legitimate and illegitimate case characteristics. After controlling for 39 relevant case characteristics, Baldus *et al*. discovered that prosecutors were 3.2 times more likely to seek the death sentence in white-victim cases than black-victim cases and juries were 4.3 times more

likely to impose the death sentence in white-victim cases than black-victim cases (Baldus *et al.* 1990).[137] They also discovered that prosecutors treat black-victim cases with greater leniency with respect to plea-bargaining for a reduced charge. Prosecutors were 4.2 times more likely to accept a voluntary manslaughter plea in black-victim cases than white-victim cases (Baldus *et al.* 1990, p. 361 n.47).[138]

Although the Supreme Court rejected McCleskey's claims by ruling that Baldus *et al*.'s statistical data were incapable of showing purposeful discrimination on the part of prosecutors, judges, and capital juries, researchers continued to conduct studies examining the impact of race and other legal factors on the capital charging-and-sentencing process. Following the Supreme Court's decision in *McCleskey*, the U.S. General Accounting Office (GAO) commissioned a study to evaluate all of the available evidence on the role of race in the capital punishment process (see U.S. General Accounting Office 1990). The report revealed that 82 percent (23 of 28) of all methodologically rigorous (and non-duplicate) studies examining the capital charging-and-sentencing process revealed that the race of the victim had a significant effect on the

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[137] Although the odds-multiplier was smaller for the race-of-victim effect in the prosecutorial discretion model than in the jury discretion model (3.2 versus 4.3), race-of-victim had significantly more explanatory power in the prosecutorial discretion models (as measure by its contribution to overall model fit) (Baldus *et al.* 1990, p. 167).

[138] Baldus *et al*. report an odds-multiplier (i.e., odds ratio) of .24 for white-victim cases with respect to prosecutorial discretion in accepting a plea for voluntary manslaughter. That is, white-victim cases were .24 times less likely to result in a plea for voluntary manslaughter compared to black-victim cases. The reciprocal of that odds-ratio ($.24^{-1} = 4.16$) represents the odds that black-victim cases result in a plea for voluntary manslaughter compared to white-victim cases. In other words, defendants charged with murdering black victims are over four times more likely to receive a plea for a reduced charge (i.e., voluntary manslaughter) than defendants charged with murdering white victims.

As mentioned in Chapter Two, Georgia prosecutors are also significantly more likely to seek the death penalty in cases that involve black offenders and white victims. Prosecutors sought the death penalty in 70 percent of black-offender/white-victim cases, 32 percent of white-offender/white-victim cases, 19 percent of white-offender/black-victim cases, and 15 percent of black-offender/black-victim cases. Georgia capital juries imposed the death sentence in 22 percent of black-offender/white-victim cases, 8 percent of white-offender/white-victim cases, 3 percent of white-offender/black-victim cases, and one percent of black-offender/black-victim cases.

probability of receiving a death sentence.[139] Offenders accused of murdering white victims, irrespective of their own race, were significantly more likely to be charged with capital murder and be sentenced to death. Studies conducted since the GAO report in California (Pierce and Radelet 2005; Rohrlich and Tulsky 1996; Weiss *et al.* 1999), Florida (Radelet and Pierce 1991), Illinois (Pierce and Radelet 2002), Maryland (Baldus and Woodworth 2001; Paternoster *et al.* 2004), Missouri (Sorensen and Wallace 1995), New Jersey (Baldus 1991; Weisburd and Naus 2001), North Carolina (Paternoster 1991; Unah and Boger 2001), Ohio (Williams and Holcomb 2001), Pennsylvania (Baldus *et al.* 1998), and South Carolina (Paternoster 1991; Songer and Unah 2006) all reveal that white-victim homicides are more likely to be noticed for the death penalty or result in a death sentence than black-victim homicides.[140] Furthermore, researchers examining the capital punishment process in Arizona (Thomson 1997), Illinois (Pierce and Radelet 2002), Maryland (Baldus and Woodworth 2001; Paternoster *et al.* 2004), Missouri (Sorensen and Wallace 1995), and New Jersey (Weisburd and Naus 2001) discovered that black-offender/white-victim homicides were more likely to be notice for the death penalty or result in a death sentence than any other offender/victim racial combination. In fact, the only studies conducted on the death penalty since the GAO report that did not

[139] Studies were considered methodological rigorous if they received a satisfactory rating on five dimensions: (1) study design, (2) sampling, (3) measurement, (4) data collection, and (5) analytical technique. Of the 52 studies originally examined, 28 studies met these criteria: Arkin (1980), Baldus, Woodworth, and Pulaski (1990), Barnett (1985) Berk and Lowery (1985), Bienen, Weiner, Denno, Allison, and Mills (1988), Bowers and Pierce (1980), Bowers (1983), Ekland-Olson (1988), Foley (1987), Foley and Powell (1982), Gross and Mauro (1984), Keil and Vito (1989), Keil and Vito (1996), Kleck (1981), Klein *et al.* (1987), Klein and Rolph (1989), Klemm (1986), Lewis, Mannle, and Vetter (1979), Murphy (1984), Nakell and Hardy (1987), Paternoster and Kazyaka (1988), Radelet (1981), Radelet and Pierce (1985), Radelet and Vandiver (1983), Riedel (1976), Smith (1987b), Vito and Keil (1988), and Zeisel (1981).

[140] Lee's (2007) recent study of death penalty charging decisions in California also revealed that defendants charged with murdering Hispanic-victims were significantly less likely to be noticed for the death penalty than defendants charged with murdering white-victims.

find race-of-victim or race-of-defendant effects were conducted in Colorado (Baldus, Woodworth, and Pulaski 1986b) and Nebraska (Baldus *et al.* 2002).[141]

Of particular note are the recent studies conducted in Maryland and North Carolina. These two studies represent the most comprehensive statistical examinations of the death penalty since the Baldus *et al*.'s (1990) landmark study in *McCleskey*.[142] Examining 1,311 death eligible cases in Maryland from 1978 through 1999 and considering a total of 123 legitimate and illegitimate case characteristics, Paternoster and colleagues (2004, pp. 35–39) discovered that white-victim cases were 1.8 times more likely to be noticed for the death penalty and three times more likely to have their death notices remain than black-victim cases. Black-offender/white-victim cases were over twice (2.1) as likely to be noticed for the death penalty than white-offender/white-victim cases, 2.6 times more likely to be noticed for the death penalty than white-offender/black-victim cases, and 2.8 times more likely to be noticed for the death penalty than other offender/victim racial combinations. With respect to death sentences, black-offender/white-victim cases were 2.6 times more likely to result in a death sentence than

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[141] Race-of-victim effects were not statistically significant in the Colorado study because of the extremely small sample size. Baldus *et al*. (1986b) were only able to identify 179 death-eligible cases over a five year period (1979 – 1984) and only four cases resulted in a death sentence. All four of these cases, however, were white-victim cases although 31 percent of all death-eligible cases were nonwhite-victim cases (see also Anderson 1991). A recent study conducted by Michael Radelet (2003) that examines Colorado's entire history of executions (1859 – 1972) reports that 25 percent of the state's 103 executions have been carried out against members of racial/ethnic minorities and 89.2 percent individuals executed in Colorado have were convicted of murdering white victims. In a follow-up to this study, Radelet and colleagues (2006) examine two decades of capital charging patterns in Colorado (1980 – 1999) and discover prosecutors were 4.2 times more likely to seek the death sentence in white-victim cases than in black-victim cases (p. 579).

[142] A third comprehensive statistical study was conducted in New Jersey (see Weisburd and Naus 2001). The study examined over 400 death eligible cases since 1982 and considered 110 legitimate and illegitimate case characteristics. Due to the small number of death eligible cases and the small number of total death sentences (55) the statistical models were very unstable and the results varied considerably depending on the factors used in the analytical models. Nonetheless, tentative results indicate that white-victim cases were significantly more likely to advance to the penalty phase than nonwhite-victim cases (see also Baldus 1991).

white-offender/white-victim cases, 3.8 times more likely to result in a death sentence than black-offender/black-victim cases, and 11.3 times likely to result in a death sentence than other offender/victim racial combinations. Paternoster and Brame also discovered that the racial disparities that occur at the early stages of the capital charging-and-sentencing process were not corrected through the advancing stages (see also Paternoster *et al.* 2004). Unah and Boger's (2001) analysis of nearly 2,000 murder cases in North Carolina between 1993 and 1997 also revealed strong race-of-victim effects. After considering a total of 113 legal and extra-legal factors, they discovered that prosecutors were three times more likely to seek the death penalty and judges and juries were 3.5 times more likely to impose the death sentence in white-victim cases than non-white victim cases.

Expanding the GAO's original study to include research conducted through 1997, Baldus and Woodworth (1997) discovered that death penalty studies have been conducted in all 38 death penalty states. Ninety-three percent of these studies found evidence of a race-of-victim effect and nearly 50 percent of these studies find evidence of a race-of-defendant effect. Studies from eleven of these states have been "well-controlled" studies, meaning they have taken into account ten or more non-racial case characteristics (Baldus and Woodworth 1997, 2003; Baldus *et al.* 1998, p. 1661 n.71).[143] For each of the states in which a well-controlled study has been conducted, a less well-controlled study was also conducted. In six of these states, the racial disparities were

[143] Well-controlled studies were conducted in California, Colorado, Georgia, Kentucky, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Pennsylvania, and South Carolina.

found to be stronger in the well-controlled studies.[144] In three states the race effects were weaker, but remained statistically significant (Baldus *et al.* 1998, pp. 1661–62).[145]

Not only does evidence suggest that the race of the victim and (to a lesser extent) the race of the defendant directly impacts capital charging-and-sentencing decisions (Baldus and Woodworth 2003; U.S. General Accounting Office 1990), death penalty appeals (Radelet and Vandiver 1983), commutation decisions (Marquart *et al.* 1994; Wolfgang *et al.* 1962), and executions (Jacobs *et al.* 2007; Keil and Vito 1992; Langbein 1999; Radelet 1989; Radelet and Mello 1986), it also suggests that race may have an *indirect* effect on the capital punishment process that increases the likelihood of a disproportionate death sentence. For example, a growing body of research literature suggests that: (1) prosecutors are more likely to proceed with capital cases with weak evidence when the defendant is a member of a minority group (Harmon 2001a, b; Parker, Dewees, and Radelet 2001);[146] (2) whites who hold racist attitudes towards blacks are more likely to support the death penalty (Aguirre and Baker 1993; Barkan and Cohn 1994; Mitchell and Sidanius 1995; Unnever and Cullen 2007), more likely to be allowed to serve on capital juries (Lynch 2006; Russell 1993; Young 2004), more likely to favor the conviction of the innocent over letting guilty defendants go free (Young 2004), and more likely to believe that the death penalty is the only appropriate punishment for convicted killers (Russell 1993); (3) prosecutors are more likely to use peremptory strikes

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[144] The six states were Colorado, North Carolina, New Jersey, Nebraska, Kentucky, Pennsylvania, and South Carolina.

[145] These states were California, Georgia, and Mississippi.

[146] Evidence of prosecutors' willingness to proceed with a capital prosecution with weak evidence when the defendant is a member of a minority groups has been discovered at both the state and federal levels. Bruck and colleagues' (2006) recent examination of the federal death penalty since it was reinstated in 1998 revealed that at least 15 defendants were who had their cases authorized for capital prosecution were subsequently acquitted or found innocent of the crime. Of these 15 defendants, 80 percent were racial/ethnic minorities (6 black, 6 Hispanic, and 3 white).

against potential black jurors during jury selection for capital trials—regardless of the race of the offender or victim—because black jurors are less likely to be conviction prone (Baldus *et al.* 1998, 2001; Bowers and Foglia 2003; Dieter 2005; Elliott-Engel 2008; Sommers and Norton 2007) and more likely to consider mitigating evidence (Bowers, Steiner, and Sandys 2001; Haney 2005); (4) black jurors are more likely to be intimidated by white jurors in jury deliberations—particularly black jurors who are least conviction prone (i.e., elderly black women) (Bowers *et al.* 2001; Eisenberg, Garvey, and Wells 2001b); (5) capital jurors frequently misunderstand instructions during trial (Bowers and Steiner 1999; Eisenberg and Wells 1993; Luginbuhl and Howe 1995) and racial discrimination is greatest when juror comprehension of courtroom instructions is poor (see Lynch and Haney 2000),[147] and jurors are more likely to vote for a death sentence when they are confused (Bowers and Foglia 2003; Dieter 2005; Frank and Applegate 1998; Garvey, Johnson, and Marcus 2000); (6) minority capital defendants, particularly blacks, tend to hold stigmatized status positions (net of actual individual behavior) (see Fleury-Steiner 2006; Kan and Phillips 2003),[148] and murderers of stigmatized individuals tend to be treated more leniently by prosecutors (Blume *et al.* 1998) and jurors (Baumer, Messner, and Felson 2000; Kleck 1991; Sundby 2003; but see Eisenberg, Garvey, and Wells 2003); and (7) minority capital defendants—particularly blacks and Hispanics—

[147] A growing body of experimental evidence suggests that racial/ethnic stereotypes are especially relevant when individuals' ability to process information is systematically diminished or when judgments become increasingly complex. In particular, individuals use racial/ethnic stereotypes (when available and apparently relevant) as a central theme around which they organize evidence concerning defendants' culpability, emphasizing stereotype-consistent information and negating stereotype-inconsistent information as way of simplifying judgment tasks (Bodenhausen 1990; Bodenhausen and Lichtenstein 1987; Bodenhausen and Wyer 1985). Negative affective states may also significantly impact decision-making, with heightened stereotyping being observed among both angry (Bodenhausen, Sheppard, and Kramer 1994) and anxious individuals (Baron *et al.* 1992). These affective states may be particular common among jurors in death penalty trials (Garvey 2000).

[148] For detailed discussions of the creation and diffusion of status value resulting from group membership, see Ridgeway (1991), Ridgeway and colleagues (1998) and Gould (2002).

are more likely to be represented by court appointed counsel, and capital defendants who are represented by court appointed counsel are more likely to receive a death sentence and more likely to have their appeals denied (see, generally, Beck and Shumsky 1997; Bright 1990, 1992, 1994; Dieter 1995; Gelman *et al.* 2004).[149]

In addition to focusing on the role of race and racial discrimination in the administration of capital punishment, scholars have examined the role that region plays in the capital charging-and-sentencing process. Since the moratorium on executions was lifted in 1976 after the *Gregg* decision, 82.2 percent of all executions have occurred in the South (American Civil Liberties Union 2004; Death Penalty Information Center 2008). Texas and Virginia, which currently incarcerate 13.7 percent of the nation's death row inmates, account for over 45 percent of executions since 1976. California and Pennsylvania, on the other hand, which house one-quarter the country's death row population, have only accounted for 1.4 percent of those executed during the same time period (Death Penalty Information Center 2008).

Although some scholars have hypothesized that there is a southern subculture of punitiveness and violence (see Ball-Rokeach 1973; Clarke 1998; Erlanger 1974, 1976; Zimring 2003), recent evidence suggests that there is little overall variation in support for capital punishment between Southerners and non-Southerners (Borg 1997). In fact, there appears to be tremendous variability in support for *and* use of capital punishment both across and within states (American Civil Liberties Union 2004; Baumer *et al.* 2003;

[149] Over 90 percent of the individuals on death row could not afford a private attorney (see Tabak and Lane 1989). Iyengar's (2007) recent analysis of the federal indigent defense system discovered that minorities and immigrants reside in jurisdictions that disproportionately contract with private attorneys (known referred to as Criminal Justice Act attorneys) rather than use federal public defenders who are salaried employees of the court. The study also reveals that Criminal Justice Act attorneys systematically under-perform federal public defenders with respect to conviction rates and sentence lengths, and their underperformance is primarily attributable to attorney experience, wages, law school quality, and average caseload.

Messner *et al.* 2005). Recent evidence suggests, however, that this variation can be partly accounted for by the structural characteristics of these jurisdictions (American Civil Liberties Union 2004; Baldus *et al.* 2002). Jacobs and Carmichael (2002), examining why states reinstated capital punishment after the *Furman* decision, discovered that a large minority presence, significant economic inequality, and political conservatism increased both the likelihood and rapidity of the return of capital statutes.[150] Similarly, Unah and Steenbergen (2005) discovered that state-level citizen ideology, institutional ideology, and political party competition influence the likelihood and rapidity of executions, net of defendant characteristics and location in the South.[151] Liebman and colleague's (2002) analysis of error rates in capital trials revealed that states and counties with high reversal rates had: (1) a homicide risk rate for whites equal to or greater than that of blacks; (2) higher proportion of blacks; (3) higher proportion of residents receiving public assistance; (4) lower arrest rates for Index offense (i.e., serious felonies); and (5) trial judges subjected to highly partisan elections.[152]

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[150] Jacobs and Carmichael controlled for the murder rate, violent crime rate, unemployment rate, level of urbanization, and region of the country. For a discussions of the impact of political conservatism on national criminal justice policy over the past several decades, see Abramsky (2002), Beale (1997), Beckett and Sasson (2000), and Simon (2007). Scholars have also discovered that state racial composition is associated with the passage of felon voting restrictions after the passage of the Fifteenth Amendment (Behrens *et al.* 2003, p. 596).

[151] *Citizen ideology* captures the public's dominant political values. *Institutional ideology* is distinct from citizen ideology and measures the liberalism of a state's policies (i.e., restrictiveness of gun law policies, abortion laws, temporary assistance to needy families, tax progressivity, and permissiveness of unionization). *Political party competition* measured the level of inter-party competition for both state Houses. Case-level factors included defendant's race/ethnicity, marital status, education level, criminal history, and age.

[152] For detailed discussions of the role of judicial politics in criminal proceedings, see Blume (1999), Bright (1997, 1998), Bright and Keenan (1995), Brooks and Raphael (2002), Helms and Jacobs (2002), Huber and Gordon (2004), and Schanzenbach (2007). See also Unah (2003) and Gordon and Huber (2002) for discussions of the impact of electoral politics on prosecutorial discretion in capital and non-capital cases, respectively. Boylan (2005) and Glaeser *et al.* (2000) provide thorough discussions of the potential impact of future "career aspirations" on prosecutorial discretion at the federal level.

Recent studies of capital punishment systems in California (Pierce and Radelet 2005), Colorado (Hindson *et al.* 2006), Georgia (Baldus *et al.* 1990; Kroll 1991), Illinois (Pierce and Radelet 2002), Maryland (Paternoster *et al.* 2004), Nebraska (Baldus *et al.* 2002), New Jersey (Baldus 1991; Weisburd and Naus 2001), Ohio (Williams and Holcomb 2001), and Texas (Brock, Cohen, and Sorensen 2000) all revealed that a small number of counties are responsible for the vast majority of death sentences in each state, net of legitimate case characteristics. In Maryland, for example, prosecutors in Baltimore County were 13 times more likely to seek the death penalty in death-eligible cases than prosecutors in Baltimore City (the state's largest city), five times more likely to seek the death penalty than prosecutors in Montgomery County, and three times more likely to seek the death penalty than prosecutors in Anne Arudel County, although Baltimore City, Montgomery County, and Anne Arudel County all had significantly higher homicide rates (Paternoster *et al.* 2004). Similarly, Baldus and colleagues' (2002) study of Nebraska revealed that prosecutors in urban counties in Nebraska were nearly 2.5 times more likely to seek the death penalty than prosecutors in rural counties. These findings are consistent with research on non-capital crimes which suggests that the larger social context is very important in understanding charging and sentencing decisions (see, e.g., Britt 2000; Helms and Jacobs 2002; Kautt 2002; Ulmer and Johnson 2004; Weidner, Frase, and Pardoe 2004).

### *4.2.3 Race and the Federal and Military Death Penalty*

The first execution under a federal death sentence was that of Thomas Bird in 1790 (Little 1999). Since that time, at least 343 individuals have been executed under federal jurisdiction: 39 percent white, 35 percent black, 19 percent Native American, and

7 percent either Hispanic or of unknown race/ethnicity. From 1900 through 1999, 61 percent of individuals executed under federal law were members of minority groups (see Little 1999). As of July 2004, 68.6 percent of defendants on federal death row (22 of 32) were members of minority groups (21 black, 1 Native American) (Death Penalty Information Center 2008).

As with all other state capital statutes, the federal death penalty was also invalidated after the *Furman* decision in 1972. Unlike most states, however, the federal death penalty was not reinstated until 16 years after *Furman* when the Drug Kingpin Act was signed into law in 1988 (U.S. Congress 1994).[153] The federal death penalty primarily differs from capital statutes at the state level in that federal prosecutors must seek approval from the Attorney General to seek the death penalty. The period from 1998 to 1994 is referred to as the "pre-protocol era" because federal prosecutors were only required to notify the Attorney General when they affirmatively wished to seek the death penalty against a defendant (U.S. Congress 1994). From November of 1988 to March of 1994, federal prosecutors sought approval for 52 death penalty cases and received approval in 47 of these cases (U.S. Department of Justice 2000). The raw numbers suggest strong racial disparities in the federal capital punishment system. Of the initial 52 cases, 75 percent of the defendants were black, 13 percent where white, 10 percent were Hispanic, and 2 percent were members of another minority group (U.S. Congress 1994).

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[153] See *Anti-Drug Abuse Act of 1988*, 21 U.S.C. § 848(e) (1988). Shortly after the *Furman* ruling, the federal government reinstated the death penalty for individuals convicted of aircraft hijacking that resulted in death. Due to the infrequency of this type of offense, the federal government would not have an active death penalty statute until 1988.

Beginning in 1995, when the Federal Death Penalty Act was signed into law, the U.S. Department of Justice adopted a protocol that required federal prosecutors to submit information on all federal cases that were death eligible, regardless of whether the prosecutor intended to seek the death penalty (U.S. Department of Justice 2000).[154] From 1995 through 2000, federal prosecutors submitted information on 685 death eligible federal cases and sought the death sentence in 183 of these cases (U.S. Department of Justice 2000). Then-Attorney General Janet Reno authorized 86.8 percent of the cases submitted by prosecutors (159 of 183 cases) (U.S. Department of Justice 2000). In 75 percent of these cases the defendant was a member of a minority group and over 50 percent were black, although the death penalty authorization rate was higher for white offender cases (38 percent) than black-offender cases (25 percent) and Hispanic-offender cases (20 percent).[155] White-offender cases were much more likely to result in a plea agreement (48 percent) than black-offender (25 percent) and Hispanic-offender (28 percent) cases. It is impossible to determine, however, whether federal prosecutors differentially offered plea bargains based on the race of the offender. Plea agreements require the cooperation of the defendant and it is possible that black and Hispanic offenders are less willing to accept plea agreements than white offenders.

Racial differences appear to be more pronounced when examining the race of the victim. The death penalty authorization rate for white-victim was cases 15 percentage points higher than the authorization rate minority-victim cases (37 percent vs. 21 percent). Race-of-victim bias also appears evident in the actual imposition of the federal death penalty (Baldus 2001; but see Klein, Berk, and Hickman 2006). Among all death

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[154] See *Federal Death Penalty Act of 1994*, 18 U.S.C. § 3591 (1994).
[155] Of the 312 defendants approved for capital prosecution since the federal death penalty was reenacted, 233 (75 percent) were members of minority groups (McNally 2004).

eligible cases, white-victim cases were over twice as likely to result in the death sentence compared to minority victim cases (5 percent vs. 2 percent). In the eleven states that actually imposed a federal death sentence, white-victim cases were also over twice as likely to result in the death sentence as minority-victim cases (17 percent vs. 8 percent). With respect to offender/victim racial combinations, black-offender/white-offender cases were almost four times more likely to result in a death sentence than cases with a black offender and a non-white victim (11 percent vs. 3 percent). In the eleven states that imposed a death sentence, black-offender/white-offender cases were over three times more likely to result in a death sentence than cases with a black-offender and non-white victim (24 percent vs. 7 percent) (U.S. Department of Justice 2000, 2001).

Similar to the administration of capital punishment at the state level, there is significant regional variation in the use of the federal death penalty. From 1995 through 2000, 42 percent (287 of 685) of submissions of death eligible cases were from five jurisdictions: Puerto Rico, Eastern District of Virginia, Maryland, Eastern District of New York, and the Southern District of New York. In fact, attorneys from 21 districts did not submit a single death-eligible case between 1995 and 2000 and attorneys from 40 districts never recommended seeking the death penalty against a defendant (U.S. Department of Justice 2000; see also Klein *et al.* 2006).[156]

There are also significant racial disparities in the administration of capital punishment in the U.S. Armed Forces. Currently, six of the seven individuals (85.7

[156] Mannheimer (2006) notes that, since 2002, at least five individuals have been sentenced to death in federal court for conduct that occurred in states that do not authorize the death penalty, and argues that the federal death penalty may constitute "cruel and unusual" punishment when it is applied in states that have abolished capital punishment. In particular, he suggests that the Eighth Amendment ought to be read as a restraint on upon the federal government to punish in a way that conflicts with the norms of an individual state.

percent) on military death row are members of minority groups (5 blacks, 1 white, and 1 Asian/Pacific Islander) (Death Penalty Information Center 2008). Although no one has been executed by the U.S. Military since 1961, racial disparities in the administration of the death penalty have been present both before and after desegregation (Sullivan 1994). For example, during World War II, blacks accounted for less than 10 percent of the military population (Adams 1994), but constituted 78.5 percent of individuals executed during that period (55 of 70 executions) (Sullivan 1994).[157] After racial segregation in the military was outlawed in 1948, racial disparities in the administration of capital punishment actually increased. From 1954 to 1961 (the date of the last military execution), 11 of the 12 individuals executed by the military were black (91.6 percent) (Serrano 1994; Sullivan 1994). The offender/victim racial combination also appears to influence the military death penalty: every black inmate on military death row was convicted of killing a white victim (Serrano 1994).

In summary, although the codified racially discriminatory practices in the administration of criminal justice in the Antebellum South (1619 – 1865), the Reconstruction Era (1865 – 1876), and the Jim Crow Era (1877 – 1954) were struck down as unconstitutional during the middle of the twentieth-century, a voluminous research literature suggests that race continues to influence capital charging and sentencing decisions. The vast majority (93 percent) of studies examining the capital charging-and-sentencing process in states across the nation since *Furman* discovered that the race of the victim significantly influences the likelihood that a prosecutor seeks the death penalty against a defendant or the likelihood that a judge or jury imposes a death

[157] Fourteen of the 18 soldiers executed (77.7 percent) in England during World War II were minorities (11 blacks, 3 Hispanics) (Lilly and Thomson 1997).

sentence, net of legitimate case characteristics (Baldus and Woodworth 1997). Moreover, 82 percent of methodologically rigorous studies conducted in eleven different states since *Furman* report statistically significant race-of-victim effects in capital charging or sentencing decisions (but cf. Morton and Rolph 2000). Numerous human rights, civil rights, and legal organizations—such as the American Bar Association (ABA), American Civil Liberties Union (ACLU), National Association for the Advancement of Colored People (NAACP), National Association of Criminal Defense Lawyers (NACDL), and the National Bar Association—have also publicly condemned the racially disparate treatment of minorities in the capital punishment system at both the state and federal levels. Ironically, to date, no racial discrimination claim in a capital case has prevailed before the U.S. Supreme Court (see Blume *et al.* 1998); though it seems unlikely the court will be able to continue to dismiss such claims in light of the mounting evidence documenting widespread and persistent racial bias in the administration of capital punishment since *Furman*. Perhaps as an indication of the Court's changing of direction, it recently ruled, eight-to-one, that lower courts are required to give capital defendants the opportunity to prove whether prosecutors violated their constitutional rights by engaging in racial discriminatory jury selection practices in their particular cases (*Miller-El v. Cockrell*, 537 U.S. 322 [2003]).[158] Authoring the majority opinion in *Miller-El*, Associate Justice Kennedy wrote:

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[158] In *Batson v. Kentucky* (476 U.S. 79 [1986]), the U.S. Supreme ruled that it was unconstitutional for prosecutors to use their peremptory challenges to strike potential jurors solely on the basis of their race (see also Bourke, Hingston, and Devine 2003). It was more than century earlier, in *Strauder v. West Virginia* (100 U.S. 303 [1880]), that the Supreme Court first held that the purposeful exclusion of blacks from jury service violated the Equal Protection Clause of the Fourteenth Amendment, but defendants challenging racial discrimination in *voir dire* were required to meet a prohibitively high burden of proof: a showing of *systematic* bias by the prosecutor (see *Swain v. Alabama*, 380 U.S. 202 [1965]). The *Batson* court overruled *Swain*, holding that a defendant was allowed to make a *prima facie* case of racial discrimination based on the prosecutor's conduct in the defendant's particular case, after which the prosecutor would be

> Irrespective of the whether the evidence could prove sufficient to support a charge of systematic exclusion of African Americans, it reveals that the culture of the district attorney's office in the past was suffused with bias against African Americans in jury selections. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in the petitioner's case. Even if we presume at this stage that prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards…Our concerns here are heightened by the fact that, when presented with this evidence, the state trial court somehow reasoned that there was not even the inference of discrimination to support a prima facie case (537 U.S. at 354).[159]

Concern over racial discrimination in the capital punishment led several members of the U.S. Congress to support the passage of racial justice legislation. Under such

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allowed to rebut the challenge by offering a race-neutral reason for excluding the veniremember and the trial judge would decide whether the prosecutor's reason was legitimate or merely pretext. The Supreme Court would later rule that the exclusion of potential jurors based solely on ethnicity (*Hernandez v. New York*, 500 U.S. 352 [1991]) and gender (*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 [1994]) was unconstitutional as well.

Several years later after the *Miller-El* ruling, the Supreme Court decided, eight-to-one (Justice Thomas dissented), that California's "more likely than not" burden of proof for defendants raising *Batson* challenges was unconstitutional and defendants were only required to produce evidence sufficient to "draw an inference that discrimination [had] occurred" to satisfy their prima facie case of discriminatory jury selection (see *Johnson v. California*, 545 U.S. 162 [2005]).

[159] In 2008, the Pennsylvania Supreme Court ruled that death row inmate, Robin Cook, failed to establish a *prima facie* case of purposeful racial discrimination with respect to the prosecutor's use of peremptory challenges to exclude black jurors during *voir dire* (Elliott-Engel 2008). Cook presented a training videotape created by then-Assistant District Attorney Jack McMahon during the year prior to Cook's trial that depicted McMahon instructing other prosecutors on how to successfully use racially-motivated peremptory challenges to strike black jurors. In the videotape, McMahon told prosecutors that blacks from lower income areas were not "good" jurors because were less likely to convict resulting from their "resentment for law enforcement" and "resentment for authority." He also advised prosecutors to develop pretextual race-neutral reasons for striking black jurors in the event defense counsel attempted to raise a *Batson* claim. The training videotape, recorded in 1987, was released in 1997 by the incumbent district attorney, Lynne Abraham, when McMahon challenged Abraham in an election for the district attorney position.

Cook was convicted in 1988 of first-degree murder, criminal conspiracy to commit murder, and possessing an instrument of crime and robbery. During *voir dire* for Cook's trial, McMahon used 14 of his 19 peremptory strikes against potential black jurors. In a four-to-two ruling (one Justice did not participate in the case), the court concluded that McMahon was able to offer race-neutral reasons for 11 of the 14 potential black jurors he challenged, some thirteen years after Cook's trial. The court also noted that there were eight black jurors on Cook's jury and Cook was unable to prove that McMahon's race-neutral explanations were pretextual. The two dissenting Justices concluded that the videotape, showing McMahon explicitly instructing jurors to develop pretexual justifications for strikes of black jurors, seriously undermined McMahon's race-neutral reasons for striking black jurors.

legislation, individuals convicted of capital crimes would have been able to challenge their death sentences using conventional evidentiary standards established in civil racial discrimination cases (e.g., employment and housing discrimination) (Cole 1994). The proposed legislation also required states to maintain sufficient data on all potential capital cases in order to allow capital defendants and prosecuting attorneys to present and defend claims under such legislation (Baldus *et al.* 1994b, p. 378). The initial version of the legislation was introduced in 100th U.S. Congress by Representative John Conyers, chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, but the bill died in committee.[160] During the following congressional term, a modified version of the legislation, known as the "Racial Justice Act" (RJA), was proposed in both houses of the 101st U.S. Congress (1989 – 1990), but also failed to make it out of committee.[161] Three subsequent versions of the RJA that were introduced in 1991 and 1993 also died in committee (Baldus, Pulaski, and Woodworth 1994a).[162] In 1994, due largely to the efforts of the Congressional Black Caucus, a weaker version of the RJA was passed in the House of Representatives, but failed to reach the Senate when Republicans in the Senate threatened to filibuster if the RJA had remained on the crime bill.[163] As Cole (1994) notes, passage of the RJA would have marked the first time since Reconstruction that the U.S. Congress has done anything to respond to racial discrimination in the criminal justice system. In 1998, Kentucky became the first state to

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[160] See H.R. 4442, 100th Congress, 1st Session (1988).
[161] See S. 1696, 101st Congress, 1st Session (1989); H.R. 4618, 101st Congress, 2d Session (1990).
[162] See S. 1249, 102d Congress, 1st Session (1991); H.R. 2851, 102d Congress, 1st Session (1991); H.R. 3329, 103rd, 1st Session (1993).
[163] See H.R. 4017, 103rd Congress, 2d Session (1994). This version of the RJA was considered "watered-down" because although it provided condemned prisoners the opportunity to challenge their death sentence with statistical proof of racial discrimination, it established stricter requirements for proving a *prima facie* case (e.g., very strong statistically significant evidence of racial disparity) and did not require State officials to collect additional data on the administration of the death penalty (Baldus *et al.* 1994b, p. 379).

pass and enact such legislation.[164] Under Kentucky's RJA, defendants are allowed to present statistical or other evidence suggesting that their race, the race of their victim(s), or both, played a significant part in prosecutor's decision to seek the death sentence in their particular case. Such a claim must be made at a pre-trial conference, after which the court prescribes a time for the submission of such evidence by both the prosecution and defense. Under Kentucky's law, the defendant must provide clear and convincing evidence that race was the basis for the decision in her or his case. If the court finds in favor of the defendant, it is required to order that the death sentence cannot be sought in that particular case.

Following Kentucky's adoption of the RJA, similar legislation was introduced in Florida, Georgia, Illinois, Mississippi, Nebraska, North Carolina, Ohio, and Texas, but failed to pass in any of these states (American Bar Association 2003a, Appendix J; American Civil Liberties Union 2003; Mears 1998b).[165] The failure of the Georgia Legislature to pass racial justice legislation is particularly noteworthy considering no other state has been subject to more scrutiny than Georgia with respect to racial bias in the administration of the capital punishment in the modern era of the death penalty. As noted in Chapter Two, several Georgia death penalty cases challenging the constitutionally of capital punishment have set legal precedent. The history of Georgia's death penalty and its influence on the administration of the death penalty nationwide is presented in the next chapter.

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[164] See *Kentucky Racial Justice Act*, Ky. Rev. Stat. Ann. § 532.300 (1998).

[165] See S. 1662, 102d Leg., Reg. Sess. (Fla. 2000); H.R. 324, 146th Gen. Assem., Reg. Sess. (Ga. 2001); H.R. 1211, 146th Gen. Assem., Reg. Sess. (Ga. 2002); H.R. 129, 147th Gen. Assem., Reg. Sess. (Ga. 2003); S. 1771, 92d Gen. Assem., Reg. Sess. (Ill. 2001); H.R. 4139, 92d Gen. Assem., Reg. Sess. (Ill. 2001); H.R. 2982, 93rd Gen. Assem., Reg. Sess. (Ill. 2003); H.R. 168, 2002 Reg. Sess. (Miss. 2002); H.R. 217, 2003 Reg. Sess. (Miss. 2003); LB 781, 98th Leg., 1st Reg. Sess. (Nebr. 2003); S. 171, 2001 Reg. Sess. (N.C. 2001); H.R. 140, 2001 Reg. Sess. (N.C. 2001); H.R. 102, 124th Gen. Assem., Reg. Sess. (Ohio 2001); H.R. 370, 78th Leg., Reg. Sess. (Tex. 2003); H.R. 866, 78th Leg., Reg. Sess. (Tex. 2003).

# Chapter 5: Georgia and the Death Penalty

## 5.1 Executions in the South, 1608 – 2008

The South has been a major focus of debate over the administration of the death penalty. While some scholars have suggested that Southerners are neither more likely to support the death penalty (Borg 1997) nor more likely to hold favorable attitudes towards violence (Erlanger 1974) than non-Southerners, empirical studies of the death penalty process consistently reveal that prosecutors are more likely to seek the death penalty, judges and juries are more likely to impose a death sentence, and executions are more likely to be carried out in the South (Blume, Eisenberg, and Wells 2004; Clarke 1998; Jacobs *et al.* 2007; Kroll 1991; Liebman *et al.* 2002; Ogletree 2002). The fifteen former slave states account for slightly over 80 percent of the 1,136 executions from 1976 through 2008: Alabama (38), Arkansas (27), Delaware (14), Florida (66), Georgia (43), Kentucky (3), Louisiana (27), Maryland (5), Mississippi (10), Missouri (66), North Carolina (43), South Carolina (40), Tennessee (4), Texas (423), and Virginia (102) (Death Penalty Information Center 2008). The territory of Oklahoma (88 executions since 1976) also allowed slavery but it did not receive its statehood until 1907, over forty years after the abolition of slavery. The eleven states that seceded the from the Union—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia—account for 72 percent of the total number of executions since 1976 (Death Penalty Information Center 2008).

### *5.1.1 Executions in Georgia, 1735 – 2008*

King George, II, of England granted Colonel James Edward Oglethorpe a charter for the founding of the colony of Georgia on June 9, 1732. Oglethorpe, the colony's first governor, was concerned about the conditions of debtors' prisons in London and established Georgia as a penal colony for such inmates. Slavery was originally prohibited in the colony, but the English Parliament repealed the prohibition on October 26, 1749, after repeated petitions from the colonists and slavery officially became legal in the colony on January 1, 1751. Four years later, on January 7, 1755, the first Royal Legislature of Georgia met in Savannah and adopted the colony's first slave code—modeled after South Carolina's "Negro Act" of 1740—and formally declared that all Negroes, mulattoes, *Mestizos* (Indians), and their offspring who were slaves at the time of the act were assigned to slavery forever (Royal Legislature of Georgia [1755] 1910). The first recorded execution in the colony was that of female Irish indentured servant, Alice Riley, on January 19, 1735, for the murder of her master, William Wise.[166] Riley's boyfriend, Richard White, who assisted in the murder, was executed the following day (Espy and Smykla 2004). Nearly forty years later, on September 20, 1774, Jack (Lyford)[167] became the first slave (officially) executed in the colony of Georgia.[168] Mr. (Lyford) was convicted of arson and was burned to death (Espy and Smykla 2004).

From 1735 to 1924, the legal method of execution in Georgia was hanging. Executions were typically carried out by the sheriff in the county where the crime was

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[166] Riley was pregnant at the time of her trial and was allowed to deliver the baby before her execution.
[167] The surname of "Lyford" is listed parenthetically because enslaved Africans were not officially allowed to have surnames; rather they were commonly identified by the surname of their slave masters. Typically name transmission among slaves was matronymic because slave masters obtained rights to the offspring of their females, but not their males (Gutman 1976).
[168] Georgia was granted statehood in 1776, becoming the thirteenth state to join the Union, and its first constitution was signed the following year.

committed. On May 20, 1925, Gervis Bloodworth and Willie Jones (both white males) were the last two individuals officially executed by hanging in Georgia. In August 1924, death by hanging was abolished by the Georgia General Assembly and was replaced by the electric chair. The first electric chair was installed in the Georgia State Prison in Milledgeville, Georgia in 1924. Howard Hinton, a black male convicted of murder in Dekalb County, was the first person executed by electrocution in Georgia on September 13, 1924. Nearly fourteen years later, in 1938, the electric chair was moved to the new Georgia State Prison in Reidsville, Georgia and Archie Goodwin, a black male, was the first person to be executed at the new facility (Mears 1999). The electric chair was moved, once again, to the Georgia Diagnostic and Classification Center in Jackson, Georgia in 1980 and John Eldon Smith (a white male) became the first individual executed at the Jackson facility in 1983 (Georgia Department of Corrections 2002).[169]

As noted in Chapter Two, several states in the West and Southwest switched from electrocution to lethal gas (or lethal injection) in the 1930s, 1940s, and 1950s (Banner 2002). Most Southern states, however, resisted such reform and vigorously defended their use of the electric chair (see, e.g., Driggs 1993). Over the next half-century, opponents of the electric chair in Georgia continuously pressured the state legislature to change the state's method of execution to lethal injection. Death penalty opponents cited the mounting evidence showing that death by electrocution was, in fact, extremely painful and often resulted in significant disfigurement to the body of the convicted (see, e.g., Death Penalty Information Center 2008; Denno 1994).[170] On January 27, 2000, the

[169] Smith was also the first person executed in Georgia under the state's post-*Furman* death penalty statute.
[170] On December 12, 1984, Alpha Otis Stephens was executed at the Georgia Diagnostic and Classification Center in Jackson, Georgia. Stephens had to be given a second charge of electricity after the first two-minute electric charge failed to kill him. Physicians had to wait six minutes after the first charge so

Georgia General Assembly officially changed the method of execution in the state from electrocution to lethal injection, but allowed individuals who committed a capital crime before the enactment of the new statute to be executed by electrocution.[171] However, on October 5, 2001, in *Dawson v. State* (554 S.E.2d 137 [Ga. 2001]), the Georgia Supreme Court held that death by electrocution constituted cruel and unusual punishment and all executions in the state had to be carried out by lethal injection (see Mears 2002, pp. 285–86). Three weeks later, on October 25, 2001, Terry Mincey (a white male) became the first person in Georgia put to death by lethal injection.[172]

### *5.1.2 Race and Executions in Georgia, 1774 – 2008*

From 1774 (the year of the first recorded execution of a black person in Georgia) through 2008, 992 official executions were carried out in Georgia. Of these nearly one thousand executions, 737 of those executed were black (74.3 percent), 237 were white

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Stephens's body could cool off enough to allow them to examine him and declare another jolt was needed. During that time, it is reported that Stephens took 23 breaths (Death Penalty Information Center 2008).

[171] Ga. Code Ann. § 17-10-38.

[172] The constitutionality of lethal injection was challenged soon after the Georgia Supreme Court outlawed executions by electrocution (Mears 2002, pp. 282–83). Of central concern was the absence of a licensed physician in the lethal injection process. Indeed, Georgia's new death penalty statute did not require the presence of a physician because the American Medical Association opposes physician involvement in executions. This is particularly problematic considering the difficulty in determining whether an individual who was administered the lethal drugs remains conscious after the injection. The drug used in Georgia, *Pavulon*, serves the primary function of paralyzing the body so that no twitching or seizures are observed by individuals viewing the execution (Mears 2004).

On April 16, 2008, the U.S. Supreme Court ruled, seven-to-two, that Kentucky's four-drug lethal injection protocol (*Valium*, sodium pentathol, *Pavulon*, and potassium chloride) did not violate the Eighth Amendment's prohibition against cruel and unusual punishment (*Baze v. Rees*, 128 S. Ct. 1520 [2008]). Justice John Paul Stevens, concurring in judgment, enumerated many problems that he believed continued to plague the administration of the death penalty and stated that the death penalty was inherently unconstitutional. Justice Stevens stated that he felt bound by court precedent to concur with the majority, but urged that it was time to once again reconsider the justifications for capital punishment.

The dissent, written by Justice Ruth Bader Ginsburg and joined by Justice David Souter, stressed that the consequences of mistake when administering the four-drug scheme are "horrendous and effectively undetectable," and therefore measures that can materially increase the likelihood that lethal injection will occur painlessly must be adopted by the state if readily available.

(23.9 percent), and 6 were Native American (0.6 percent).[173] Disaggregating these data into pre- and post-slavery time periods, however, reveals some stark differences in the administration of the death penalty in Georgia. Prior to the Emancipation Proclamation (circa 1863), 102 executions were carried out in Georgia. Of those executed during that time, 59 were white (57.8 percent), 37 were black (36.3 percent), and six were Native American (5.9 percent)—the proportion of executions that were of white offenders was approximately 11.5 percentage points greater than blacks (Espy and Smykla 2004). From 1863 through 2008, 890 individuals were executed in Georgia: 700 blacks (79.6 percent) and 177 whites (20.2 percent)—the proportion of executions carried out against blacks was nearly 60 percentage points greater than that of whites (Death Penalty Information Center 2008; Espy and Smykla 2004).[174] This dramatic swing in the proportion of executions carried out against blacks since the abolition of slavery has led some historians to suggest that, prior to emancipation, slave owners placed greater value on preserving black life because of the slaves' economic worth (Fogel and Engerman 1974). Other scholars argue that following emancipation, the discriminatory use of capital punishment in the former Confederate states, along with the proliferation of other racially motivated (and state endorsed) practices such as segregation laws, poll taxes, literacy tests, and felony disenfranchisement laws, served to forcibly and violently reestablish (and re-legitimize) the racial hierarchy that existed under slavery (Behrens *et al.* 2003; Clarke 1998; Foner and Mahoney 1995; Williamson 1984).

Recall that the U.S. Supreme Court placed a moratorium on executions in 1972 with its decision in *Furman* and reinstated the death penalty four years later in 1976

[173] According to the Espy file, thirteen (1.3 percent) of these executions did not list the race of the person executed (Espy and Smykla 2004).
[174] Thirteen cases (1.3 percent) are missing data on the race of the executed (Espy and Smykla 2004).

following its decisions in *Gregg*, *Proffit*, and *Jurek*. (Also recall that many states quickly began sentencing defendants to death only a few months after the *Furman* decision in 1972.) The Court believed that the new guided-discretion death penalty statutes were sufficient to eliminate the rampant arbitrariness and capriciousness that characterized the pre-*Furman* era.[175] However, in the aftermath of *Gregg*, executions in Georgia continue to be almost exclusively reserved for individuals convicted of murdering white victims. Georgia ranks sixth in the nation with respect to total executions since the death penalty was reinstated (Death Penalty Information Center 2008) and from 1977 through 2008, 43 people were executed in Georgia: 28 were white offenders convicted of murdering white victims (65.1 percent), 11 were black offenders convicted of murdering white victims (25.6 percent), and four were black offenders convicted of murdering black victims (9.3 percent). With respect to the race of the victim, nearly 91 percent of the executions during this period were of offenders convicted of murdering white victims (Death Penalty Information Center 2008; Espy and Smykla 2004). The proportion of executions for white victim cases is particularly startling considering that more than two-thirds (66.7 percent) of homicide victims in Georgia from 1976 to 2000 were black and over half of known homicide offenders were black (56.6 percent) (Fox 2005).

As noted in Chapters Two and Four, death penalty opponents argued that racial disparities in the administration of the death penalty were most pronounced for the crime of rape. The first recorded execution for the crime of rape in Georgia was that of an unidentified slave in 1847 (Espy and Smykla 2004). From 1847 until the last official

[175] Although the majority in *Furman* believed that the existing death penalty statutes unnecessarily permitted arbitrariness and capriciousness, it did not hold that racial discrimination was demonstrated in the pre-*Furman* era. In fact, only Justice Marshall emphasized the legacy of the racially discriminatory administration of the death penalty in the United States (Mears 1999).

execution for rape was carried out in Georgia in 1961, the state executed 103 individuals for the crime of rape (Espy and Smykla 2004). Of these 103 executions, 101 (98.1 percent) have been of black men—the vast majority of which convicted of raping white women (Espy and Smykla 2004; Georgia Department of Corrections 2002).[176]

## 5.2 Georgia and the Modern Death Penalty

Georgia has been the most influential state in shaping national death penalty policy in the modern era of capital punishment (see Baldus *et al.* 1990). No less than seventeen cases originating in Georgia have set legal precedent with respect to the administration of capital punishment, including the *Furman* and *Gregg* cases which, respectively, were responsible for placing and lifting the moratorium on executions in the United States in the 1970s (Cook 1996).[177] A brief discussion of the most significant cases originating in Georgia and their impact on the capital punishment system in America is provided below.

### *5.2.1 Landmark Georgia Death Penalty Cases*

*Furman v. Georgia (1972).* In August 1967, William Henry Furman, a black male, was arrested for the shooting death of William Micke, a white male Chatham County resident, during a botched burglary. Furman broke into the victim's house and

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[176] Recall from Chapter Four that from 1608 to 1977, 843 of the 947 official executions for individuals convicted of rape in America have been of black men (89.2 percent).

[177] According to Cook (1996), the seventeen Georgia death penalty cases that have set legal precedent are (in chronological order): *Whitus v. Georgia* (385 U.S. 545 [1967]); *Furman v. Georgia* (408 U.S. 238 [1972]); *Gregg v. Georgia* (428 U.S. 153 [1976]); *Davis v. Georgia* (429 U.S. 122 [1976]); *Coker v. Georgia* (433 U.S. 584 [1977]); *Eberheart v. Georgia* (433 U.S. 917 [1977]); *Presnell v. Georgia* (439 U.S. 14 [1978]); *Green v. Georgia* (442 U.S. 95 [1979]); *Godfrey v. Georgia* (446 U.S. 420 [1980]); *Zant v. Stephens* (462 U.S. 862 [1983]); *Francis v. Franklin* (471 U.S. 307 [1985]); *McCleskey v. Kemp* (481 U.S. 279 [1987]); *Amadeo v. Zant* (486 U.S. 214 [1988]); *Ford v. Georgia* (498 U.S. 411 [1991]); *Dobbs v. Zant* (506 U.S. 357 [1993]); *Burden v. Zant* (510 U.S. 132 [1994]); and *Lonchar v. Thomas* (517 U.S. 314 [1996]).

fled when the victim came to investigate, tripping over an electrical cord and accidentally firing the gun he was carrying through a closed door in the house. The bullet passed through the door and killed Mr. Micke. Furman was found guilty by a jury and sentenced to death on September 20, 1968.[178] Furman subsequently appealed his sentenced to the Georgia Supreme Court, arguing that Georgia's death penalty statute violated his constitutional rights because it lacked sentencing guidelines and it was administered in a racially discriminatory manner. The Georgia Supreme Court unanimously disposed of Furman's constitutional challenge, holding that the state's death penalty statute had repeatedly been found *not* to constitute cruel and unusual punishment (see *Furman v. State*, 167 S.E.2d 628 [1969]). Furman appealed to the U.S. Supreme court and his case was consolidated with two additional cases, one from Georgia and the other from Texas, involving black men sentenced to death for raping white women.[179] Although the Court believed that Furman failed to prove racial bias in his case, it ruled that the lack of sentencing guidelines for juries in Georgia's death penalty statute was a violation of the Eighth Amendment and subsequently invalidated all capital punishment statutes that lacked such standards (see Chapter Two). At the time of the *Furman* decision, there were 43 individuals on death row in Georgia: 29 convicted of murder, 12 convicted of rape, and two convicted of armed robbery (Mears 1999, p. 16).

When the 1973 Georgia General Assembly convened the following January, drafting new death penalty legislation and reenacting the death penalty was its top

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[178] Furman, 26 years old at the time, was diagnosed as being "mentally deficient" and subject to psychotic episodes. The court, however, rejected Furman's insanity plea.

[179] The rape cases involved twenty-one year-old Lucious Jackson (Georgia) and twenty-one year-old Elmer Branch (Texas). Jackson was sentenced to death on December 10, 1968 and Branch was sentenced to death on July 26, 1967, and their sentences were affirmed on appeal in state court (*Jackson v. State*, 171 S.E.2d 501 [Ga. 1969]; *Branch v. State*, 447 S.W.2d 932 [Tex. Crim. App. 1969]).

priority. In fact, several members of the General Assembly were prepared to defy the U.S. Supreme Court's *Furman* mandate and simply reenact the old death penalty statute (Mears 1999, p. 18). New death penalty bills were quickly filed in both the House and Senate. One of the most important provisions of the bill was the inclusion of a pre-sentencing hearing in which prosecutors were required to prove certain aggravating circumstances relating to the crime or the defendant. Also, during this pre-sentencing hearing, the defendant would be allowed to present mitigation evidence suggesting why the death penalty should not be imposed.[180] The House and Senate versions of the new death penalty legislation were immediately challenged by members in both houses. Opponents of the proposed legislation argued that the changes to the statute were merely cosmetic and that the new legislation did very little to prevent the unconstitutional application of the death penalty, particularly with respect to poor and black defendants. Proponents of the new legislation believed that the three procedural reforms that were amended to the old statute made it constitutional, namely: (1) a bifurcated hearing for guilt/innocence and sentencing; (2) a list of statutory aggravating that juries were required to consider before imposing a sentence; and (3) automatic appellate review by the Georgia Supreme Court (see Chapter Two).[181] Despite the opposition to the bills, the legislation passed by a vote of 154 to 16 in the Georgia House of Representatives on February 13, 1973 and by a vote of 47 to 7 on February 22, 1973 in the Georgia Senate. Prior to the final vote on the new bill in the Senate, several amendments to make the

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[180] 1973 Ga. Laws 74, § 1; Ga. Code Ann. § 27-2534 (1973).

[181] With respect to automatic appellate review, the Court was required to determine: (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and (3) whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant (1973 Ga. Laws 74, § 4; Ga. Code Ann. § 27-2537 [1973]).

death penalty mandatory were struck down (Mears 1999, p. 35). Slightly over a month later, on March 28, 1973, Governor Jimmy Carter signed the bill into law and it immediately became effective.[182]

Georgia's new death penalty was originally published in the *Georgia Laws 1973 Session*.[183] The legislation was codified and provided for eleven separate instances where the death penalty could be imposed on someone convicted of a capital offense:

> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> > (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, *or the offense of murder was committed by a person who has a substantial history of serious assaultive* [*sic*] *criminal convictions*;[184]
> >
> > (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

[182] During his campaign for the U.S. Presidency in 1976, Carter issued a position paper that brings into question his comprehension of the Georgia death penalty statute that he signed into law. Carter wrote, "My position on the death penalty was spelled out as Governor. It should be retained for a few aggravated crimes like murder committed by an inmate with a life sentence. The penalty must be assessed by a jury and must be reviewed in each case by a three-judge panel of the State Supreme Court. Since there has not been an execution since 1967 in the United States, the death penalty actually means ineligibility for parole consideration" (Carter 1976). The Georgia statute, however, made no provisions for a three-judge review panel, nor was it limited to crimes like murder committed by an inmate currently serving a life sentence.

[183] 1973 Ga. Laws 74, § 3; Ga. Code Ann. § 27-2534.1 (1973).

[184] The italicized portion of the death penalty statute was declared unconstitutionally vague by the Georgia Supreme Court in *Arnold v. State*, 224 S.E.2d 386 (Ga. 1976).

(3) The offender, by his [*sic*] act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself [*sic*] or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his [*sic*] official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself [*sic*] or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the

> statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

At the time of *Furman*, the Criminal Code of Georgia defined capital offenses to include murder, rape, armed robbery, and kidnapping. As noted above, the legislation stated that once a defendant noticed for the death penalty was convicted of any capital offense, the trial would move to the pre-sentencing hearing where the prosecution must prove the existence of at least one of the ten statutory aggravating circumstances.[185] The defendant would also be allowed to present any mitigating circumstances or evidence in support of the contention that the death penalty should not be applied in her or his case. With very few changes, Georgia's death penalty legislation has remained in place since Governor Jimmy Carter first signed it into law.[186]

Jesse Lee Coley became the first person sentenced to death in Georgia after the new death penalty legislation was enacted. Coley, a black man, was convicted of raping a white woman in Wayne County, Georgia, and sentenced to death on April 27, 1973—less than a month after Governor Carter signed the new death penalty bill into law. Following his death sentence, Coley appealed to the Georgia Supreme Court. The Court held that the new death penalty statute "[did] not offend the principles of decisions of the U.S. Supreme Court in *Furman* and *Jackson*" (*Coley v. State*, 204 S.E.2d 612, 616–17 [Ga. 1974]). Although the Court ruled that the new legislation was not in violation of the U.S. Constitution or the Georgia Constitution, it held that Coley's death sentence was excessive when compared to the penalty imposed in similar cases. Coley's sentence was

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[185] The lone exception to this requirement was for the crime of aircraft hijacking or treason. For these crimes, no evidence of statutory aggravating circumstances was needed.

[186] In 1996 and 1997, there were two unsuccessful proposals to lower the age of eligibility for the death penalty to sixteen. There were also two attempts to add an additional aggravating circumstance that would allow the death penalty in the event a person was convicted of the rape of a child under the age of twelve; however this legislation was also unsuccessful (Mears 1999, p. 46).

overturned and he was resentenced to life in prison.[187] After the *Coley* decision, it became clear to death penalty opponents that constitutionality of Georgia's new death penalty law would ultimately be tested in the U.S. Supreme Court.

*Gregg v. Georgia (1976).* Troy Leon Gregg, a white male, was convicted of murdering and robbing two men in Gwinnett County, Georgia. Gregg received four death sentences from a Gwinnett County jury: one for each murder and one for each armed robbery, and he appealed his sentences to the Georgia Supreme Court. The Court affirmed his two death sentences for the murders, but vacated his two death sentences for armed robbery, holding that the death penalty for armed robbery was excessive and disproportionate to the penalties imposed in similar cases (*Gregg v. State*, 210 S.E.2d 659 [Ga. 1974]).

The U.S. Supreme Court granted certiorari in Gregg's case in order to ultimately decide on the constitutionality of Georgia's new death penalty legislation. On July 2, 1976, approximately one and a half years after the Georgia Supreme Court approved the state's new death penalty law, the U.S. Supreme Court approved Georgia's death penalty legislation (by a vote of seven-to-two), holding that it satisfied the requirements of *Furman* (*Gregg v. Georgia*, 428 U.S. at 196–207, 220–24). As discussed in Chapter Two, the Court also approved the guided-discretion statutes adopted by Florida (*Proffit v. Florida*) and Texas (*Jurek v. Texas*), while invalidating the mandatory statutes from North Carolina (*Woodson v. North Carolina*) and Louisiana (*Roberts v. Louisiana*).

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[187] Shortly after the *Coley* decision, the Georgia Supreme Court reversed death sentences of two other defendants convicted of armed robbery, holding that such sentences were excessive and disproportionate to the sentences imposed in similar cases (see *Floyd v. State*, 210 S.E.2d 810 [Ga. 1974]; *Jarrell v. State*, 216 S.E.2d 258 [Ga. 1975]). In both of these cases, however, the defendants were also given death sentences for murder, and these sentences were affirmed by the Court. In *Jarrell*, the Court also affirmed the death sentence for the crime of kidnapping.

*Coker v. Georgia (1977) and Eberheart v. Georgia (1977).* The Georgia Supreme Court's decisions in *Coley* and *Gregg* seriously brought into question the appropriateness of the death penalty for rape and armed robbery, respectively. Although the Georgia Supreme Court's decisions in these cases did not officially invalidate the death penalty for rape and armed robbery, it clearly revealed the Court's belief that such a penalty for these crimes was excessive and inappropriate. Nonetheless, the Georgia General Assembly did not narrow the scope of capital crimes; therefore rape, armed robbery, and kidnapping, along with murder, remained death eligible offenses. The U.S. Supreme Court agreed to hear two death penalty cases originating out of Georgia that challenged the constitutionality of the death penalty for non-homicide offenses: *Coker v. Georgia* and *Eberheart v. Georgia*. The first case was that of Ehrlich Anthony Coker, a white male convicted of raping a white woman in Ware County, Georgia and sentenced to death. The second case was that of John Wallace Eberheart, a black man sentenced to death for the rape and kidnapping a white woman in Cook County, Georgia.[188] One year following the *Gregg* decision, the U.S. Supreme Court held that the death penalty for the crimes of rape and kidnapping *with* bodily injury in which no killing occurred was a violation of the Eighth and Fourteenth Amendments (see Chapter Two). Later that year, in *Collins v. State* (236 S.E.2d 759 [1977]), the Georgia Supreme Court applied the rationale of *Coker* and *Eberheart* to the offenses of armed robbery and kidnapping *without* bodily injury and held that the death penalty could not be imposed for these offenses as well.[189]

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[188] Eberheart's accomplice, John Wesley Hooks, was convicted of rape and also sentenced to death.

[189] While the scope of the death penalty has been significantly narrowed with respect to non-homicide offenses, economist Ilyana Kuziemko (2006, p. 137 n.15) suggests that any homicide is potentially a capital offense in Georgia (see also Rosen 1986).

Recall that the NAACP Legal Defense Fund began challenging the constitutionality of the death penalty for rape based upon racial disparities in the administration of capital punishment in Southern States in the early 1950s (see Chapter Two). In 1963, the U.S. Supreme Court denied certiorari in a case involving a black defendant and a white victim that challenged the constitutionality of the death penalty for rape (*Rudolph v. Alabama*, 375 U.S. 889).[190] The *Coker* case was the first time that the U.S. Supreme Court ruled on the constitutionality of the death penalty for rape, but the Court did not specifically address the issue of racial disparities in the imposition of the death penalty for rape, instead holding that rape "does not compare with murder" and "is an excessive penalty for the rapist, who, as such, does not take human life" (*Coker v. Georgia*, 433 U.S. at 598). It is probably not a coincidence that the case on which the Court decided to invalidate the death penalty for rape involved a white offender and a white victim, although these cases very rarely resulted in a death sentence (see LaFree 1989; Wolfgang and Riedel 1975). The *Coker* decision allowed the Court to sidestep the larger issue of rampant racial bias in the administration of the death penalty. As White (1991, p. 135) notes, "By blocking the death penalty for rape, the U.S. Supreme Court blocked the continued production of what had been the strongest evidence of racial bias in capital punishment."[191]

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[190] In 1969, the LDF also challenged the constitutionality of the death penalty for armed robbery in which no one was killed on grounds that it constituted cruel and unusual punishment because it was so infrequently and arbitrarily applied in such cases (see *Boykin v. Alabama*, 395 U.S. 238). The U.S. Supreme Court granted Boykin a new trial based on a procedure issue, but avoided addressing the question of whether the death penalty for armed robbery was a violation of the Eighth Amendment (see Chapter Two).

[191] The United States has not executed anyone convicted of committing a non-homicide offense since the death penalty was reinstated in 1976. Fourteen states and the federal government *do* authorize the death penalty for non-homicide offenses, including the rape of a minor, treason, aggravated kidnapping and aircraft hijacking, but only Louisiana has actually sentenced an individual to death for an offense other than murder since *Coker v. Georgia* (D'Avella 2006). The Louisiana Supreme Court held that a statute allowing

*Presnell v. Georgia (1978).* In the same year as the *Gregg* decision, a jury in Cobb County, Georgia, sentenced Virgil Delano Presnell to death for the murder of an eight year-old girl. Presnell appealed his sentence, arguing that he was neither tried nor convicted of the aggravating circumstance on which the jury based his death sentence—kidnapping with bodily injury and aggravated sodomy. In 1978, the U.S. Supreme Court reversed Presnell's death sentence, holding that the sentence violated Presnell's due process rights under the Fourteenth Amendment. According to the Court, juries must find legally valid aggravating circumstances to warrant a death sentence (*Presnell v. Georgia*, 439 U.S. 14). Presnell's case was remanded for resentencing and he was again sentenced to death in 1999.

*Francis v. Franklin (1985)*. The year after the *Presnell* decision, Raymond Lee Franklin was sentenced to death for the kidnapping and murder of a Bibb County, Georgia resident. While serving a prison sentence for an unrelated crime, Franklin shot and killed his victim during a botched escape attempt after visiting a local dentist's office. Franklin claimed that the shooting was an accident and that the pistol fired when the victim unexpectedly slammed his door after Franklin demanded the key to the victim's car. The U.S. Supreme Court held that the trial judge improperly instructed the jury that Franklin had the burden of proof to show that he did not intend to kill the victim,

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the death penalty for the non-fatal aggravated rape of a minor under the age of 12 (see La. Rev. Stat. Ann. § 14:42[c]) was constitutional and did not violate *Coker* (*State v. Wilson*, 685 So. 2d 1063 [La. 1996]); however the ruling was on a pre-trial order and not a conviction and sentence. The court reasoned that, given the nature of the crime and the severity of harm inflicted on the victim and society, the death penalty was not excessive. Moreover, the court believed that deference should be given to the legislature to determine the appropriateness of the death penalty for cases of rape of a child less than 12 years of age.

In June 2008, the U.S. Supreme Court held that the Louisiana statute authorizing the death penalty for the non-fatal rape of a minor violated the Eighth Amendment (*Kennedy v. Louisiana*, 554 U.S. ___, 128 S.Ct. 2641 [2008]). Writing for the majority, Justice Kennedy explained that only six jurisdictions permitted the death penalty for child rape, and therefore it was a disproportionate punishment for that crime. In his dissenting opinion, Justice Alito criticized the majority's focus on the absence of a national consensus because *Coker* had impaired legislative consideration of the issue for child victims.

(*Francis v. Franklin*, 471 U.S. 307 [1985]). According to the Court, the Fourteenth Amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. A capital defendant enjoys the presumption of innocence and does not have the burden of proof in a capital case; it is the prosecution's task to proof beyond a reasonable doubt that a defendant intended to commit the crime (see also *Enmund v. Florida*, 458 U.S. 782 [1982]; *Tison v. Arizona*, 481 U.S. 137 [1987]).

*McCleskey v. Kemp (1987).* As noted earlier, death penalty opponents had repeatedly attempted to challenge the racially discriminatory application of capital punishment since the early 1950s (see also Chapter Two). In 1968, the LDF presented data to the Eighth Circuit of the U.S. Court of Appeals demonstrating that black males convicted of raping white women were disproportionately sentenced in death in the South (see *Maxwell v. Bishop*, 398 F.2d 138). Although the Court acknowledged that the data demonstrated a historical pattern of racial bias in the administration of the death penalty, it affirmed Maxwell's sentence, holding that the data did not prove purposeful discrimination in his particular case. Four years after the *Maxwell* case, in the *Furman* decision, the U.S. Supreme Court held that racial bias had not been proven, but suggested that proof of purposeful discrimination would constitute cruel and unusual punishment. Eleven years later, the U.S. Supreme Court granted certiorari in another case from Georgia, *Zant v. Stephens* (462 U.S. 862 [1983]), and held that race-of-defendant or race-of-victim discrimination, whether covert or overt, was constitutionality impermissible (see Chapter Two).[192]

[192] Alpha Otis Stephens was sentenced to death for murder and during his appeal he argued that one of the three statutory aggravating circumstances on which his sentence was based was invalid. The Court affirmed Stephens's death sentence, holding that his sentence was valid as long as the jury properly found at least one aggravating circumstance.

Following the *Furman* ruling, death penalty opponents began emphasizing the collection of social science evidence on pivotal issues surround the death penalty (Haines 1996). When Warren McCleskey—a black man sentenced to death for the 1978 murder of a white police officer during a burglary in Atlanta, Georgia—appealed his sentence to the U.S. Supreme Court on the grounds it had been imposed in a racially discriminatory manner, the LDF finally had its opportunity to present evidence of racial bias from a massive statistical study of Georgia's death penalty system (for a detailed discussion, see Chapter Two). McCleskey's attorneys' argued that the racially discriminatory administration of capital punishment in Georgia violated their client's right to due process and protection from cruel and unusual punishment under the Fourteenth and Eighth Amendments, respectively.[193]

The U.S. Supreme Court affirmed McCleskey's death sentence, by a vote of five-to-four, ruling that the data presented on behalf of McCleskey failed to prove purposeful discrimination.[194] The Court ruled that the data presented in *McCleskey* combined the decisions of several relatively autonomous actors from multiple jurisdictions across the state, making it impossible to pinpoint any potential source of bias. More damaging to death penalty opponents, however, was the Court's belief that the standard methods of proving purposeful discrimination in employment and jury selection cases did not apply in the capital sentencing context (see also Acker 1993; Ellsworth 1988). Although the

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[193] Several empirical studies of Georgia's post-*Furman* capital punishment system had been published prior to *McCleskey*. Baldus and colleagues' (1983, 1985, 1986b) and Gross and Mauro's (1984) analyses revealed that Georgia's death penalty system continued to operate in an arbitrary and discriminatory manner. These pre-*McCleskey* studies were conducted for academic purposes, but as noted in Chapter Two, the LDF sponsored Baldus *et al*.'s (1990) "Charging and Sentencing Study" (CSS) to specifically challenge the constitutionality of Georgia's death penalty system. The statistical evidence presented in *McCleskey* consisted of both the "Procedural Reform Study" (PRS), which was conducted by Baldus *et al*. solely for academic purposes, and the CSS.

[194] The State of Georgia executed Warren McCleskey on September 25, 1991.

Court did not foreclose the possibility of challenging racial bias in the administration of the death penalty, subsequent evidence based on the decision-making patterns of one individual or from one jurisdiction has also been rejected by the courts. According to Blume and colleagues (1998), the major obstacle to these challenges is the level of proof necessary to shift the burden of proof on death penalty decision-makers.[195]

In sum, the U.S. Supreme Court's rulings in *Furman*, *Gregg*, *Coker*, *Eberheart*, *Presnell*, *Franklin*, and *McCleskey* have significantly influenced the administration of capital punishment across the country.[196] Though these seven cases have been the most influential cases originating in Georgia, legal analysts have noted that at least nine additional cases from Georgia have also had an important impact on the capital

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[195] Indeed, the evidentiary standard required by the Court to prove racial bias may be unreasonably high. For example, three years after *McCleskey*, the Georgia Supreme Court ruled that the trial court did *not* error in refusing to consider a post-sentence affidavit of a juror stating that she overheard two white jurors making racially derogatory comments about the defendant during deliberations (see *Spencer v. State*, 398 S.E.2d 179 [Ga. 1990]).

[196] Prior to the U.S. Supreme Court's landmark *Batson* decision in 1986, in which it ruled that peremptory challenges may not be used to exclude jurors solely because of their race, the Court overturned the death sentence of Phil Whitus—a black man from Mitchell County, Georgia—on the grounds that blacks were systematically excluded from Georgia grand juries (see *Whitus v. Georgia*, 385 U.S. 545 [1967]). At the time of Whitus's trial, no black person had ever served on a grand jury or petit jury in Mitchell County and jury lists were derived from the County's tax returns that were color-coded based upon race (white sheets for whites and yellow sheets for blacks). The Court held that purposeful exclusion of blacks from the grand jury was unconstitutional (see also Snoddy 2002).

As part of the "Criminal Justice Act of 2005," the Georgia General Assembly recently passed bills reducing the number of peremptory jury strikes available to capital defense attorneys from twenty to ten (see H.R. 170 & S. 2, 148th Gen. Assem., Reg. Sess. [Ga. 2005]). The bills also give prosecuting attorneys the same number of peremptory strikes as capital defense attorneys. Previously, defense attorneys were allowed twice as many peremptory strikes as prosecutors, but the prosecutors challenged the statute allowing defendants a greater number of peremptory strikes (Ga. Code Ann. § 15-12-165 [2005]), claiming the statute was unconstitutional because it allowed defendants to use peremptory challenges in a discriminatory manner (Geerdes and Cox 2005, p. 151). The Georgia Supreme Court ruled that the statute was constitutional, noting that the Equal Protection Clause prohibited racial and gender discrimination in jury selection, and therefore the proper remedy was already available through *Batson* or *J.E.B.* motions (see *Robinson v. State*, 598 S.E.2d 466, 468 [2005]). The "Criminal Justice Act of 2005" allowed the Georgia General Assembly to circumvent the Georgia Supreme Court's ruling by revising the statute. As noted in Chapter Four, prosecutors in death penalty cases are significantly more likely to use peremptory strikes against black jurors because, irrespective of the race of the defendant, black jurors are less likely to vote for the sentence of death. Allowing prosecutors and capital defense attorneys an equal number of peremptory strikes is likely to significantly reduce the number of blacks serving on capital juries, particularly considering that blacks in Georgia are less likely to be able to serve on juries in the first place because of the State's of felony disenfranchisement laws (see King and Mauer 2004).

punishment process nationwide (for a discussion of these other cases, see Cook 1996). These cases have also placed Georgia's capital punishment system under a microscope in the death penalty community; nevertheless, it appears that race continues to figure prominently in Georgia's capital charging-and-sentencing process. Between 1976 and the U.S. Supreme Court's *McCleskey* ruling in April of 1987, 85.7 percent of executions in Georgia were of black offenders convicted of murdering white victims (6 of 7 executions). Since the *McCleskey* decision, only 16 percent of executions in Georgia have been of black offenders convicted of murdering white victims; however 32 of the 36 executions after the *McCleskey* ruling have been of individuals convicted of murdering white victims (89 percent) (Death Penalty Information Center 2008). Moreover, not a single white offender has been executed for the murder of a black victim in Georgia since the *Gregg* decision (see also Radelet 1989; Radelet and Mello 1986).[197]

### *5.2.2 Race/Ethnicity, Gender, Region, and Georgia's Death Penalty*

*Race/Ethnicity.* As noted in Chapter Two, Baldus and colleagues (1990) discovered that prosecutors were significantly more likely to seek the death penalty and judges and juries were significantly more likely to impose the death sentence in murder cases involving white victims in Georgia, even after considering over 230 case factors. On January 31, 2009, there were 106 individuals on death row in Georgia: 54 whites (50.9 percent), 48 blacks (45.3 percent), three Hispanic (2.8 percent), and one Asian American (0.9 percent). Eighty-one were convicted of murdering white victims (77.4 percent), 23 were convicted of murdering black victims (21.9 percent), and one was

[197] Nationally, only 1.3 percent of executions since 1976 have been of white offenders convicted of murdering black victims—the first was in 1991 in South Carolina and the most recent was in 2006 in Virginia (Death Penalty Information Center 2008).

convicted of murdering a Hispanic victim (0.95 percent).[198] Twenty-five of the 47 black death inmates row for which there was race-of-victim information were convicted of murdering one or more white victims (53.2 percent). This statistic is particularly noteworthy considering nearly 90 percent of black-offender homicides involved black victims in Georgia from 1976 through 2000. Fifty-three of the 54 white inmates on death row were convicted of murdering white victims (98.1 percent), which is similar to the 93 percent of white offender homicides involving white victims in Georgia during the same time period (Fox 2005).[199]

*Gender.* Female homicide offenders in Georgia are grossly underrepresented on death row. Only one of the 106 death row inmates in Georgia is female (0.9 percent). From 1976 through 2000, however, over 16 percent of homicide offenders in Georgia were female. One the other hand, female-victim homicide cases are overrepresented on death row. Currently, 59.4 percent of current death row inmates in Georgia were convicted of murdering *at least* one female victim, although between 1976 and 2000 less than one-quarter of all homicide cases involved a female victim (Fox 2005). There may also be an interaction between race/ethnicity and gender. Of the 57 death row inmates convicted of murdering at least one female victim, only 18 were convicted of murdering black females (31.5 percent).

*Region.* Death penalty scholars have consistently noted the dramatic jurisdictional variation with respect to death charging and sentencing in Georgia (see Baldus *et al.* 1990; Kroll 1991). Variation in the use of capital punishment only moderately corresponds to the actual homicide activity in these jurisdictions. Since 1973,

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[198] Race-of-victim information was missing for one case.

[199] As is customary in the death penalty literature, homicides in which *at least* one of the victims is white are considered "white-victim" homicides (see Baldus *et al.* 1990).

there has been at least one homicide in 157 of Georgia's 159 counties (98.7 percent), yet only 55 counties (35 percent) are responsible for the state's entire death row population (see Fox 2005; Georgia Department of Corrections 2002). Moreover, 11 of those 55 counties (24 percent) are responsible for 53.7 percent of the death row population (57 of 106 death row inmates). Since Georgia's post-*Furman* death penalty statute was enacted in 1973, through 2008, 344 individuals have been sentenced to death. These 344 death sentences come from 104 of Georgia's 159 counties (65.4 percent), and nearly half of these of these death sentences (167 or 48.5 percent) come from just 14 counties.[200]

With respect to capital charging, prosecutors from 91 counties in Georgia (57 percent) have filed all of the 381 death penalty notices for homicides occurring between 1993 and 2000 (see Table 1). Three counties (1.9 percent)—Fulton (Atlanta), Dekalb (Decatur), and Chatham (Savannah)—accounted for nearly one-half of the reported homicides, but only 14 percent of death notices during this period. Particularly interesting is that nearly one-third of Georgia homicides occurred in Fulton County, although approximately five percent of death notices (and 1.8 percent of death sentences) came from Fulton County between 1993 and 2000. The nine counties with the highest death noticing rates (i.e., percentage of homicides noticed for the death penalty)—Effingham (100 percent), Morgan (90 percent), Appling (83 percent), Gilmer (67 percent), Putman (62 percent), Hart (60 percent), Oconee (58 percent), Fayette (57 percent), and Burke (56 percent)—account for only 3.3 percent of the state's population

[200] The fourteen counties are: Baldwin, Bibb, Chatham, Clayton, Cobb, Dekalb, Douglas, Floyd, Fulton, Glynn, Gwinnett, Hall, Muscogee, and Richmond.

and 1.3 percent of homicides, but 12.6 percent of death notices between 1993 and 2000 (Georgia Bureau of Investigation 2001).[201]

### *5.2.3 Miscarriages of Justice: Innocence and Prejudicial Error*

*Innocence.* As discussed in Chapter Three, between 1973 and 2008, 130 individuals have been released from death row after having their conviction overturned and being either acquitted at re-trial or having all charges dismissed *or* after being given an absolute pardon by based on new evidence of innocence (Death Penalty Information Center 2008). Since Georgia reinstated its death penalty in 1973, four death row inmates have been released because of their innocence—all of them have been black males (Mears 1999, pp. 169–80).[202] Earl Charles (convicted 1975; released 1978) was erroneously convicted for the double murder of two merchants in Chatham County. Charles was released after it was discovered that a police detective falsified eyewitness identifications and persuaded a witness to lie in court. Charles, who was in Tampa, Florida at the time of the homicides, subsequently won a settlement from Savannah city officials for misconduct in the original investigation. Jerry Banks (convicted 1975; released 1987) was falsely convicted of a double homicide in Henry County, and later released when it was discovered that the prosecutor withheld exculpatory evidence and police planted physical evidence at the scene of the crime.[203] Robert Wallace (convicted 1980; released 1987) was sent to death row for the shooting death of a police officer. Wallace was acquitted at re-trial when it was discovered that he acted in self-defense.

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[201] These counties are also located in very rural areas, with only one—Fayette County—having more than 30 percent of its population living in an urban area.

[202] Two of these cases involved white victims (Charles and Banks) and two involved black victims (Wallace and Nelson).

[203] Banks committed suicide six months after being released from death row (Mears 1999).

Finally, Gary Nelson (convicted 1980; released 1991) was released after spending eleven years on death row for the alleged murder of a female acquaintance in Chatham County. Prosecutors in Nelson's case falsified physical evidence and concealed exculpatory evidence in the case and the police officer in the case lied about the murder weapon.

James Creamer and Henry Drake were also erroneously sentenced to death in Georgia, however they both were serving life sentences by the time they were released based on evidence of their innocence. Creamer, a white male, was sentenced to death by a Cobb County jury in 1973 and served two years on death row before his release. Creamer's death sentence was imposed under the same statute that was in effect at the time of the *Furman* decision, so his death sentence was commuted to life imprisonment following the U.S. Supreme Court's moratorium on the death penalty. The Georgia Supreme Court would later overturn Creamer's conviction after it was discovered that the prosecution withheld and destroyed exculpatory evidence. Soon after Creamer's conviction was reversed, another person confessed to the murders for which Creamer had been sentenced to death. Although Creamer was not on death row at the time his sentence was reversed, the sole reason that he was not on death row before his release was the U.S. Supreme Court's ruling in *Furman*, a completely unrelated case. Drake, also a white male, was sentenced to death in Madison County for an alleged murder and armed robbery. Drake's conviction was solely based the testimony of his co-defendant, William Campbell. Drake's initial conviction and sentence were reversed on federal appeal and, after a second trial, he was sentenced to life imprisonment. Six months after Drake's resentencing, after William Campbell recanted his original testimony and admitted that Drake was not involved in the homicide and a state medical examiner

presented evidence suggesting that Drake was not at the crime scene, the Georgia Board of Pardons and Parole released Drake based on the belief that he was innocent. Both Creamer and Drake were falsely convicted for murdering white victims (Mears 1999).

*Prejudicial Error.* Liebman and colleagues' (2000a) landmark study of serious prejudicial error in the capital punishment process revealed that 339 death sentences were imposed in Georgia between 1973 and 1995 (see also Liebman *et al.* 2002).[204] The authors define "serious prejudicial error" as error that the court believes "substantially undermines the reliability of the guilt finding or death sentence imposed at trial" (Liebman *et al.* 2000a, p. 6). Of those 339 cases, 309 (91 percent) had been reviewed on direct appeal, and 112 (36 percent) were reversed because of serious prejudicial error. Out of the 197 cases that were forwarded to state post-conviction, an additional 24 cases were subsequently reversed (12 percent). Collectively, 136 of the 309 death sentences (44 percent) reviewed during state direct appeal and state post-conviction were reversed. At the federal level, 63 of the 97 cases reviewed during federal habeas corpus were reversed (65 percent). Liebman *et al.* define the "overall error rate" as the proportion of capital judgments thrown out during the first (state direct appeal) inspection due to serious error, plus the proportion of the original judgments that survive the first inspection but are thrown out at the second (state post-conviction) inspection, plus the proportion of the original judgments that survive both state inspections but are thrown out at the final (federal habeas) stage. According to their calculations, Georgia's error rate of

[204] It is important to note that the total number of capital defendants sentenced to death during this time was 270. Several capital defendants were sentenced to death multiple times. This would usually occur when a capital defendant was sentenced to death, her or his sentence and/or conviction was reversed on appeal because of reversible error, and she or he was subsequently resentenced to death (for a list of these cases, see Mears 1999, Appendix A).

80 percent was well above the national average of 68 percent.[205] Of this 80 percent, 39 percent of reversals were the result gross ineffectiveness on the part of defense counsel, 20 percent involved jury mis-instruction, 19 percent involved prosecutorial misconduct, and four percent involved biased judges or juries (Liebman *et al.* 2000a). It must be emphasized that serious prejudicial error is not commonly discovered in other types of criminal cases. For example, in Georgia between 1970 and 2003, criminal defendants alleged prosecutorial error or misconduct in 449 cases (22 of these cases were death penalty cases) (Weinburg 2003). Of these 449 cases, the court found harmful error and granted reversals in only 39 cases (8.7 percent).[206]

### *5.2.4 Life Without the Possibility of Parole*

Currently all 35 states with capital punishment statutes offer life without the possibility of parole (LWOP) as a sentencing option in death penalty cases (see Chapter Three). Georgia's LWOP legislation became effective on May 1, 1993.[207] The year following the enactment of the legislation, Georgia's Board of Pardons and Parole challenged the statute, contending such legislation violated the state constitution's separation of powers provision.[208] The Georgia Supreme Court rejected the Board of

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[205] The range was from 18 percent (Virginia) to 91 percent (Mississippi). It is also noteworthy that Georgia had the fourth highest reversal rate at the federal habeas stage in the United States and the second highest among Southern states (among states with at least four federal habeas cases completed). Georgia also had the highest federal habeas reversal rate in Eleventh Circuit U.S. Court of Appeals (Alabama and Florida are the other two states in the Eleventh Circuit) (Gelman *et al.* 2004; Liebman *et al.* 2000a)

[206] If one were to include the 17 additional cases in which at least one dissenting or concurring judge believed that harmful error was present, only 12.5 percent of the 449 cases would have been reversed do to serious prejudicial error on the part of the prosecution (Weinburg 2003).

[207] 1993 Ga. Laws 569, § 4; Ga. Code Ann. § 17-10-30.1 (1993).

[208] The Georgia Board of Pardons and Parole was created in 1943 and is granted the power to grant executive clemency, which includes reprieves, pardons, and commutations (Ga. Const. art. IV, § 2, pt. II(a)). The Board consists of five-members who are appointed by the Governor and subject to Senate confirmation. The Georgia Attorney General, who is also appointed by the Governor, serves as a legal advisor to the Board. Although the Governor is given the authority to appoint the Board, she or he has no direct influence to grant (or deny) clemency.

Pardons and Parole argument, holding that "the power to create crimes and to prescribe punishment therefore is legislative" (see *Freeman v. State*, 440 S.E.2d 181, 184 [Ga. 1994]). Citing a 64 year-old case (see *Johnson v. State*, 152 S.E. 76 [Ga. 1930]), the court went on to say that because LWOP legislation, like death penalty legislation, renders a defendant ineligible for parole in the first instance, it did not constitute a separation of powers violation.

Two years after the Georgia Supreme Court validated the state's life without parole legislation, it ruled six-to-one to restrict LWOP to death penalty cases. Writing for the majority, Justice Carole Hunstein wrote, "The unavoidable result of the legislative enactment is to bar the State from seeking life without parole unless the State has filed a notice of intent to seek the death penalty" (see *State v. Ingram*, 467 S.E.2d 523, 525 [Ga. 1996]). The Georgia Supreme Court, agreeing with an earlier ruling from Fulton County Superior Court Judge Elizabeth E. Long (see *State v. Ingram*, No. S96A0158), held that the sentencing laws represented a "coherent statutory plan" under which the same rules must govern the imposition of capital punishment and life without parole.[209]

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The Board is required to collect as much information as possible about every inmate who may be eligible for relief under the powers of the Board. The information gathered by the board typically includes, but is not limited to, (1) circumstances of the crime and the sentence received, (2) the names of the judge, prosecutors, defense attorneys, and investigating officers, (3) the pre-sentencing report and any relevant previous court records, (4) any probation reports, and (5) any relevant social, physical, mental, or criminal documents/records about the inmate (Ga. Code Ann. § 42-9-41(a)(1)-(8)).

[209] LWOP is an *automatic* sentencing option for other non-homicide offenses. Under Georgia's Sentence Reform Act of 1994 (i.e., the "Two Strikes" Law), any individual convicted of committing any of the "seven deadly sins"—murder, rape, armed robbery, kidnapping, aggravated sodomy, aggravated sexual battery, and aggravated child molestation—for the first time must serve a minimum of ten years in prison, or up to the maximum sentence allowed under law, all without possibility of parole. Individuals convicted of committing any one of the seven offenses for the second time, and who are not being tried for capital murder, are automatically sentenced to life without parole. In 2005, both houses of the Georgia legislature (H.R. 248 & S. 57, 148th Gen. Assem., Reg. Sess. [Ga. 2005]) introduced bills that would have mandated individuals convicted of murder who have previously been convicted of three or more felonies be sentenced to life without parole. The bill was adopted in the Senate, but was withdrawn and recommitted to the Rules Committee in the House of Representatives.

The Court's ruling in *Ingram* may have radically altered the administration of capital punishment in Georgia. Restricting LWOP to murder cases in which the prosecution has filed noticed of intent to seek the death penalty has led many prosecutors to seek the death sentence in cases they do not believe are deserving of the death penalty, but they do believe warrant LWOP. In these instances, LWOP becomes a "bargaining chip" for prosecutors (cf. Kuziemko 2006). Prosecutors are able to threaten defendants with the possibility of facing the death penalty if they do not choose to accept a plea bargain of LWOP. For example, following the jury's sentencing of Devonia Inman to LWOP in Alapaha County, Georgia in 2001, District Attorney Bob Ellis remarked, "Had we not sought the death penalty, we could have not gotten life without parole" (Failor 2001). Ellis told reporters that seeking only life in prison would have left the option open for eventual parole, but by seeking death the jury had the opportunity to deny parole to Inman.

While such a strategy may work well for prosecutors in some cases, allowing them to quickly dispose of murder cases to the satisfaction of the community and the family and friends of the victim(s), it also places many more murder defendants whose alleged crimes would not warrant the death penalty at a much greater risk for the death penalty. A capital defendant may opt to "take her or his chances" at a capital murder trial, hoping to be acquitted or sentenced to a life sentence *with* the possibility of parole (LS), rather than plea to LWOP and spend the rest of her or his natural life in prison.

On January 31, 2009, inmates serving LWOP sentences for the crime of murder comprised slightly more than one-half of one percent (0.54 percent) of the total incarcerated population in Georgia. Of the 300 inmates serving a LWOP sentence for the

crime of murder, 205 were black (68.3 percent) and 94 were white (31.3 percent). On that same date, 4,674 inmates were serving LS sentences for murder: 3,244 blacks (69.4 percent), 1,394 whites (29.8 percent), 22 Asian Americans (0.5 percent) and 13 "Other" (0.27 percent). As noted earlier, slight over half of homicide offenders in Georgia from 1976 to 2000 were black (approximately 55 percent), so blacks appear to be somewhat over-represented with respect to LWOP and LS. The proportion of blacks serving LWOP and LS sentences, however, are nearly identical.[210]

One hundred and fifty-one capital defendants with crime dates between 1993 and 2000 received LWOP either by plea bargain or during the penalty trial phase (see Figure 1). Slightly over 65 percent of these capital defendants were black (99), 32.5 percent were white (49), and two percent were Hispanic (3). With respect to the race of the victim, 59.6 percent were cases with *at least* one white victim, 31.1 percent were cases with all black victims, and two percent were cases with Asian American victims.[211] Nearly an identical number of capital defendants were sentenced to LS with incident dates between 1993 and 2000 (see Figure 2). Of these 147 individuals, 58.5 percent were black (86), 38.8 percent were white (57), and 2.7 percent were Hispanic (4). In terms of the distribution of these with respect to the race of the victim, 59.5 percent were cases with *at least* one white victim, 33.1 percent were cases with all black victims, 2.7 percent

[210] The overrepresentation of blacks for the crime of voluntary manslaughter is slightly greater. As of January 31, 2009, there were 1,190 inmates imprisoned for voluntary manslaughter in Georgia. Of these 1,190 inmates, 72.6 percent (864) were black, 26.1 percent (311) were white, 0.34 percent (4) were Asian American, and 0.84 percent (10) were "Other." With respect to the 127 inmates serving time for involuntary manslaughter, blacks comprised 59.8 percent (76) and whites comprised 40.2 percent (51). This overrepresentation of blacks for manslaughter may be the result of prosecutors' willingness to offer plea bargains of manslaughter to black offenders. As noted in Chapter Four, Georgia prosecutors are more likely to offer a reduced charged for black-offender/black-victim cases, net of legitimate case characteristics.

[211] Race-of-victim information was missing for five cases (3.4 percent).

were cases with Hispanic victims, and two percent were cases with Asian American victims.

To date, no study has systematically examined the potential influence of extra-legal factors on the likelihood that a capital defendant receives LWOP versus LS in Georgia. While it is understandable why death penalty scholars and legal activists have focused their attention on the "death/non-death" dichotomy, it is becoming increasingly important to examine more subtle distinctions in sentencing outcomes for capital cases because LWOP has become a popular sentencing alternative in the vast majority of death penalty states (see also Chapter Seven).[212]

## 5.3 SUMMARY

Despite the U.S. Supreme Court's mandate in *Furman*, it appears that illegitimate factors may continue to play a prominent role in Georgia's capital charging-and-sentencing process. The raw data suggest that prosecutors are more likely to seek the death penalty and judges and juries are more likely to impose the death sentence on individuals charged with and convicted of murdering white and female victims. Furthermore, these raw data strongly suggest that the jurisdiction in which a homicide occurs influences the probability that a case is noticed for the death penalty and results in a death sentence, net of the actual homicide rate of the jurisdiction. As noted in Chapter Four, racial justice legislation was introduced in Georgia, but failed to pass in either

[212] Until recently, Texas and New Mexico were the only two death penalty states that did not offer LWOP as a sentencing option in capital cases. In June 2005, Texas Governor Rick Perry signed LWOP legislation into law. Interestingly, the very same bill failed by two votes in the state senate just two months earlier (S. 60, 79th Leg., Reg. Sess.). The initial defeat of the bill was particularly noteworthy because nearly 80 percent of Texans supported having LWOP as a sentencing alternative (Robison 2005). New Mexico completely repealed its capital statute in March 2009 (Associated Press 2009).

house of the General Assembly.[213] Georgia's proposed Racial Justice Act (RJA) would have mandated the collection and analysis of countywide data pertinent to the imposition of the death penalty by appropriate county agencies such as district attorney and public defender offices, as well as Superior Courts (Mears 1998b). In fact, as discussed in Chapter Four, the federal government adopted a similar protocol in 1995 requiring federal prosecutors to submit information on all death eligible cases, irrespective of the U.S. Attorney's intent to seek the death penalty (see U.S. Department of Justice 2000). Although the Department of Justice (DOJ) never officially attributed the change in protocol to pressure from RJA proponents, it may be more than mere coincidence that the DOJ adopted the new protocol the year after the RJA was approved in the U.S. House of Representatives.

In 2001 and 2003, resolutions for the creation of the House Study Committee on the Death Penalty[214] and the Georgia Capital Punishment Study Commission,[215] respectively, failed in the Georgia House of Representatives.[216] The proposed Capital Punishment Commission would have been established to specifically consider the issues outlined by the American Bar Association's (ABA) newly established death penalty protocols (see American Bar Association 2001). In February 2003, the ABA's "Death Penalty Moratorium Implementation Project" received a grant from the European Commission's European Initiative for Democracy and Human Rights to examine whether

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[213] In 2001, 2002, and 2003, different versions a RJA were introduced in the Georgia House of Representatives, but never made it out of committee (see H.R. 324, 146th Gen. Assem., Reg. Sess. [Ga. 2001]; H.R. 1211, 146th Gen. Assem., Reg. Sess. [Ga. 2002]; H.R. 129, 147th Gen. Assem., Reg. Sess. [Ga. 2003]).

[214] H.R. Res. 1594, 146th Gen. Assem., Reg. Sess. (Ga. 2002).

[215] H.R. Res. 546, 147th Gen. Assem., Reg. Sess. (Ga. 2003).

[216] The House Study Committee on the Death Penalty was to be comprised of five members and the Capital Punishment Study Committee was to consist of eleven members from the Georgia House of Representatives.

jurisdictions in America with capital punishment statutes met the minimum standards of fairness and due process established by the ABA. Georgia was selected as one of its five initial "assessment projects" in September of the following year (see American Bar Association 2004)[217] and the ABA released its official assessment report in January 2006, urging the state to place a moratorium on seeking the death penalty after discovering significant flaws in Georgia's administration of capital punishment (American Bar Association 2006b).[218] Perhaps in response to the ABA's focus on Georgia, the 2005 – 2006 Legislative Session of the Georgia General Assembly adopted a resolution to create the Capital Punishment Study Commission. According the resolution, the purpose of the commission is to "study the death penalty" and "urge the suspension of executions until such time as a report from such study commission is submitted to the General Assembly and the General Assembly and governor act in response to recommendations for the study commission."[219] But in light of the General Assembly's pattern of establishing "unfunded mandates" in the area of criminal justice reform (see American Bar Association 2006b; Atlanta Bar Association 2001; Spangenberg Group 2002), it is

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[217] The four other assessment sites were Alabama, Arizona, Florida, and Tennessee. The ABA began a second set of assessments in January 2005 in Louisiana, Ohio, Oklahoma, South Carolina, Texas, and Virginia.

[218] In particular, the ABA discovered seven major problems with the current Georgia death penalty system: (1) no guarantee of defense counsel for condemned inmates in habeas corpus appeals; (2) inexperienced and poorly prepared defense attorneys representing capital defendants; (3) inadequate proportionality review conducted by the State Supreme Court; (4) rampant miscomprehension of judicial instruction by capital jurors; (5) racial disparities in the imposition of the death penalty; (6) unreasonable evidentiary standard for capital defendants in mental retardation cases; and (7) death eligibility for unintentional murder (i.e., felony murder).

The Georgia Supreme issued 159 rulings that upheld the proportionality of death sentences imposed between 1992 and 2007. An investigation conducted by the Atlanta Journal-Constitution found that 129 of these rulings (approximately 80 percent) cited prior death cases that had been overturned. In total, the Georgia Supreme Court cited 76 cases that had been overturned. Particularly troubling was the fact that in 55 of these rulings, at least 25 percent of the cases cited them had been overturned. Only 14 rulings cited no overturned cases (Rankin, Vogel, and Wertheim 2007).

[219] H.R. Res. 301, 148th Gen. Assem., Reg. Sess. (Ga. 2005); S. Res. 184, 148th Gen. Assem., Reg. Sess. (Ga. 2005).

questionable whether it will ultimately commit the necessary resources for such a commission.[220]

Considering the current racial/ethnic, gender, and regional distribution of capital cases in Georgia, and the vast empirical literature documenting the historical continuity of these disparities in Georgia's capital charging-and-sentencing process (see Chapter Four), it is very likely that the Georgia General Assembly's Capital Punishment Commission (if established) will discover that these disparities persist (as did the ABA Moratorium Project), even after taking into account a wide range of legitimate legal characteristics. Undoubtedly a plethora of evaluation studies and policy recommendations will emerge from these projects, primarily focusing on how to make the capital punishment system more "even-handed" and "effective." That is, it will be suggested that traditional legal tools should (and must) be used to solve traditional legal problems (Black 2002a, p. 117; Kan and Phillips 2003, p. 71). However, death penalty scholars have questioned whether these "incremental fixes" to the capital punishment system can ever correct or change the legacy of racial/ethnic bias in the administration of the death penalty in America (Howe 2004; Kan and Phillips 2003; Ogletree 2002). Moreover, some scholars have suggested that these minor procedural reforms may actually do more harm than good because they further entrench a failed capital

[220] Two years after the General Assembly created Georgia's first statewide public defender system, the state Senate Judiciary Committee introduced several bills to give the executive and legislative branches significantly more control over spending for the newly created system. The proposed legislation would (1) transfer control over the governing body of the public defender system, the Georgia Public Defender Standards Council, from the judicial branch to the executive branch (S. 139, 149th Gen. Assem., Reg. Sess. [Ga. 2007]); (2) give state and local politicians more influence over the Council's operations, including its composition, qualifications and terms for new members, and hiring and firing decisions (S. 140, 149th Gen. Assem., Reg. Sess. [Ga. 2007]; S. 141, 149th Gen. Assem., Reg. Sess. [Ga. 2007]); (3) significantly restrict local public defenders' staff hiring (S. 142, 149th Gen. Assem., Reg. Sess. [Ga. 2007]); and (4) allow state judicial circuits to drop out of the system (S. 143, 149th Gen. Assem., Reg. Sess. [Ga. 2007]). Preston Smith, chair of the state Senate Judiciary Committee, specifically cited the cost of defending a high profile capital murder case in Atlanta as motivation for limiting indigent defense spending (Land 2007).

punishment system by providing the appearance of legality and impartiality (see, e.g., Kaufman-Osborn 2006b, p. 369; Ogletree 2002, p. 34).

Admittedly, some death penalty proponents posit that the post-*Furman* procedural safeguards have been successful at reducing pre-*Furman* problems in the administration of the death penalty (Cassell 2003; Marquis 2003), but there is little debate among most death penalty scholars that the vast majority of methodologically rigorous empirical studies of the capital charging-and-sentencing process since 1973 reveal patterns that are remarkably similar to the charging-and-sentencing patterns prior to *Furman* (see Chapter Four). Unfortunately, the bulk of research on the death penalty process has *not* been theoretically informed, and as a result, both advocates and critics of death penalty reform have been unable to offer an adequate explanation of why patterns of racial/ethnic, gender, and regional bias persist *and* why the past three decades of procedural reforms have failed to significantly reduce the amount of arbitrariness, capriciousness, and bias in the administration of capital punishment in America.[221]

Many scholars often attribute racially disparate outcomes to conscious (Sorensen and Wallace 1999) and/or unconscious (Gross and Mauro 1989; Howe 2004; Johnson 1988) racial prejudice among decision-makers in the capital charging-and-sentencing system (but cf. Kleck 1991). Advocates of the overt or conscious racism explanation

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[221] In 1994, in his dissenting opinion in *Callins v. Collins* (510 U.S. 1141), U.S. Supreme Court Justice Harry Blackmun wrote:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, [*citation omitted*] and despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form (510 U.S. at 1144–45).

often highlight evidence of racially motivated misconduct by police, prosecutors, judges, and jurors, such as tampering with evidence, excluding blacks from capital juries, *et cetera* (see Chapter Four). While deliberate acts of racial discrimination certainly play an important role in some capital cases (see, e.g., Blume *et al.* 1998; Sorensen and Wallace 1999), the "disparities are too great and too wide-spread to be blamed entirely on racial bigots" (Gross and Mauro 1989, p. 110). Moreover, the most consistent finding in the literature is that white-victim cases are treated most punitively, irrespective of the race of the defendant (but cf. Klein and Rolph 1989). True, several studies have discovered that black offenders accused of murdering white victims are treated most severely, but black-offender/white-victim homicides are relatively infrequent, and as a result, this finding has been difficult to replicate across jurisdictions in well-controlled studies (Baldus *et al.* 1998). Analysts have also suggested that white-victim cases are treated more severely because capital prosecutors, judges, and jurors: (1) display a blatant disregard for the lives of black victims (Hawkins 1997; Ogletree 2002, pp. 32–33; Sorensen and Wallace 1995), (2) feel more sympathy for white victims (Gross and Mauro 1989, pp. 113–14), and (3) experience more pressure from the community in white-victim cases (Baldus *et al.* 1998; Bright 1995a).[222] Recent data from interviews of former capital jurors (as opposed to jury simulation studies, see, e.g., Applegate *et al.* 1993; Lynch and Haney 2000) suggest, however, that the influence of race/ethnicity on decision-makers in the capital punishment process may be more complex. For example, white jurors—particularly white male jurors—appear significantly more likely to vote for the death

[222] Media coverage of homicides may also have an indirect impact on prosecutorial discretion to seek the death penalty via its impact on community awareness (and subsequent outrage) over the crime. Several researchers have discovered that homicides involving victims who where white, female, extremely youthful/elderly, and wealthy were most likely to receive coverage in the local media irrespective of the heinousness of the crime (see Hawkins, Johnson, and Michener 1994; Sorenson and Berk 1998).

sentence, irrespective of the race of the defendant or race of the victim (Bowers *et al.* 2001). These interviews also revealed that black jurors are more likely to consider certain types of mitigation evidence (e.g., lingering doubt, remorsefulness, future dangerousness) than white jurors, and white jurors appear to be less receptive to mitigation evidence when the defendant is black (see Bowers and Foglia 2003; Bowers *et al.* 2001)—which is likely to be related to perceived culpability. Therefore, a combination of black-juror leniency and white-juror severity may be partly responsible for observed death sentencing patterns, irrespective of the race/ethnicity of the defendant(s) and victim(s) involved in these cases. Nonetheless, the legally legitimate characteristics of capital cases remain among the most important factors influencing jurors' decisions. Proponents of conscious and unconscious racism explanations, however, have been largely silent as to why (and under what conditions) blacks may be more receptive to mitigation evidence than whites, even with respect to intra-racial homicides. Racial prejudice explanations, while helpful, are only able to partially account for the observed capital charging-and-sentencing patterns. Relative to the total number of death eligible homicides in jurisdictions with capital punishment statutes, the death penalty is used rather infrequently (cf. Liebman 2000). Even if one were to assume that white-victim homicides are of primary concern to decision-makers in the death penalty system, only a small fraction of white-victim homicide cases are ever subject to the death penalty (Blume *et al.* 2004; Borg 1998).

The thirty years of empirical research on the modern capital punishment system in the United States has done a remarkable job identifying and describing patterns racial discrimination in the administration of the death penalty. Scholars have been less

successful, however, at explaining why these patterns persist in light of all of the scrutiny that the capital punishment system has received during the last three decades. To be sure, death penalty scholars have done a much better job at explaining why the Courts have been unreceptive to statistical and other types of evidence documenting the arbitrary, capricious, and discriminatory application of the death penalty (see, e.g., Baldus *et al.* 1994b; Blume *et al.* 1998; Ellsworth 1988; Gross and Mauro 1989; Haney and Logan 1994), but they have largely failed (or neglected) to satisfactorily explain the complex ways in which race/ethnicity, gender, and region influence the administration of capital punishment in the United States. Comprehensive and valid explanations of the role of extra-legal factors are important for more than just scholarly reasons. An accurate understanding of the forces driving these patterns is absolutely necessary for effective policy recommendations and death penalty reform. Perhaps a major reason why procedural "fixes" to the capital punishment process over the past three decades have been unsuccessful is that they fail to address the actual underlying "sources" of these disparities (Howe 2004; Kan and Phillips 2003).[223] The following chapter describes why existing theories of the role of extra-legal factors in the criminal sentencing process have been inadequate in explaining the influence of these extra-legal factors—particularly race/ethnicity—on the capital charging-and-sentencing process and describes an alternative explanatory framework which is believed to overcome these shortcomings.

[223] The term "sources" is used rather than "causes" because the term "cause" often implies temporal priority, spatio-temporal contiguity, and constant conjunction; whereas "source" merely implies a sufficient condition (see Chapter Six; see also Lieberson and Lynn 2002, pp. 11–12).

## Chapter 6: Presentation and Evaluation of Theoretical Perspectives

The majority of research on the role of extra-legal factors—particularly race/ethnicity—in the criminal sentencing process has not been strongly guided by theory (Everett and Wojtkiewicz 2002; Mears 1998a; Unnever and Hembroff 1988). Traditionally, scholars have engaged in evaluation studies (i.e., studies of legal effectiveness) rather than research guided by theoretical propositions that attempt to order, predict, and explain variation in the sentencing outcomes (Black 1972). That is, these scholars attempt to examine whether the law is operating—or applied—in a manner consistent with larger abstract standards of how the law *should* operate (i.e., the concern over "ought" versus "is").[224] These standards (or ideals) arise from a myriad of sources, including constitutional doctrine, moral and other philosophical principles, and federal, state, and local statutes which tend to reify these more general principles (see, generally, Durkheim [1893] 1947). This focus on "law in books" (i.e., ideal law) versus "law in action" (i.e., real law)—referred to as *legal realism*—attracted a strong following when introduced in the late nineteenth- and early twentieth-centuries, and continues to influence contemporary legal scholarship (see Bechtler 1977; Hunt 1978, Chapter 3; Livingston 1982).[225] While the legal realist movement—popularized by Oliver Wendell

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[224] Black (1972) suggests that much of the sociology of law resembles "technocratic" thought, holding that problems of law reduce to problems of *technique*. A technique is considered desirable if it works and "what works" can be learned through science (pp. 1090–91). The primary focus, then, is to make law more efficient and more effective—to make law more closely realize these ideals (see, e.g., Schwartz 1978b; Tamanaha 1997, Chapter 2). For a similar critique of the sociology of punishment, see Garland (1990).

[225] U.S. Supreme Court Justice Benjamin Cardozo (1947, p. 10) remarked, "[t]he most distinctive product of the last decade [i.e., the 1920's] in the field of jurisprudence is the rise of a group of scholars styling themselves realists." It must be noted, however, that the term "legal realism" lacks a precise definition and, from the outset, many legal realists were sharply critical of one another (Rumble 1965, pp. 547). According to Cahill (1952, p. 97), legal realism "it is less a description than a slogan and carries emotional connotations rather than precise meanings." The early legal realists frequently disagreed about the role of pre-established legal norms in the judicial process and the feasibility of a "value-free" science of law, along the lines of natural science (Rumble 1965, pp. 553–54). Realists on either side of these issues claimed to follow the tradition established by Holmes, but as Rumble points out, Holmes' legacy is sufficiently

Holmes ([1881] 1963), Roscoe Pound (1910), and Karl Llewellyn ([1930] 1978)—is responsible for challenging conventional thinking about legal decision-making by placing a strong emphasis on social context, legal realists "engaged in little research and formulated little theory about the reality of law" (Black 1989, p. 5).

Similarly, most scholars continuing in the legal realist tradition have largely failed to advance or significantly contribute to a comprehensive theory of law (Black 1997; Luhmann 1989), and their research remains primarily concerned with critiquing current legal practices and advocating for legal reform (e.g., Baldus *et al.* 2001; Bowers *et al.* 2001; Gross 2001; Hawkins 1997; Johnson 1988; Langbein 1999; Liebman 2000; Radelet and Vandiver 1986; Whitehead 1998).[226] Perhaps is it not surprising, then, that while the empirical literature concerning the role of extra-legal factors in criminal sentencing in general—and the capital punishment process in particular—has proliferated, theoretical

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ambiguous such that a clear resolution of this debate is unlikely (p. 566). Disagreements notwithstanding, the legal realist movement owes much of its intellectual tradition to Roscoe Pound's *sociological jurisprudence* (p. 548). According to Pound, the distinctive features of sociological jurisprudence were four-fold (two methodological and two substantive). With respect to his two methodological claims, Pound insisted that: (1) methods and concepts from the social sciences be used in the study of law and legal institutions and (2) the traditional subject-matter of legal study must be expanded beyond the case-method (i.e., focus on judicial opinions) to include scientific evidence of the relations of the law to society and of the needs and interests and opinions of the contemporary society. His two substantive claims were directed at the attitudes towards legal rules. Pound believed: (1) legal rules, in fact, have a very limited impact on determining legal decisions; and (2) antecedent rules should be as a means to the achievement of social ends (i.e., equitable application of the law) and that judges should be free to deal with the individual case, so as to meet the demands of justice between parties and accord with the general reason of ordinary men (Pound 1910, pp. 20, 35–36; Rumble 1965, pp. 548–49).

[226] Undoubtedly, critical legal scholarship is necessary and research examining the effectiveness of our legal system is essential. Likewise, recommendations for policy reform emerging from this line of research are extremely important. Legal scholarship, however, involves more than the examination of the effectiveness of law. As Black (1989, p. 4) notes, legal scholars should also be concerned with constructing "a general theory capable of predicting and explaining legal behavior of every kind… unconcerned with policy and uncontaminated by practical considerations." That is, researchers should be concerned with developing a "pure science" of law (see also Cooney 1986).

understanding of legal behavior has not progressed much since the early formulations of Holmes and Pound (Black 1989; but cf. Evan 1990; Tamanaha 1997).[227]

Theory, however, is not completely absent from the voluminous research on extra-legal factors and sentencing. Theoretical propositions are found—either implicitly or explicitly—in a large number of studies; however, theory tends to plays a minor—if not trivial—role. In fact, most studies remain "legal effectiveness" studies that are driven more by ideology than theory (Schiff 1981), and do little more than apply theoretical explanations *post factum* to interpret empirical results.[228] As a result, there has been relatively little interplay between research and theory (for discussions, see Merton [1949] 1968, Chapters 4 and 5; Parsons 1938). According to Black (2000a, p. 346), "Research is often independent of theory, and theory is often independent of research." General theoretical propositions seldom dictate or guide the selection (or exclusion) of concepts used to explain variation in sentencing outcomes.[229] Similarly, theoretical concepts and propositions are rarely modified (i.e., restricted or expanded) or discarded in light of the growing body of supportive or disconfirming empirical research (Lenski 1988, pp. 166–67; Merton 1948, p. 506).

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[227] According to Black (2002a, p. 106), "Lawyers had studied law for at least a thousand years without ever formulating a major scientific idea about it."

[228] For example, Kempf-Leonard and Sample (2001, p. 111) state, "the theoretical model of a rational case processing system is used *to guide the interpretation of our findings* and the recommendations we offer for improvement" (emphasis added).

Merton (1945, p. 468), however, strongly criticizes this approach to scientific explanation. "*Post factum* explanations remain at the level of *plausibility* (low evidential value) rather than leading to "compelling evidence" (a high degree of confirmation). The logical fallacy underlying the *post factum* explanation rests in the fact that there is available a variety of crude hypotheses, each with some measure of confirmation but designed to account for quite contradictory set of affairs. The method of *post factum* does not lend itself to nullifiability, if only because it is so completely flexible."

[229] For example, rather than carefully and self-consciously selecting theoretically relevant variables and assessing their relative explanatory power, researchers merely include a long list of variables in an attempt to maximize the amount explained variation (for discussions of the shortcomings associated with this approach, see Horwitz 1983, p. 370; Mayhew 1981, p. 631).

Despite the aforementioned problems with current theoretical formulations concerning legal behavior, three different theoretical perspectives commonly employed to explain the relationship between race/ethnicity (and other extra-legal factors) and sentencing are presented below (see Section 6.1.2). Following their presentation, these theories are evaluated according to widely accepted scientific standards of theory construction, and their relative strengths and weaknesses are identified. After the presentation and evaluation of these perspectives, a fourth theoretical perspective is introduced and evaluated (see Section 6.2). Not only is it argued that this fourth perspective realizes these scientific criteria more successfully than the other approaches, but that it also introduces a research strategy (i.e., paradigm) that avoids several of the common shortcomings that plague socio-legal theory in general (cf. Scheppele 1994).[230]

## 6.1 Dominant Theoretical Perspectives

### *6.1.1 Scientific Criteria of Evaluation*

Before discussing the major theoretical perspectives employed when analyzing the relationship between extra-legal factors and criminal sentencing, it is first necessary to outline the criteria on which these theories will be evaluated. According to Harris (1979, p. 5), it is important "to provide general criteria for distinguishing science from other ways of gaining knowledge and for distinguishing one research strategy from another." Although the requirements of "good scientific theory" are usually taken for granted by most social scientists, a close examination of the voluminous theoretical

[230] A research strategy (or paradigm) is a set of general assumptions about entities and processes in a domain of study, and about the appropriate methods to be used for investigating the problems and constructing theories in that domain (see Kuhn 1970, 1977; Laudan 1977, p. 120).

literature in the social sciences reveals that many of the established standards of scientific theory are often neglected by theorists (for detailed discussions, see Black 1995; Jasso 1988; Lenski 1988; Mayhew 1981); therefore it is necessary to make explicit the standards on which theoretical formulations will be evaluated. Admittedly, scientists often differ on which criteria are most important in theory construction, however these disagreements tend to be trivial (see Braithwaite 1953; Nagel 1979). In fact, certain standards are nearly always emphasized and the numerous specific criteria articulated by some theorists have been shown to be derivative of more general standards (Nagel 1979, p. 29). Black (1995, pp. 831–45) and others (e.g., Akers 2000, pp. 6–13; Braithwaite 1953; McKinney 1966, pp. 18, 62–64; Tittle 1995, pp. 17–53) identify four major criteria on which scientific theory is commonly judged: (1) generality; (2) parsimony; (3) testability; and (4) empirical validity.[231]

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[231] Four additional criteria commonly articulated by scientists are *objectivity, logical coherence*, *clarity*, and *originality* (see Black 1995; Fuchs 1992; Mayhew 1981; Popper 1964). The objectivity of a theoretical formulation is its capacity to be "value-free" and unbiased (Nagel 1979, p. 485). The clarity of a concept or theory can be simply defined as its capacity to be understood. According to Mayhew (1981, p. 629), lack of clarity often boils down to a refusal (or failure) to discuss certain critical questions that must be answered in order for the theory to be intelligible. Logical coherence refers to both a logical consistency between parts of the theory (i.e., no internal contradictions) and the absence of spurious reasoning (Jasso 1988, p. 3). Objectivity, clarity, and logical coherence, however, can be subsumed under one or more of the four criteria mentioned above. For example, if objectivity is an observable characteristic of an idea, then it is an element of validity (Black 2000a, p. 351 n.23). Similarly, if a theory is unclear and logically incoherent, it cannot be parsimonious and testable. In fact, these problems (e.g., lack of clarity, lack of parsimony, logical incoherence) have a strong tendency to occur together (Mayhew 1981, pp. 629–30).

Originality simply refers to the novelty or innovativeness of an idea. "The importance of being original is so fundamental [to scientific theory] that it may be taken for granted and not even mentioned when scientific ideals and standards are listed. Yet science is obsessed with newness" (Black 1995, p. 846). It is widely acknowledged that the most celebrated scientists in history offered completely original insights to problems under investigation (e.g., Copernicus's sun-centered astronomy, Newton's theory of gravity, Einstein's general theory of relativity) (see Kuhn 1970). When original ideas first appear, however, they are often unpopular to the larger scientific community and may even be professionally damaging (see, generally, Barber 1961; Kuhn 1970). In fact, it has even been argued that the more original (i.e., unconventional) an idea, the more hostility and controversy it will attract (see Black 1995, 2000a). Opposition notwithstanding, novel approaches to the study of reality (whether physical, biological, psychological, or social) are what significantly advance science (Bronowski 1958). The originality of a theory or concept, however, becomes important only if it is first general, parsimonious, testable, and valid.

*Generality.* Many scientists and philosophers of science have argued that perhaps the most important aspect of scientific theory is its generality (see Braithwaite 1953; Harris 1979; Hempel 1965; Hempel and Oppenheimer 1948; Lenski 1988; Mayhew 1980, 1981; Nagel 1979). Generality (also referred to as "scope") is commonly understood as the capacity to explain the widest range of phenomena possible under a single explanatory framework or structure (Akers 2000, p. 6). Furthermore, propositions derived from a general theory are not restricted to limited regions of space and time (Braithwaite 1953, Chapter 9). It has even been argued that generality is necessary for science to progress (Nagel 1979, p. ix) and that generality is the "supreme virtue" of scientific theory (Lenski 1988, p. 166). Still others have maintained that generality is a "contemptuous attitude towards a particular case" and that science "craves" generality (Black 1995, p. 833).

Admittedly, social scientists in general—and sociologists in particular—are far from consensus on the importance and appropriateness of establishing "timeless" and "spaceless" theory (for discussions, see Black 2000c; Homans 1964; Lenski 1988; Somers 1998). In fact, many social scientists continue to argue that social processes are culturally and historically contingent, therefore prohibiting such general explanations (e.g., Frankford 1995; Tamanaha 1997). However, following Nagel (1979, pp. 506–507) and others (see Black 1979b; Mayhew 1981), it is argued here that the difficultly in establishing highly general social theory is not inherent in the study of social phenomena (i.e., social phenomena are not too complex to fully comprehend); rather the difficulty arises because social scientists have largely failed to establish more discriminating classifications of social phenomena that are of a transcultural nature. As a result, most

theoretical formulations in the social sciences employ familiar "common sense" distinctions and possess a very limited scope of valid application (Mayhew 1980, p. 352; Nagel 1979, pp. 459, 503).

> The fact that social processes vary with their institutional settings, and that the specific uniformities found to hold in one culture are not pervasive in all societies, does not preclude the possibility that these specific uniformities are specializations of relational structures invariant for all cultures…the "historically conditioned" character of social phenomena is no inherent obstacle to the formulation of comprehensive transcultural laws (Nagel 1979, pp. 462–64).

> In the case of human associations, which are the most unlike imaginable in purposes and in total meaning, we find nevertheless similar formal relationships between individuals. Superiority and subordination, competition, imitation, division of labor, party structure, representation, inclusiveness towards members and at the same time exclusiveness towards non-members, and countless similar variations are found, whether in civic group or in a religious community, in a band of conspirators or an industrial organization, in an art school or in a family. However diverse, moreover, the interests may be from which the socializations arise, the forms in which they maintain their existence may nevertheless be similar (Simmel 1909, p. 299).[232]

Certainly, problems associated with narrow classifications of phenomena under consideration are not particular to the social sciences. In fact, Braithwaite (1953) notes that, in their early stages of development, all sciences were characterized by common sense distinctions and low-level generalizations. As these sciences advanced, however, more general (i.e., abstract) formulations were developed and narrow classifications previously considered were either greatly expanded or discarded altogether:

> As the hierarchy of hypotheses of increasing generality rises, the concepts with which the hypotheses are concerned cease to be properties of things

[232] Simmel ([1908] 1950, pp. 21–22) initially conceived sociology as the science of social forms—"social geometry"—and suggested that sociologists should leave the examination of the content of social interaction to other social sciences (e.g., economics and psychology) much in the same way that geometry leaves the analysis of content to other physical sciences: "Geometric abstraction investigates only the spatial forms of bodies, although empirically these forms are given merely as the forms of some material content. Similarly, if society is conceived as interaction among individuals, the description of the forms of this interaction is the task of the science of society in its strictest and most essential sense."

> [that] are directly observable, and instead become theoretical concepts (e.g., atoms, electrons), which are connected to the observable facts by complicated logical relationships (p .ix).
>
> In fact, the very purpose of moving from the particular to the general is to improve our understanding of both. The specific entities of the social world—or, more precisely, specific facts about these entities—provide the basis on which generalizations must rest. In addition, we almost always learn more about a specific case by studying more general conclusions (King, Keohane, and Verba 1994, p. 35).

Highly general theory, then, achieves a greater level of *scienticity*[233] than theoretical formulations that are culturally and historically contingent because it orders, predicts, and explains a much wider range of phenomena under investigation. Highly general theory also allows scientists to identify and understand relationships previously ignored or believed to be completely incomprehensible (Bronowski 1958; Mills 1959).

*Parsimony.* Akers (2000, p. 7) defines parsimony as "the conciseness and abstractness of a set of concepts and propositions."[234] The principle of parsimony, then, is to use as few propositions as possible to explain the widest range of phenomena.[235] In science, a simple (i.e., parsimonious) theoretical formulation that explains as much as a complex one is always preferable.[236]

> Since all models are wrong [i.e., all models are approximations], the scientist cannot obtain a "correct" one by excessive elaboration. On the contrary, following William of Occam he should seek an economical description of natural phenomena. Just as the ability to devise simple but evocative models is the signature of the great scientist, so over-elaboration…is often the mark of mediocrity (Box 1976, p. 792).
>
> The goal is to develop a theory that is at once simple and fruitful, a theory, that is, with a minimum of postulates and a maximum of predictions, the

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[233] According to Black (2000a, p. 351), science is a matter of degree. Scienticity is the capacity of a theory to realize scientific standards of generality, parsimony, testability, validity, and originality.
[234] Others have remarked that "abstraction is the essence of scientific inquiry…." (Posner 2003, p. 17).
[235] Nietzsche ([1888] 1998, p. 75) remarked, "It is my ambition to say to in ten sentences what other men say in whole books—what other men do *not* say in whole books."
[236] Black (1995, p. 838) argues that science "loves simplicity and despises complexity."

> latter including predictions for phenomena or relationships not yet observed (Jasso 1988, p. 1).

This is not to say, of course, that social life is not complex. Nor is it argued that the development of a parsimonious (and highly general) theory of social phenomena is an easy task. It is widely believed, however, that the ultimate purpose of science "is to simplify reality and find underlying patterns where reality first appears more complicated…[t]he more concisely such patterns are formulated, the more the goal of parsimony is realized" (Black 1995, p. 838).[237] The complexity of social life, then, does not require that theoretical propositions about social life be exceedingly complex or that parsimonious explanations of social phenomena are forever doomed (but cf. Sarat 1989; Tamanaha 1997). In fact, as the complexity of a theory increases, it becomes increasingly unclear.[238] Theories that rest on numerous assumptions and qualifications seldom order, predict, and explain social phenomena with reasonable accuracy—they are inefficient (Nagel 1979, p. 449).[239] Increasing complexity also invites divergent interpretations and increases the likelihood that the propositions will be misunderstood. If propositions are misunderstood, their testability—and ultimate validity—is also questionable. Stinchcombe (1968, p. 6) remarked, "Social theorists should prefer to be wrong rather than misunderstood. Being misunderstood shows sloppy theoretical work." Nagel (1979) also dismisses arguments that social phenomena are too complex to fully comprehend as misguided:

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[237] Weber ([1904] 1949, p. 58) remarked that the duty of sociology was to "analytically order[] empirical reality."

[238] Edling (2002, p. 203) writes, "[S]ociological models should be precise, or else they cannot serve as hypothesis generators and consistency checkers in any substantial way; and those are two important functions for theoretical models."

[239] According to Posner (2003, p. 17), "A theory that sought faithfully to reproduce the complexity of the empirical world in its assumptions would not be a theory—an explanation—but a description."

> The complexity of a subject matter is at best not a precise notion, and problems that appear to be hopelessly complex before effective ways for dealing with them are invented often lose this appearance after the inventions have been made…though social phenomena may indeed be complex, it is by no means certain that they are in general more complex than physical and biological phenomena for which strictly universal laws have been established. Moreover, while it is true that responses to a given social situation are mediated by the variable interpretations [individuals] place upon it, this fact by itself does not explain why there are no universal laws relating each of the several interpretations placed upon a given type of social stimulus to a particular form of human response (p. 505).

Similarly, Mayhew (1981) notes:

> Parsimony is critical to the development of any theory about social phenomena. A theory that is too complex to be understood (or too complex to permit the implementation of research on critical questions) is no more than an appeal to incomprehensibility, a claim that what is being studied cannot be understood (p. 629).

*Testability.* It is widely recognized in the scientific community that scientific theory must be falsifiable (see Popper [1934] 1968). In order for a theory to be falsifiable, it must satisfy two conditions. First, it must be predictive (Jasso 1988). As Black (1995, p. 831) notes, "a prediction need not prophesy the future of anything, but is simply an empirical pattern—something observable—logically implied by the theory."[240] If prediction is not possible the theory cannot be proven false; it cannot be tested. Second, it must be stated in quantitative language so that predictions can be evaluated by measurement (see Braithwaite 1953; Zetterberg 1966). This measurement, however, does not require a determination of precise differences (interval or ratio measurement); rather it need only be a determination of whether more or less of something occurs (ordinal measurement) or merely whether something occurs at all (nominal measurement) (Black 1995, p. 831 n.14). Indeed, if science is the study of variation (i.e., change) in

[240] McKinney (1966, p. 47) argues that scientific explanation consists of showing that a given event "had to be expected in view of the presence of certain factors prior and/or contemporaneous with it."

reality, as most scientists would suggest, a scientific theory that makes clear predictions about the quantity (or relative quantity) of a particular phenomenon occurring under specific conditions is superior to one that makes claims which are not subject to measurement (Akers 2000).[241] According to Nagel (1979, p. 447), the testability of social scientific theory is what distinguishes it from moral and social philosophy.[242]

*Empirical Validity.*[243] The validity of a theory is its truthfulness or accuracy; that is, how well the theory is supported by empirical research evidence (Akers 2000).[244] Although theories will inevitably encounter negative or disconfirming evidence, this does not warrant the theory being judged wholly invalid (Harris 1979). It is only after continued rigorous empirical testing that a theory's validity can truly be known (Popper [1934] 1968). Through repeated testing, weaknesses in the theory are identified, often resulting in the theory being modified or discarded. Most scientists agree, however, that

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[241] Lieberson and Lynn (2002) vigorously challenge the importance of prediction in sociological theory. They argue that predictability is a standard adopted from classical physics that is impractical in the social sciences and many of the natural sciences: "[Sociologists] are again trying to do something that [sociologists] have no business expecting to be able to do, at least in a world of complex influences that are not restrained as they would be in a true experiment. This again leads to unrealistic goals and forced efforts to have tests of predictability that are not appropriate...because they implicitly use a standard from classical physics rather than a more realistic standard of how it works in the wider set of sciences" (p. 10). Unfortunately, Lieberson and Lynn fail to offer a viable alternative for distinguishing between rival theories (or theoretical programs). By viewing predictability in relative rather than absolute terms, the predicative power of the theory remains a useful way to evaluate competing explanations of social phenomena. Moreover, the focus on predictability facilitates careful theory construction—attention to the development of clear predictions often improves the parsimoniousness and logical consistency (i.e., inherent coherence) of a theory.

[242] Black (2000a, p. 360 n.43) suggests that much of the work of classical (e.g., Durkheim, Simmel, and Weber) and modern (e.g., Collins, Luhmann, and Parsons) sociologists is largely untestable (see also Lenski 1988, pp. 165–66). Cooney (1993, p. 2227) posits that "no flaw is more fatal to a scientific theory than lack of testability."

[243] To be sure, empirical validity is but one of many different types of validity considered by scientists. Others include face validity, content validity, concurrent validity, convergent validity, and discriminant validity (see, e.g., Skrondal and Rabe-Hesketh 2004, p. 8), but these forms of validity are generally relevant to the measurement of theoretical concepts, not to the overall accuracy of theories. Thus when scientists speak of validity of a theory, they are usually referring to empirical validity.

[244] The validity of a scientific theory also increases with the precision of its predictions. "The validity of a theory is measurable with its precision: the degree to which the frequency and magnitude of its explanatory variable(s) matches the frequency and magnitude of the variable it seeks to explain. The highest validity is total precision" (Black 2000a, p. 351 n.26).

it is better for a theory to be false than it is for a theory to be untestable (see Black 2000a, p. 351 n.24). An incorrect theory, at minimum, advances science through alerting the researcher (and scientific community) what reality is not—it eliminates something (Black 1995, p. 841). An unfalsifiable theory, on the other hand, cannot be as judged right or wrong and, therefore, it cannot advance the understanding of the phenomenon under investigation.[245]

The four criteria described above—generality, parsimony, testability, and validity—constitute an "epistemological checklist" with which scientific theory should evaluated (see Black 1995, p. 847).[246] These criteria guide the critique of the theoretical perspectives presented below.

### *6.1.2 Description of Dominant Perspectives*

Research examining the relationship between extra-legal factors and criminal sentencing that has been theoretically informed generally employs—or is believed to support—one of three theoretical perspectives: (1) formal legal; (2) conflict; and (3) interactionism (see Dixon 1995, pp. 1159–62; Pratt 1998, pp. 513–15; Urbina 2003, pp. 9–28).[247]

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[245] According to Francis Bacon (1875, p. 210), "Truth more readily emerges from error than from confusion."

[246] Epistemology is the philosophy of knowledge, including its nature and evaluation (see Black 1995, p. 829 n.3; Nagel 1979, p. 30).

[247] The *organizational maintenance* perspective, rooted heavily in the work of Michels ([1911] 1962), has also been used to explain sentencing outcomes. Organizational maintenance theorists posit that researchers must focus on the operational goals of legal officials, rather than the political (i.e., conflict), symbolic, or formal legal goals of sentencing. According to this perspective, the operational goal of courtroom elites (e.g., prosecutors and judges) is to maintain a stable and orderly sentencing system through the efficient processing and disposing of cases (Dixon 1995, p. 1162; Johnson 2006a, pp. 264–66; Kautt 2002, p. 642). Organizational maintenance theorists posit that an efficient sentencing system is maintained through the heavy use of plea-bargaining (see Baker and Mezitti 2001). (The U.S. Supreme Court specifically approved plea-bargaining as a means of managing overloaded criminal dockets, see *Santobello v. New York*, 404 U.S. 257, 260–61 [1971].)

*Formal Legal Theory.* The formal legal perspective conceives law, fundamentally, as an affair of rules and logic.[248] According to this view, the explanation of legal behavior lies in the rules by which established facts are assessed (see Savelsberg 1992; Weber [1925] 1954, [1922] 1968). In the formal legal model, the social characteristics of actors in a particular case have no relevance unless these characteristics are mentioned in the rules themselves. The model also assumes that law is constant from one case to another, so it becomes possible to predict or anticipate the outcomes of cases based upon the assessment of facts (Trevino 1996, Chapter 5).[249]

Formal legal theorists, for example, acknowledge that members of certain minority groups, on average, receive harsher sentences than whites, but suggest that this

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When attempting to explain racial disparities in sentencing, it is questionable, however, whether organizational maintenance theory offers a novel or sufficiently different theoretical perspective from formal legal and conflict perspectives. First, organizational maintenance theory cannot, by itself, explain racial disparities in criminal sentencing, so it is usually coupled with conflict perspectives (Chambliss and Seidman 1971). Organizational maintenance theorists argue that social elites are processed in ways that reduce their sentences, mainly through the use of plea bargains. Minority and powerless groups, on the other hand, are processed in ways that fail to reduce their sentences. From this perspective, processing and extra-legal variables (e.g., race/ethnicity) interact to affect sentencing (Dixon 1995). Second, legal rules still play a central role in organizational maintenance theory, although their role tends to be understated by organizational maintenance theorists. In fact, many legal statutes mandate certain procedures for specific crimes. For example, in Georgia, prosecutors must file a notice of intent to seek the death penalty *prior* to a grand jury indictment (Mears 1999). In North Carolina, any murder case in which one or more of several statutorily defined elements are present must become a death penalty case (Unah and Boger 2001). Organizational maintenance theorists also underestimate the role and importance of formal rules that are designed to streamline the legal process and make sentencing more efficient. In recent years, the U.S. Supreme Court and U.S. Congress, along with state supreme courts and state legislatures, have limited the scope of appeals and shortened the appellate process (see Haines 1996; Hertz and Liebman 2005; Williams 2000). The distinction between formal legal goals and operational goals, then, is dubious at best.

Perhaps the strongest criticism of organization maintenance theory is that it is tautological (for a discussion of tautological explanations in the social sciences, see Akers 2000). Legal rules, case processing, and sentencing outcomes are all examples of legal behavior (see Black 1976). Therefore, not only do organizational maintenance theorists *explicitly* attempt to explain one form of legal behavior (case dispositions) with another form of legal behavior (case processing), they *implicitly* incorporate another form of legal behavior (i.e., formal legal rules) into their theory. Legal processing, then, becomes part of what is to be explained and is incapable of providing an adequate explanation of legal behavior, sentencing or otherwise (Black 1972; Horwitz 1983; Timasheff 1937).

Due to the aforementioned limitations of organizational maintenance theory, criminologists and socio-legal theorists tend to focus their attention on formal legal, conflict, and interactionists perspectives.

[248] The formal legal model is also known as the *differential involvement* model (Pratt 1998, p. 513) and the *jurisprudential model* (Black 1989, pp. 19–22).

[249] A discussion of the virtues and vices of rule-based legal reasoning is beyond the scope of this project; see Scalia (1997) and Sunstein (1996) for contrasting arguments.

results from the fact that members of these minority groups are involved in more serious crimes and have more extensive criminal histories (see, generally, Wilbanks 1987; Wilson and Herrnstein 1985). According to this view, race/ethnicity and other extra-legal factors play little or no role in the sentencing process once legally relevant characteristics, such as offense severity and the offender's criminal history, are held constant (see Hagan 1974; Kleck 1981). Although supporters of this perspective tend to acknowledge that racial/ethnic bias in criminal sentencing was evident (and even widespread) in the past, even after racial/ethnic considerations were formally removed from legal codes, they hold that racial/ethnic neutrality now exists due to increased formalization and bureaucratization of the criminal judicial process (Pratt 1998, p. 515). Studies that continue to detect significant racial/ethnic differences are criticized by these theorists as being methodological flawed (Hagan 1974; Kleck 1969, 1981) and for incorrectly attributing such differences to racial/ethnic prejudice rather than other difficult to measure factors that are likely to be correlated with race/ethnicity (e.g., quality of legal representation) (Abrams and Yoon 2007; Schanzenbach 2005b).

*Conflict Theory*. The *conflict* perspective, largely rooted in the neo-Marxist tradition (e.g., Chambliss and Seidman 1971; Quinney 1970; Sellin 1938; Turk 1969), argues racial/ethnic, gender, and class discrimination in criminal sentencing is ubiquitous and results from power differentials between groups in society—differentials that are embedded in the institutional organization of society.[250] According to this view, racial/ethnic minorities, women, and the poor are members of politically and economically deprived groups who suffer from institutionalized discriminatory social

[250] Pratt (1998) refers to the conflict model as the *direct-impact* model; Dixon (1995, p. 1160) refers to it as the *substantive political* model.

practices, particularly in the criminal justice system (see, e.g., Chambliss 1999; Du Bois [1940] 1968). Law, then, is either manipulated directly by powerful groups to maintain their advantage or it simply mirrors the basic tenets of the market economy (Hunt 1993; Savelsberg 1994; Spitzer 1983; Trevino 1996, Chapter 4; Turk 1969). Conflict theorists, for example, maintain that racial/ethnic minorities receive harsher sentences than whites even after important legal characteristics (e.g., prior record, offense severity) are held constant because law-making and law-finding differentially (and deleteriously) impacts members of politically and economically disadvantaged groups (see, e.g., LaFree 1989; Petersilia 1985; Zatz 1987). Revisions of conflict theory have identified certain mediating *and* moderating factors that impact the relationship between race/ethnicity and criminal punishment (see Hawkins 1987). These recent modifications of conflict theory, however, significantly blur the distinction between conflict and interactionist perspectives and, perhaps, are more accurately classified as integrated theories.[251]

*Interactionism.* The *interactionist model* emphasizes the social context in which criminal sentencing takes place and posits that the meaning and impact of legal and extra-legal case characteristics vary according to the setting in which such sentencing occurs (Tamanaha 1997, pp. 143–52). According to this perspective, which is rooted in symbolic interactionism (see Blumer 1969; Goffman 1963; Mead 1934; Simmel [1908] 1950; Thomas and Znaniecki [1921] 1958), the meaning and significance of legal and extra-legal factors are not abstract, fixed and unchanging; rather they are open to continual negotiation, reinterpretation, and recreation depending on the actors' goals and

[251] In particular, Hawkins argues restatements of conflict theory were merely oversimplifications of its original formulation. Contrary to these previous oversimplifications, he emphasizes the importance that earlier conflict theorists placed on: (1) victim characteristics, (2) "race-appropriate" and "race-inappropriate" crime, (3) the differential mechanisms of "power-threat" and "subordination," and (4) region.

the setting in which interaction occurs (Brittan 1981; Emmelman 1994). For example, interactionists believe that the meaning and salience of race/ethnicity in a criminal sentencing hearing is likely to vary according to observable aspects of the case, such as the offender's prior criminal record (Thomson and Zingraff 1981; Zatz 1984), offense severity (Kempf and Austin 1986), prosecutorial decision-making (Keil and Vito 1989), the degree of urbanization and political climate of the jurisdiction (Hagan and Zatz 1985), and the structure of sentencing guidelines (Miethe and Moore 1986). The influence of race/ethnicity will also vary according to subjective, largely unobservable factors such as preexisting individual and group attitudes about members of a particular minority group (e.g., prejudices and stereotypes) and newly formed attitudes and definitions about racial/ethnic minorities that emerge in each decision-making process (Blumer 1969). Consequentially, an offender's racial/ethnic background will not uniformly disadvantage her or him when being sentenced; rather the specific characteristics of each particular case, the interpretation of these characteristics by decision-makers in the case, and the specific goals of the decision-makers determine how race/ethnicity operates in that situation.[252]

### *6.1.3 Evaluation of Dominant Perspectives*

*Generality.* The first criterion on which these perspectives are evaluated is the generality of the proposed explanation. Conflict theory, considered one of the "grand" theories of society (Collins 1975, 2002), is much broader in scope than both formal legal

[252] Some theorists have integrated elements from one or more of these three dominant perspectives. For example, both Albonetti (1991) and Steffensmeier and colleagues (Steffensmeier and Demuth 2000, 2001; Steffensmeier, Kramer, and Streifel 1993; Steffensmeier, Kramer, and Ulmer 1998) combine aspects of symbolic interactionism and formal legal theory in causal attribution and focal concerns theories, respectively.

and interactionist perspectives. Conflict theorists often conceptualize race/ethnicity, gender, and social class as proxies for economic and political power. They argue, for example, that power differentials between racial/ethnic groups explain racial/ethnic disparities in criminal processing at all stages of the criminal justice system (i.e., from law-making through sentencing) (see Turk 1969). Furthermore, they posit that these economic and power differentials explain racial/ethnic disparities in law-making, law-breaking, and the response to law-breaking throughout history and across different societies (Chambliss and Seidman 1971; Reiman 1979). Although the broad scope of the conflict perspective is largely regarded as one of its greatest strengths, its generality has been questioned because of earlier conflict theorists' nearly exclusive focus on class division and inequality resulting from capitalist economic systems (Akers 2000; Black 1993). Conflict theorists have been criticized for being unable to explain the existence of inequality in criminal justice systems in socialist and other societies that are not economically and politically stratified (or only have limited stratification in these areas).

Interactionists maintain that the essential meaning of race/ethnicity and its impact on criminal sentencing may change from situation to situation (cf. Bobo 1999). Furthermore, these theorists argue that extra-legal factors such as race/ethnicity are important primarily, if not exclusively, through their association with other legal and extra-legal factors. Interactionists, however, are largely silent as to how and when pre-existing roles, norms, or ideologies constrain legal behavior. For example, although interactionists acknowledge that social actors are not always equal when they confront one another in the legal process (Brittan 1981, pp. 179–80), they offer little guidance as to how power and status differentials may systematically influence the legal process (but

cf. Black and Baumgartner 1983; Cooney 1994). Because interactionists posit that concepts have to be continually redefined and reevaluated in every instance of interaction, their theory is criticized for not only "dispens[ing] with generalization" (Perdue 1986, p. 255), but also for offering virtually no simplification of reality (Black 1989; but cf. Tamanaha 1997).[253]

The cross-cultural applicability of interactionism is also limited because interactionists neglect explicitly addressing important differences in judicial traditions and legal cultures or haphazardly use Western interpretive frameworks to explain legal behavior in non-Western nations. Perhaps not surprisingly, interactionists have been primarily concerned with explaining legal processes and outcomes in legal systems based on English common law, most notably in the United States, the United Kingdom, Ireland, Australia, and Canada (see, e.g., Unnever and Hembroff 1988).[254] Systems based on English common law assign a preeminent position to case law (i.e., judge-made law) and emphasize an adversarial process in the courtroom. Legal systems based on common law, however, constitute a small proportion of the legal cultures of the world (David and Brierly 1985). For example, the legal systems of continental Europe, Central and South America, and Asia are based on the civil law tradition, which gives precedence to written law and emphasizes an inquisitorial process in the courts, assigning the court a pivotal role in the pre-trial preparation of evidence by police, the presentation of evidence at trial, and the examination of witnesses (see Royal Commission on Criminal Justice 1993). The majority of nations in Africa and the Middle East have legal systems that combine

[253] Some legal sociologists have argued that the discipline will be unable to construct any useful substantive theory unless it "ceases to be preoccupied with the 'legal profession' and the behavior of jurors in particular social units" (Gibbs 1968, p. 446; see also Black 1997).
[254] The state of Louisiana and the Canadian province of Quebec have legal systems that combine both common law and civil law.

elements of common or civil law with elements of customary or Islamic law, which are largely rooted in spiritual, philosophical, or religious traditions (David and Brierly 1985). These different legal cultures vary in the manner in which they conceptualize and structure judicial discretion and legal innovation (see Rosen 1989). As a result, the communicative process in legal proceedings, a central feature of the interactionist perspective, may be of limited utility in explaining legal behavior in certain legal cultures.

Interactionism may have limited cross-temporal applicability as well. The explanatory power of the interactionist model is likely to be dependent on the quantity and diversity of ideas found in any given society—the amount of culture.[255] Interactionists assume there exists a sufficient amount of different ideas in a social setting from which individuals can infer meaning about a social object. While this assumption is likely to hold in modern societies that have numerous subcultures and much individuality, it is problematic for the study of earlier societies. Many early societies, for example, had very little culture (in terms of quantity, not quality)—they had one language, one religion, one way of dressing, on way of preparing food, and so forth (Black 1976); therefore it is unlikely that interactionism could adequately account for variation in legal behavior in these early societies because of the sparseness and homogeneity of ideas in those contexts.

Formal legal theorists posit that the characteristics of a case outlined in pre-established rules primarily determine legal decision-making (but see Levi 1949). While acknowledging that certain extra-legal factors inappropriately influenced the legal

[255] According to Black (1976, p. 61), "culture has an existence of its own, apart from the way people experience it;" therefore it is possible to measure the amount of culture in any given setting.

process in the past, formal legal theorists contend that legal decision-making has been formalized to the point where rules have become the only important predictors of legal outcomes (e.g., sentencing guidelines). The generality of this approach, however, has also been seriously questioned. First, by conceding that legal rules were ineffective at formalizing legal behavior in the past, formal legal theorists limit the generality of their approach because they must restrict the importance and function of legal rules to the modern period. Formal legal theory's generality is further restricted by its apparent logical inconsistency (i.e., internal contradiction): it suggests that rules were of limited importance in the past, but are of greater importance in the present because more restrictive rules have been applied to current legal behavior (see also Kan and Phillips 2003).

*Parsimony.* Black (2000a, p. 838), quoting Gell-Mann (1994, p. 28), notes, "It is not simple to define 'simple.'" Most scientists agree, however, that when comparing competing theoretical explanations, the theory that uses the fewest number of propositions and rests on the fewest assumptions to explain the widest range of phenomena is considered the most parsimonious (Friedman 1953; Mayhew 1981).

Formal legal theorists attempt to explain legal behavior by legal rules themselves. That is, they explain legal behavior by the application of legal rules to the facts in a particular case and attribute racial/ethnic, age, gender, and social class differences in sentencing to the differential involvement of members of these groups in serious crimes and the prevalence of extensive (or serious) criminal histories among certain members of these groups. While formal legal theory appears to offer a rather parsimonious explanation of sentencing differences, it rests on several assumptions concerning the

creation and application of the law. Namely, formal legal theorists assume that (1) legal systems are becoming increasingly characterized by *formal rationality*,[256] emphasizing the universal application of established rules, rather than *substantive rationality* which is purposive and primarily concerned with the ends served by legal decisions (Engen *et al.* 2003; Savelsberg 1992; Tomlins 2007; Weber [1925] 1954); (2) laws, except in rare instances, are developed *independent* of considerations of extra-legal factors (see Chambliss and Seidman 1971); (3) laws can be directly applied to facts of a case independent of evaluations that, either explicitly or implicitly, rely on extra-legal factors (Black 1979a, 1989); and (4) laws are not—or cannot be—applied in a manner that is technically "legal" but still discriminatory (see Black 2002a, pp. 111–13; Bushway and Piehl 2001).[257] Some socio-legal theorists have found these assumptions extremely problematic (see Black 1989; Savelsberg 1992). These assumptions, then, seriously

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[256] Ewing (1987) identifies two dimensions of formal rationality: (1) *logically formal rationality* and (2) *sociologically formal rationality*. Logically formal rationality refers to a logical and gapless system of legal rules. Sociologically formal rationality, on the other hand, refers to the notion of uniformity and equal treatment under the law. Sentencing guidelines, for example, reflect both of these dimensions of rationality.

[257] To be sure, all laws "discriminate"—that is, they focus on specific behaviors (and groups). In this context, however, researchers mean "socially undesirable" or "legally dubious" discrimination. For example, Bushway and Piehl (2001) discovered that judges make downward departures (from sentencing guidelines) more often in white-defendant cases than in black-defendant cases. Similarly, judges make upward departures more often in black-defendant cases than in white-defendant cases. Therefore, although these judges' actions are "legally permissible," they appear to be discriminatory because the sentencing guidelines already take into account the severity of the crime and the criminal history of the defendant (see also Johnson 2005; Mustard 2001). Also recall that all death penalty statutes require capital jurors to weigh statutory aggravating and mitigating evidence during the penalty phase (see Chapter Two). Interviews with former capital jurors reveal that white jurors are less receptive to mitigation evidence when the defendant is black (Bowers and Foglia 2003; Bowers *et al.* 2001), thereby allowing white jurors to "legally discriminate" against black defendants through the exercise of discretion at the sentencing stage (and perhaps the conviction stage as well). This neither implies that judges and jurors consciously act in a discriminatory manner (Johnson 1988) nor that discretion in the legal process will inevitably lead to discrimination (Baldus *et al.* 1994b); however it should be noted that discretion is desirable only to those who benefit from it and the robust empirical associations between race/ethnicity, upward/downward departures, and juror discretion at the penalty phase of a capital trial seriously bring into question the "appropriateness" of the observed sentence enhancements or reductions (for non-capital cases) and the death penalty.

undermine the ability of formal legal theorists to offer a parsimonious explanation of legal behavior.[258]

Both conflict and interactionist approaches also rest on several questionable assumptions concerning the nature of human beings and society that potentially undermine their degree of parsimony (see, generally, Black 2000a, pp. 345–48; Popper 1964). Conflict theorists attribute group differences in criminal justice processing to the domination and oppression of politically and economically disadvantaged groups by powerful elites. Underlying this perspective are the assumptions that (1) social groups have a history of shared identity and shared fate, (2) these groups believe themselves to be in zero-sum competition over valuable (and scarce) resources, and (3) social order is primarily maintained through coercion and oppression (see Collins 1975; Perdue 1986, pp. 303–305). Critics argue that these assumptions, while being sufficient to produce discrimination, are unnecessary (Sidanius and Pratto 1999, p. 17), unobservable, and unknowable (see Black 2000a, p. 346). In fact, conflict theorists' characterization of society as being rife with disagreement has been strongly challenged by social theorists for some time, particularly as it pertains to the creation and application of criminal laws (see Akers 2000; Durkheim [1893] 1947).

Interactionists posit that the impact of extra-legal factors on criminal sentencing is not fixed, but rather it is conditioned by the social context in which sentencing occurs and by the goals and motivations of the actors in that particular setting. Interactionists assume that (1) human beings act towards things on the basis of the meaning that things

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[258] Horwitz (1983, p. 372) extends the criticism of the formal legal theory even further, positing "whether legal rules predict [legal] behavior is an empirical rather than a conceptual question." According to Horwitz and others (e.g., Black 1972; Timasheff 1937), rules are to be taken as an object to be explained and not, themselves, what explains law.

have for them; (2) these meanings are a product of social interaction in human society; (3) these meanings are modified and handled through an interpretive process that is used by each individual in dealing with the signs he encounters; and (4) communication is the basis for the formation and maintenance of social order (see Blumer 1969; Cooley [1902] 1964; Mead 1934). Interactionists' assumptions and assertions about the human mind and the conscious and unconscious meanings and feelings individuals experience seriously undermine their ability to offer a parsimonious account of influence of race/ethnicity on criminal sentencing. Interactionists, largely, remain unclear as to how—and under what conditions—the various factors present in a situation influence the meanings actors assign to social objects and how these meanings, in turn, influence sentencing outcomes. According to Brittan (1981, p. 167), "it is impossible to define symbolic interactionism with any degree of precision. One thing we must be clear about is that we are not talking about a formal theoretical scheme." This may partly result from the fact that earlier interactionists (e.g., Mead 1934) were less concerned with specifying behavioral outcomes resulting from specific forms of social interaction, as they were with explaining the processes by which mind, self, and society are constructed (Perdue 1986, p. 239; but cf. Simmel [1908] 1950). While the illumination of these processes by interactionists is extremely important, ambiguities in the theory prevent the articulation of clear behavioral implications and, ultimately, seriously limit the theory's ability to offer a clear and parsimonious explanation of legal behavior.

*Testability.* As mentioned earlier, a testable theory must be both predictive and measurable. A theory's level of testability is also related to its parsimony (see Mayhew 1981). If a theory is exceedingly complex, resting on numerous caveats and qualifiers,

testing it becomes extremely difficult. Furthermore, if it makes contradictory predictions (i.e., logically inconsistent), all data can be interpreted as supportive. Both formal legal and conflict perspectives enjoy a higher degree of testability than interactionist theory, although neither perspective is without significant problems. Formal legal theorists postulate that, holding relevant legal factors constant, extra-legal factors such as race/ethnicity, age, and gender are not predictive of sentencing outcomes. In testing this perspective, researchers compare offenders with different social characteristics (e.g., members belonging to different racial/ethnic groups) who are similar with respect to their prior criminal records and offense severity and examine whether these offenders are treated differently. While this approach seems fairly straightforward, two major difficulties arise. First, as previously mentioned, the measurement of many legally relevant variables requires a subjective interpretation; that is they result more from an evaluation than mere description (see also Bernard 2002). These interpretations may, themselves, be influenced by the social characteristic under consideration. For example, the determination of culpability (i.e., an offender's level of blameworthiness), remorsefulness, and future dangerousness (i.e., a defendant's propensity to recidivate) is not simply a matter of description, but a value judgment (see, generally, Blume *et al.* 2001; Eisenberg, Garvey, and Wells 1998; Sundby 1998). Second, the impact of an extra-legal characteristic at earlier stages in the criminal justice process (i.e., arrest, charging, plea bargaining) may have a sizable impact on decisions at a later stage (Mears 1998a, p. 681; Piehl and Bushway 2007, p. 122). By the time a case reaches court, the particular extra-legal characteristic may have very little, if any, direct effect on sentencing. The extra-legal characteristic, however, may have a strong indirect effect on

sentencing resulting from the filtering process leading up sentencing. Cases that reach the sentencing stage are a very select group that only represents a small portion of similar cases that originally entered the system (Pratt 1998, p. 519). These cases tend to be the most serious cases, so similarly situated offenders may, indeed, be treated the same. Arrest, charging, and plea-bargaining decisions, however, may be influenced by the extra-legal characteristic such that individuals with certain devalued social characteristics who commit, objectively, identical offenses as individuals with valued social characteristics are charged with more severe offenses and offered less favorable plea bargains (Dixon 1995, pp. 1162–63). Since the discretion exercised by police and prosecutors is greatest in these earlier stages, the cumulative bias resulting from these decisions is masked when researchers only examine the sentencing stage (see Donziger 1996; Sorensen and Wallace 1995, 1999).

Conflict theorists are frequently criticized for making such open-ended predictions that any contradictory evidence can be interpreted or re-interpreted to support the theory (see Liska 1993).[259] For example, when faced with unsupportive evidence suggesting certain laws and institutional practices benefit disadvantaged groups, many conflict theorists argue that such laws and practices only *appear* to serve disadvantaged groups in the short-term to maintain societal stability, but ultimately serve the long-term interests of elites (see Collins 1975). The open-ended nature of predictions derived from the conflict perspectives, however, does not automatically preclude the theory from being falsifiable. Conflict theorists, for example, could specify, *a priori*, the conditions under which powerful elites would establish laws and practices that give the appearance of

[259] In order for a theory to be testable (and falsifiable), there must be some evidence, if discovered, that would invalidate the theory. If a theory can treat all occurrences as confirmations, then it is not scientifically useful (Cooney 1993, p. 2222).

equality of neutrality. Nearly all theorists employing the conflict perspective, however, fail to establish such scope conditions when testing conflict theory (see, e.g., Hunt 1993).

Interactionist theory, because of its complexity, has been criticized for being virtually unfalsifiable (but cf. Tamanaha 1997). Interactionists argue that individual interpretation is essential understanding the role of legal and extra-legal factors in criminal sentencing. From this perspective, a particular case legal or extra-legal characteristic could be related to increased sentence severity in one case and leniency in another. While this is possible, interactionists fail to specify the conditions necessary for case factors to have a particular hypothesized effect. Straightforward testing of interactionist theory is also undermined by the fact that cases with identical legal and extra-legal characteristics can result in different outcomes because these factors may be differentially interpreted by decision-makers in the criminal sentencing process.

Empirical tests of racial disparities in criminal sentencing employing the interactionist model, for example, tend to emphasize the conditional nature of the relationship between race/ethnicity and sentencing outcomes. Interactionists interpret evidence of racial/ethnic characteristics interacting with other case factors, such as degree of urbanization or political climate (e.g., Hagan 1977), as supporting the theory. This interpretation, however, is questionable on several grounds. First, race/ethnicity can have both a direct (i.e., additive) and a conditional (i.e., interactive) effect on sentencing. Although race/ethnicity may have a greater impact some circumstances than others (e.g., urban versus rural context), race/ethnicity may still be similarly influential in both situations. While this may suggest that importance of race/ethnicity is conditional on the social context of the case, it does not necessarily suggest that the impact of race/ethnicity

operates solely through its interaction with the situational variable. Second, the influence of race/ethnicity may vary by social context for reasons other than changes in the meaning of race across these situations (see Black 1989; Liska 1993). Interactionists' reliance on the untestable assumption of negotiated meaning, however, precludes an examination of this critical question.[260] As Mayhew (1981) notes, it is no different than saying that "secret forces" are responsible for their decisions—both assertions are equally untestable. Finally, interactionists suggest that the legal and extra-legal factors present in a case may interact with an infinite number of other legal and extra-legal factors. This assertion, alone, makes the theory largely—if not completely—unfalsifiable because it would be impossible to hold constant the effects of every conceivable variable. Additionally, interactionists' focus on legal rules make the theory susceptible to many of the same criticisms of the formal legal perspective. The imprecision of predictions, along with its numerous unfalsifiable assumptions, undermine the testability of the interactionist model.

*Empirical Validity.* Problems with testability make statements about the validity of these three perspectives tentative at best. Nonetheless, a large body of empirical literature has accumulated on the influence of race/ethnicity and other extra-legal factors in the criminal sentencing process and some provisional conclusions can be drawn. A thorough survey of the empirical literature reveals support for all three perspectives (see Kempf-Leonard and Sample 2001; Pratt 1998; Urbina 2003; Weitzer 1996). Some

[260] Although it may be possible to partly examine the causal mechanisms suggested by some theorists by explicitly measuring the intervening variable(s) identified in the theory (an approach increasingly being used when testing competing criminological theories that identify many of the same explanatory variables, but relate them to crime and delinquency in very different ways, see Agnew 1995), this approach seems less well suited for testing an interactionist account of the relationship between race/ethnicity (and other extra-legal variables) and sentencing. For example, it is unlikely that analysts could accurately measure "negotiated meaning" in a courtroom or experimental setting.

studies support the formal legal model, suggesting that race/ethnicity and other extra-legal factors exert no effect (or very little effect) on sentencing decisions when legitimate legal factors are taken into account (e.g., Hagan 1974; Kleck 1981, 1985; Klein and Rolph 1989) and that the importance of race/ethnicity and other extra-legal factors, relative to legitimate legal characteristics, has greatly diminished over time (Pratt 1998).[261] Other studies provide evidence for the conflict perspective, revealing that race/ethnicity and other extra-legal factors significantly impact sentencing decisions net of relevant legal factors (e.g., Crawford, Chiricos, and Kleck 1998; LaFree 1989; Mustard 2001; Petersilia 1985; Smith and Damphouse 1996; Steffensmeier *et al.* 1998; Ulmer and Kramer 1996). Still others support the interactionist approach, indicating that race/ethnicity influences sentencing outcomes primarily through their interaction with other legal and extra-legal variables (e.g., Farnworth and Horan 1980; Hagan and Zatz 1985; Miethe and Moore 1986; Zatz 1984).

While these divergent findings may partly result from the conceptual ambiguities highlighted above, they also result from differences in methodological rigor (Bushway and Piehl 2001; Wooldredge 1998). In a meta-analysis of 47 race/ethnicity and sentencing studies, Pratt (1998, p. 518) discovered that differences in study design and analytical approach strongly influenced research findings sources of racial/ethnic disparities in criminal sentencing (cf. Schanzenbach and Yaeger 2006, p. 792).[262] In particular, the manner in which race/ethnicity was operationalized tremendously

[261] Perhaps more problematic for formal legal theorists is that empirical studies reveal that legitimate legal characteristics explain only a modest proportion of the variation in criminal sentencing (see, e.g., Berk, Li, and Hickman 2005; Blumstein *et al.* 1983). Irrespective of the role of illegitimate case characteristics, such as race/ethnicity, age, and gender in criminal sentencing, the formal legal model posits that legally relevant case factors are primarily responsible for sentencing outcomes.

[262] Meta-analysis provides for the statistical discovery of common patterns in the research literature, where inferences can be drawn on the basis of the "effect size" (or predictive capacity) of variables (Pratt 1998, p. 515; Raudenbush and Bryk 2002, p. 205).

influenced whether researchers found a statistically significant effect. Certain classifications of racial/ethnic tended to mask the true effect of race/ethnicity on sentencing (see also Steffensmeier and Demuth 2001, pp. 169–70).[263] Also, studies taking into account racial bias at earlier stages of criminal process (e.g., selection bias resulting from charging and plea-bargaining decisions) were more likely to find a significant race/ethnicity effect (see Albonetti 1997; Chiricos and Crawford 1995; Sampson and Lauritsen 1997a; Wooldredge 1998). Mitchell's (2005, p. 462) recent meta-analysis of race/ethnicity and sentencing research—expanding Pratt's study to include both published and unpublished sentencing studies (71 total)[264] and examining both continuous and discrete sentencing outcomes[265]—also discovered that blacks were sentenced more harshly than whites, independent of other measured factors, although the observed differences were generally small.

Theoretical and methodological limitations, notwithstanding, the bulk of research suggests that extra-legal factors continue to play a significant role in criminal sentencing, either directly or indirectly.[266] Mustard (2001), analyzing 77,236 federal offenders

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[263] Studies that operationalized race as "white/non-white" had the greatest likelihood of finding a significant effect. This largely resulted from the fact that "black/white" classifications grouped Hispanics and Native Americans with Anglos, and thereby masked the true race effect. This was particularly true in regions of the country that had large Hispanic populations (e.g., the southwestern region of the United States) (see also Zatz 1984).

[264] Both published and unpublished studies were included to reduce the possibility of "publication bias," which may arise when published studies are not representative of all valid studies that have been undertaken. This bias can distort meta-analysis as published studies tend to report positive (i.e., statistically significant) findings rather than negative findings (Begg 1994). Mitchell discovered that published studies tended to report substantively and statistically larger effect sizes than unpublished studies (p. 457). Forty-five percent of the studies were published as journal articles, 16 percent were published as books or book chapters, and 39 percent were unpublished (e.g., dissertations, conference papers, *et cetera*) (p. 452).

[265] Mitchell's meta-analysis focused on five types of sentencing outcomes: (1) imprisonment decisions, (2) length of incarcerative sentence, (3) ordinal scales of sentence severity, (4) discretionary lenience (e.g., downward departures and stays of sentence), and (5) discretionary punitiveness (e.g., upward departures and enhanced sentencing provisions for eligible repeat offenders) (p. 444).

[266] While the overwhelming majority of studies examining the role of extra-legal factors in the criminal charging-and-sentencing process have focused on defendant and victim characteristics, a limited number of studies have also explored the impact of judge characteristics on sentencing outcomes. Evidence suggests

sentenced under the United States Sentencing Commission (USSC) guidelines between October 1, 1991 and September 30, 1994, discovered that extra-legal factors continue to influence sentencing outcomes.[267] Controlling for numerous criminological, demographic, and socioeconomic variables, Mustard discovered that blacks were more likely to be imprisoned, receive longer sentences, and be subject to "upward" sentencing departures than whites (for similar findings, see Bushway and Piehl 2001).[268] Further analyses revealed that blacks were less likely to receive "downward" sentencing departures and, when receiving downward departures, blacks received smaller reductions than whites (see also Johnson 2005, pp. 785–86).[269]

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that judges who are female (Spohn 1990a; Steffensmeier and Hebert 1999), older (Spohn 1990b), and have served more time on the bench (Hogarth 1971) tend to impose harsher sentences, net of legitimate case characteristics. Research on the impact of judge's race on sentencing severity, however, has produced mixed results (see, e.g., Spohn 1990a; Spohn 1990b; Steffensmeier and Britt 2001; Welch, Combs, and Gruhl 1988).

[267] The centerpiece of the federal guidelines is a grid containing 258 boxes (termed the "Sentencing Table"). The grid's horizontal axis ("Criminal History Category") adjusts severity on the basis of the offender's past conviction record. The vertical axis ("Offense Level") reflects a base severity score for the crime committed, as further adjusted for those aspects of the crime that the guidelines deem relevant to sentencing. The guidelines instruct judges on how to calculate both "criminal history" and "offense level." The box at which the two factors intersect then determines the range within the judge may sentence the defendant. As required by law, the sentencing range in each box is small, the highest point being 25 percent more than the bottom, thus representing one source of discretion retained by judges. Judges may "depart" from the guidelines, formally, based on two circumstances. First is when the defendant offers substantial assistance in the prosecution of others (a downward departure). In this situation, the prosecutor must "authorize" the departure. The judge is then free to depart below the "box" range or any applicable statutory minimum sentence. Second is when the judge is able to demonstrate that there are factors in the case that have not been "adequately" factored into the guidelines and make the case "atypical." Departures under this circumstance may be either upward or downward (U.S. Sentencing Commission 1987, 1991). For a thorough discussion of judges' general use of guideline departures, see Schanzenbach (2005a).

[268] In particular, Mustard controlled for the defendant's age, gender, level of education, number of dependents, citizenship status, income (adjusted for 1993 dollars), offense level, offense type, criminal history, and the federal district where the case was tried. Mustard also analyzed interactive effects of many of these variables with one another.

[269] In November 2005, the Brennan Center for Justice and the National Institute for Law and Equity organized a focus group of twelve former U.S. Attorneys. The former U.S. Attorneys agreed that "conscious attention to the role of race in prosecutorial decision-making, as well as concerted efforts to monitor and improve the decision-making process, [was] essential for mitigating unwarranted racial disparities in the outcomes of federal criminal prosecutions" (Lu 2007, p. 195). Thirteen former U.S. Attorneys signed on to a set of prosecutorial guidelines for addressing racial disparities, which focused on five areas: (1) prosecutorial decision-making; (2) law enforcement/task forces; (3) training; (4) management/accountability; and (5) community (pp. 199–201).

Conducting a comprehensive review of the research literature on extra-legal factors and sentencing dating from the 1950s to the 1990s, both before and after the implementation of federal and state sentencing guidelines, Kempf-Leonard and Sample (2001) discovered significant racial/ethnic differences in 30 of 34 studies that analyzed racial/ethnic disparities, but not always in a direction that disadvantaged minority offenders (see also Steffensmeier and Demuth 2000, 2001). Furthermore, racial/ethnic disparities were found in every study conducted the since implementation of sentencing guidelines (see Crawford *et al.* 1998; Heaney 1991; Johnson 2003, 2005; Kramer and Steffensmeier 1993; Kramer and Ulmer 1996, 2002; Smith and Damphouse 1996; Steffensmeier *et al.* 1993; Steffensmeier *et al.* 1998; Ulmer and Kramer 1996). Kempf-Leonard and Sample (2001) also found that other extra-legal factors—gender, socioeconomic status, and familial status—significantly influenced sentencing outcomes in 46 of 49 studies, but not always in the expected direction (see also Schanzenbach 2005b).[270]

The "guided discretion" death penalty statutes have also failed to eliminate or significantly reduce racial disparities in the capital charging-and-sentencing process. As discussed in Chapter Four, the vast majority of studies of the capital charging-and-

[270] Specific studies included in the review were: Albonetti (1991), Barry and Greer (1981), Bickle and Peterson (1991), Boritch (1992), Crawford, Chiricos, and Kleck (1998), Crew (1991), D'Alessio and Stolzenberg (1993), Daly (1987, 1989), Emmelman (1994), Farnworth and Horan (1980), Farrell and Swigert (1978), Farrington and Morris (1983), Figueira-McDonough (1985), Ghali and Chesney-Lind (1986), Griswold (1987), Gruhl and Welch (1984), Hagan, Nagel, and Albonetti (1980), Heaney (1991), Holmes *et al.* (1996), Johnston, Kennedy, and Shuman (1987), Kempf and Austin (1986), Kramer and Steffensmeier (1993), Kramer and Ulmer (1996), Kruttschnitt (1981, 1982), Kruttschnitt and McCarthy (1985), Miethe and Moore (1985, 1986), Moore and Miethe (1986), Myers and Talarico (1986), Nagel and Johnson (1994), Nobiling, Spohn, and Delone (1998), Peterson and Hagan (1984), Sloan and Miller (1990), Smith and Damphouse (1996), Spohn (1990b), Spohn and Cederblom (1991), Spohn, Gruhl, and Welch (1987), Spohn, Welch, and Gruhl (1985), Steffensmeier, Kramer, and Streifel (1993), Steffensmeier Kramer, and Ulmer (1998), Stolzenberg and D'Alessio (1994), Ulmer and Kramer (1996), Unnever (1982), Weisburd, Waring, and Wheeler (1990), Wheeler, Weisburd, and Bode (1983), Wolf and Weissman (1996), and Zatz (1984).

sentencing process in the United States over the past 70 years reveal that race/ethnicity plays a prominent role in the administration of the death penalty. Over 90 percent of studies examining the capital punishment process since the *Furman* decision revealed that race/ethnicity continues to influence the likelihood that the death penalty is sought and imposed, net of the legitimate legal characteristics of the case. Furthermore, over 80 percent of the methodological rigorous studies conducted in eleven death penalty states since *Furman* report significant race-of-victim effects in charging or sentencing decisions.[271]

In sum, the three theoretical perspectives evaluated above significantly differ in the diversity of facts they address (generality), the economy of their expression (parsimony), their capacity to predict facts (testability), and their conformity to those facts (validity)—their degree of scienticity (Black 2000a, p. 351). Unfortunately, the inability of these theories to fully satisfy the fundamental standards of scientific theory seriously undermines their capacity to offer a thorough explanation of legal behavior. Furthermore, formal legal and conflict perspectives appear to be particularly limited in their ability to anticipate or readily accommodate novel facts—an important feature of any progressive theory (see Harris 1979, pp. 17, 24; Jasso 1988, p. 1; Lakatos 1970, p. 131).[272]

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[271] Radelet and Pierce (1985) also discovered that prosecutors were more likely to "upgrade" the criminal charge in cases involving white victims by charging the defendant with a felony offense or some other aggravating factor, in addition to murder, that was not initially included in the police report.

[272] Homans (1967, pp. 72–73) argues that important facts about human behavior are "obvious," "boring," and known to everyone. He claims that sociologists can no longer discover new facts; they can only explain known facts (p. 105). However Black (2002b, p. 669) claims that Homans is wrong and that his paradigm—pure sociology—is capable of making numerous predictions about unknown facts. Black's theory of law, for example, makes the novel discovery that law is situational rather than universal—only cases with the same location and direction have the same law. According to Black, the "rule of law" and "equality before the law" nowhere described legal reality. Discrimination in the law is not exceptional, it is normal, and law obeys the same sociological principles (i.e., the "laws of law") everywhere (p. 770). Black

These shortcomings, however, do not render these theories wholly invalid or useless. In fact, studies employing one or more of these general perspectives have illuminated important features of the criminal sentencing process. As noted above, research in the formal legal tradition (see, e.g., Kleck 1981; Kleck 1985; Klein and Rolph 1989) has revealed that legitimate legal case characteristics explain a modest portion of variation in sentencing outcomes and the increased formalization of the criminal justice process has had a perceivable impact on reducing bias, arbitrariness, and caprice in criminal sentencing over the past several decades *for certain crimes*. Formal legal theorists have also highlighted that race/ethnicity (and other frequently analyzed extra-legal factors) tend to be highly correlated with important legitimate legal factors, and studies that do not properly control for these legitimate case characteristics are at risk of seriously overestimating the impact of extra-legal factors on criminal court decisions.

Research growing out of the conflict and interactionism traditions has also illuminated important relationships between extra-legal factors and the criminal justice process. Minority and economic threat perspectives, derived from the conflict tradition, explain how dominant racial and economic groups may employ "enhanced" criminal justice efforts in an effort to control rapidly growing subordinate groups (Blalock 1967; Mitchell 2005; Parker, Stults, and Rice 2005).[273] For example, research suggests that cities with a high minority presence (particularly blacks and Hispanics) have larger police forces, higher arrest rates, and spend more on prisons and jails, net of actual crime rates

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has also used his pure sociology to make novel predictions about the behavior of ideas, art, violence, and God (see, e.g., Black 1995, 2004a).

[273] It has also been argued that economic and political competition *breed* prejudice and that discrimination, prejudice, and negative stereotyping sharply increase as competition for scarce jobs increases (Aronson 1972, pp. 180–81).

(Fagan, West, and Holland 2003; Jackson 1986; Liska 1993).[274] Higher arrests rates, in turn, are associated with more severe criminal sentences, net of legitimate case characteristics (e.g., offense severity and prior criminal record). Moreover, conflict theorists have shown that growing minority presence in an area is associated with whites developing more conservative political ideologies that support harsher criminal punishments, net of actual crime (Baumer *et al.* 2003; Jacobs and Carmichael 2002; Jacobs, Carmichael, and Kent 2005; Jacobs and Tope 2007; King and Wheelock 2007).[275]

Interactionists have contributed to our understanding of the criminal sentencing process by revealing how actors' characteristics—both ascribed and achieved—appear to interact to influence sentencing outcomes. For example, interactionists have noted that the influence of race/ethnicity is likely to be conditioned by other characteristics, such as age and gender (see Spohn *et al.* 1985; Steffensmeier and Demuth 2006; Steffensmeier *et al.* 1998), employment status (Hagan *et al.* 1980; Nobiling *et al.* 1998; Spohn and Holleran 2000; Weisburd *et al.* 1990), level of formal education (Albonetti 1997; Mustard 2001), and marital/familial status (Bickle and Peterson 1991; Daly 1989; Ghali and Chesney-Lind 1986; Kruttschnitt and McCarthy 1985; Peterson and Hagan 1984). Steffensmeier and colleagues (1998), for example, note that although age, gender, and race/ethnicity all have a direct impact on criminal sentencing, net of legitimate case characteristics, certain age-gender-race combinations are more likely to receive harsher sentences than other combinations. In fact, young black males are the group most likely

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[274] Recent evidence suggests that the relationship between the minority presence and police strength may be limited to the United States (Kent and Jacobs 2004).

[275] King's (2007) recent analysis of law enforcement responses to hate crime in the United States reveals that compliance with federal hate crime law is *less* likely in places with larger black populations, but the impact of black population size on compliance is contingent on region—a positive correlation in the Northeast, but an inverse relationship in the South.

to receive the most severe sentences, all else equal. Spohn and Holleran (2000) extend Steffensmeier *et al.*'s work by examining age, gender, race/ethnicity, *and* employment status combinations, and discover that young unemployed black and Hispanic males are most likely to receive harsher sentences, all else being equal.[276] Similar to conflict theorists, interactionists have also highlighted the importance of larger contextual factors such as arrest rate, unemployment rate, and urban/rural location (Myers and Talarico 1986; Thomson and Zingraff 1981; Weidner *et al.* 2004).

Although the various relationships uncovered by these three different perspectives are informative, each perspective is based upon different assumptions and makes different predictions. Perhaps the most significant shortcoming of these perspectives, then, is that none is fully capable of explaining the *robust* empirical relationships illuminated by the other perspectives. That is, none offers a sufficiently abstract explanatory framework from which the various empirically valid hypotheses could have been derived. Due to this major shortcoming, as well as the aforementioned problems with respect to each approach's level of scienticity, a fourth theoretical perspective is presented and evaluated below. This fourth perspective is believed to offer a superior explanation of legal behavior not only because of its ability to readily accommodate the facts predicted by these alternative perspectives, but also by achieving a greater degree of scienticity and avoiding several of the problems that readily plague social scientific theory.

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[276] Much research suggests that juveniles who are members of racial/ethnic minority groups (particularly black males) are more likely to have their cases transferred to juvenile court, net of offense seriousness and criminal/deviant background (Hsia, Bridges, and McHale 2004; Males and Macallair 2000; Pope, Lovell, and Hsia 2002).

## 6.2 THE BLACKIAN PARADIGM

In an effort to address the fundamental limitations of existing theories of law in particular—and sociological theory in general—theoretical sociologist Donald Black developed and advanced a research strategy for the study of human behavior operating solely at the social level. Black attempts to explain social life "through the lens of social relationships rather than through the myriad of biological, psychological, political, or economic factors that also influence social systems" (Horwitz 1990, p. ix; see also Simmel 1909, pp. 21–22). Black's paradigm represents a significant departure from conventional social scientific theory, and as a result, is unfamiliar—even shocking—to many social scientists (see Black 1995, pp. 864–69; 2002a, p. 119; Tucker 1999, p. 5).[277] The novelty of Black's approach, then, makes it necessary to carefully identify the assumptions on which it rests.

### *6.2.1 Assumptions of the Blackian Paradigm*

Black's (1979b) paradigm rests on three key assumptions that need to be made explicit before entering into a specific discussion of this theoretical strategy. The first assumption concerns the structure of scientific explanation. Black, adopting the "covering-law model" of scientific explanation, posits that it is possible to formulate highly general propositions—both timeless and spaceless—that illuminate the basic properties of social life. Second, Black assumes that the various relationships between

[277] According to Black (1995, p. 867), his working is shocking because it is epistemologically incorrect. "It violates conventional conceptions of social reality in general and legal and moral reality in particular. Therefore it shocks—epistemologically shocks—many on whom it is inflicted." Some scholars have even gone so far as to accused Black of contributing to a "nihilistic destruction of the legal tradition" (see Constable 1994, p. 19). Cooney (2003a, p. 1420) suggests that critics of the Blackian paradigm miss the "spirit" of his explanatory effort—a "theoretical nature of argument with all that implies in the way of trying to build a general, parsimonious, and new set of ideas that bring a measure of clarity and order to a field."

people underlie the variation in social life. His final assumption is that variation in social life is, in principle, quantifiable. These assumptions are discussed in greater detail below.

*Covering-Law Approach.* The covering-law model, popularized by Carl Hempel (1965, 1966) and others (e.g., Machlup 1955), has become the standard model of scientific explanation in the physical sciences (Nagel 1979) and is enjoying increased popularity in the social sciences as well (see Harris 1979; Lenski 1988; Zetterberg 1966).[278] *Covering laws* are either universal or probabilistic generalizations describing regularities (Hempel and Oppenheimer 1948). The model does not discuss singular cases; rather it understands causality to be couched in terms of what regularly happens between certain types of entities. These generalizations tell us that something is to be expected; however they are silent as to *why* something occurred (Nagel 1979, pp. 26–27). According to this approach, a theory is a restricted set of propositions—whose generality is not restricted to limited regions of space and time—yielding deductive implications that can be confirmed or refuted through empirical tests (Merton 1967, pp. 40, 66). Explanation occurs when observable variation in phenomena is deducible from the general propositions that comprise the theory (Homans 1964, pp. 811–12; Merton 1945, pp. 469–70).

Some scientists—physical, social, and biological—remain opposed to this approach and argue that the establishment of general laws is impossible or that the identification of causal mechanisms is essential to the explanation of phenomena (see, e.g., Cartwright 1983, 1989; Hëdstrom and Swedberg 1998; Machamer, Darden, and Craver 2000; Ragin 1987; Tittle 1995). For over two centuries, however, philosophers of

[278] The covering-law model is also commonly referred to as the "hypothetical-deductive model," the "deductive-nominological method," or simply the "deductive model" (see Braithwaite 1953, p. 1; Horwitz 1983, p. 375; Nagel 1979, p. 21; Somers 1998, p. 736).

science have argued that science is incapable of answering questions as to why an event occurs or why things are related in certain ways—it only describes *how* or in accordance with what rules phenomena occur (Hume [1748] 1955). In fact, both Hume ([1739] 1975) and Nietzsche ([1888] 1998) believed that the concept of causality is a requirement of the human mind, rather than a necessity of science. They argued that the human mind was incapable of understanding or explaining *change* except as the result of some antecedent cause (see also Russell [1913] 1992). Moreover, Nietzsche suggested that people tend to search for a preferred explanation rather than an actual cause, and "acceptable" explanations reflect predilections of the audience rather than the accuracy of the claim (see also Mayhew 1980; Popper [1934] 1968).[279] As Cooney observes (1986, p. 269), "No matter how all-inclusive an explanatory framework purports to be, there are limits to the number of non-circular answers it can provide. Sooner or later, all theories become mute in the face of the persistent asking of the question, 'why'?" Similarly, Sobel (1995, p. 3) comments, "social scien[tists] often incorrectly equate explanation with causation...[but] many of the processes and phenomena that are of interest to social and behavioral scientists are not causal or at least not entirely causal." Even those scientists who believe that causal statements are possible recognize the necessity of first establishing highly general laws from which empirical hypotheses can be derived. Braithwaite (1953, p. 2), for example, notes:

> To emphasize the establishment of general laws as the essential functions of science is not to overlook the fact that in many sciences the questions to which the scientist attaches most importance are historical questions about the causes of particular events rather than questions directly about general

[279] Black (2002a, p. 105) posits that individuals' social distance to a subject matter explains their desire for the scientific analysis of that subject. Individuals who are very close to the subject tend to prefer other forms of knowledge—e.g., common sense, religion, metaphysics, and folklore—and openly question the appropriateness of a "scientific understanding" of that particular subject.

> laws...[b]ut the statement that some particular event is the effect of a set of circumstances involves the assertion of a general law; to ask for the cause of an event is always to ask for a general law which applies to the particular event. Though we may be more interested in the application than in the law itself, yet we need to establish the law in order to know what law it is which we have to apply.[280]

In fact, Nagel (1979) suggests that all explanatory forms in science can be shown to exemplify the covering-law model when implicit assumptions are made explicit.[281]

*Reconceptualization of Human Behavior.* The second assumption of Black's paradigm is that social life is a reality in its own right, defined by human interaction, and can be studied as a natural phenomenon without regard to psychology (Black 1979b, 1995). While some scholars have found this assertion problematic (e.g., Frankford 1995; Greenberg 1983a; Tamanaha 1997), it has a rather long history in social thought. For example, well over a century ago, Marx ([1857] 1973, p. 176) noted that society does not consist of individuals, "rather it expresses the sum interrelations in which individuals stand with respect to one another." Similarly, Radcliffe-Brown ([1935] 1965) commented:

> Individual human beings, the essential units of society, are connected by a definite set of social relations into an integrated whole. The continuity of the social structure is not destroyed by changes in the units. The continuity of [the social] structure is maintained through the process of social life, which consists of the activities and interactions of the individual human beings and of the organized groups in which they are united (pp. 179–80).

Durkheim ([1897] 1994) also remarked:

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[280] Similarly, Popper ([1934] 1968) argues that causality can *only* be a feature of universal laws (see also Jasso 1988, pp. 2, 6; Nagel 1979, p. 31; Turner 2002, p. 667). King and colleagues (1994, p. 34) note, "Even if explanation—connecting causes and effects—is the ultimate goal, description has a central role in all explanation, and is fundamentally important in and of itself."

[281] Nagel (1979, pp. 21–26) identifies and describes four major patterns of explanation found in the sciences: (1) the deductive/covering-law model; (2) probabilistic explanations; (3) functional or teleological explanations; and (4) genetic explanations.

> [S]ocial life should be explained not by the conceptions which the participants have of it, but by the fundamental causes which escape their consciousness...and these causes ought to be sought principally in the way in which associated individuals are grouped. It is only on this condition that history can become a science and sociology, consequently, exist (p. 126).

Black's ability to explain human behavior without reference to goals, motives, purposes, values, needs, functions, interests, intentions, or anything else that is not directly observable results from this reconceptualization of individual action as social action (but cf. Durkheim [1912] 1995; Homans 1964; Weber [1922] 1968). For Black, what is normally considered individual behavior or the behavior of groups becomes the behavior of a particular form of social life.[282]

> The interaction of individual actors, that is, takes place under such conditions that it is possible to treat such a process of interaction as a system in the scientific sense and subject it to the same order of theoretical analysis which has been successfully applied to other types of systems in other sciences (Parsons 1951, p. 3).

Therefore, a person injuring their spouse or a lynch mob setting fire to a jailhouse is reconceptualized as an increase of violence in a social situation, or the behavior of violence (see Phillips 2003; Senechal de la Roche 1997a, 2001).[283] A family going to church or a minister delivering a sermon is reconceptualized as an increase of religion in a social situation, or the behavior of religion. An individual calling the police, an arrest, a jury verdict, and an appeal are reconceptualized as increases of law in a conflict, or the behavior of law (see Black 1995, p. 859; 2000a, p. 347). When conceptualized in this manner, the explanation of behavior need not resort to untestable assumptions about the

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[282] By "behavior," Black simply means variation. "Every thing behaves, living or not, whether molecules, organisms, planets, or personalities. This applies to social life as well, to families, organizations, and cities, to friendship, conversation, government, and revolution" (Black 1976, p. 1).

[283] "Violence is a social phenomenon with its own dynamic and laws. Individuals who kill and assault are merely agents of violence" (Cooney 2003a, p. 1421).

inner motivations of individuals or groups (cf. Parsons 1937). Social life, as defined by Black, has neither a mind nor emotions—it cannot be explained by its psychological characteristics.

Black, however, does not argue that psychological variables are unimportant in the explanation of human behavior (but see Mayhew 1980, p. 335). Nor does he suggest that his paradigm is at odds with psychological explanations of human behavior (Black 1976, pp. 7–8).[284] Rather, Black treats psychological and other non-sociological variables as constants in his theory (see also Lenski 1988, p. 163) and focuses specifically and exclusively on a *purely* sociological theory of human behavior and uses its own imagery, concepts, and framework of analysis (Black 1976, p. x).[285]

*Quantification of Social Variation.* Like older sciences, such as physics and chemistry, Black (1980, p. 217) argues that sociological theory should be maximally testable (see also Harris 1979, p. 17). As mentioned earlier, if a theory is to be testable, it must be stated in quantitative language so that predictions can be evaluated by measurement (i.e., counting). Black's paradigm assumes that variation in social reality is subject to quantification (see also Griffiths 1984, p. 39; Zetterberg 1966). Since measurement can occur at varying levels of precision (see previous discussion of types of

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[284] Cooney (1986, p. 294) argues that "[Individuals' and groups'] intentions and motivations are important in understanding their behavior/action, but not conclusive because people's understanding of their behavior cannot be assumed to be theoretically sound. Much work from psychoanalysis to post-structuralism has shown that human behavior can be explained by processes of which the actors may not be aware. Therefore, there is always a larger social context outside the individual that must be considered" (see also Cerulo 2002, p. 654; Miethe and Drass 1999). Benedictus de Spinoza ([1677] 1883, p. 108) famously remarked, "Men are mistaken in thinking themselves free; their opinion is made up of consciousness of their own actions, and ignorance of the causes by which they are determined. Their idea of freedom, therefore, is simply their ignorance of any cause for their actions." As Wacquant (2002, p. 1470) has explained, one of the "the proximate causes of the common limitations and liabilities of [social scientific explanation]...[is] naive acceptance of ordinary categories of perception as categories of analysis[.]"

[285] According to Black (2000a, p. 348), "Anything pure is the most of itself, autonomous and free of everything else" (see also Bourdieu [1992] 1996). As a result, Black (1979b) has labeled his paradigm, which operates solely at the social level, "pure sociology."

measurement), quantification need only identify if more or less of something is present in a particular setting or under certain conditions. Or, alternatively, if something is more likely to occur at all in a particular setting or under certain conditions. When social variation is conceptualized in this manner, quantification almost becomes intuitive (see Black 1980).[286] For example, a call to the police is more law than no call at all. Similarly, an arrest is more law than a simple call. Likewise, a prosecutor seeking an indictment is more law than an arrest. Law, then, can be seen as increasing as it progresses through various stages of the legal system (p. 211; see discussion below). Although the precise change in law from an arrest to indictment may be indeterminable, it is clear that an indictment is more law than an arrest. Variation in the years a defendant is sentenced in a criminal case or the amount of monetary compensation awarded in a civil case, on the other hand, does allow for the determination of precise differences.

The quantification of variation in all other forms of social life is possible as well. For example, it is possible to determine when more or less violence occurs (e.g., a shooting is more violence than a simple fist fight) by measuring the amount of injury—or potential injury—to the victim. The quantification of variation in religion, music, literature, medicine and science is also possible (see Black 1993, 2000a).[287]

To be sure, these three assumptions are debatable. According to Harris (1979, p. 20), however, non-empirical assumptions are necessary for *all* research strategies (see

[286] Jasso (2006, p. 38) argues that, *inter alia*, a theory should "provide[] a foundation for measurement."
[287] Black (1980, p. 214) also suggests that the quantity of social phenomenon in a social setting can be measured indirectly, if necessary. He recognizes that it may not be possible to directly observe how a phenomenon varies, so an alternative method is to measure the phenomenon by its relationship to another that can more easily be observed and quantified (e.g., the behavior of mercury in a sealed glass tube as an indirect measure of the amount of heat).

also Dumont and Wilson 1967, pp. 987–88; Somers 1998, pp. 740–45).[288] Similarly, Popper ([1934] 1968, p. 27) argues that a theory must rest on assumptions because it can never be logically deduced from the facts it explains—logical induction of a theory is impossible (see also Wacquant 2002, pp. 1523–24; but cf. Glaser and Strauss 1967).[289] One of the strengths of Black's paradigm is that the assumptions on which subsequent theories are based still allow the theories to be highly general and maximally testable (Myers 1980). Black's explanatory structure, the covering-law model, has a long history in the natural sciences and is widely believed to be the best explanatory approach for yielding highly general and empirically verifiable propositions (Braithwaite 1953, p. 9; Harris 1979, p. 17; Lenski 1988, pp. 168–69).[290] His conceptualization of social life has it roots in earlier sociological thought as well (e.g., Marx [1859] 1970; Parsons 1951; Radcliffe-Brown [1935] 1965), and avoids problematic assumptions about human nature and unobservable internal states (e.g., goals, motivations, desires). His final assumption—the quantifiability of social variation—allows for the development of testable propositions pertaining to the widest range of social phenomena. Conversely, the assumptions on which formal legal, conflict, and interactionist perspectives are based deleteriously impact their generality, parsimony, testability, and validity.

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[288] Kuhn (1970, p. 148) remarked, "Neither side [of competing research strategies] will grant all the non-empirical assumptions that the other needs in order to make its case…the competition between paradigms is not the sort of battle can be resolved by proofs."

[289] Science, according to Popper ([1934] 1968, p. 279), does not proceed through observations confirmed by verification; rather it proceeds through overarching conjectures that generalize beyond the data, but are always controlled and sharpened by refutation (see also Friedman 1953, p. 14).

[290] Sherman (1978, p. 15) remarks, "For [Donald] Black, to predict is to explain. This position would seem more defensible than the more common situation: explanation without prediction" (see also Nagel 1979, p. 447).

### *6.2.2 Description of Black's Theory of Law*

Now that the assumptions of Black's paradigm have been identified and his new conceptualization of social life has been articulated, attention turns to Black's theoretical strategy that explains variation in a particular aspect of social life: the behavior of *law*. Before presenting Black's theory of law, however, it is first important to discuss his conceptualization of law.[291]

*Black's Concept of Law.* Hempel (1965) identifies two major approaches to the meaning of concepts: nominalist and essentialist.[292] In the nominalist approach, concepts have no inherent meaning apart from their definition and are only true to the extent that they are useful (see also Nietzsche [1888] 1998). The purpose of a nominalist definition is to describe a class of phenomena in the world of experience in order to establish general principles (i.e., laws) by which the phenomena can be predicted and explained (see Cooney 1986, p. 266; Horwitz 1983, p. 370). In the essentialist approach, concepts must capture the "true nature" or "fundamental attributes" of phenomena. Essentialist concepts, however, are so vague that they are virtually useless to scientists. In fact, it is often argued that science is unable to explain the essential nature of anything, only how it varies (Nagel 1979).

Black adopts a nominalist approach to the concept of law, defining it simply as "governmental social control" (1972, p. 1096). He broadly defines social control as "the

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[291] "A definition [of a concept] is the first step toward identifying the empirical family to which it belongs, the theoretical jurisdiction responsible for its explanation, [and] the social process it may engender" (Black 2004b, p. 7).

[292] Essentialist definitions are commonly referred to as "real" or "substantive" definitions, while nominal definitions have been called "functional" definitions.

definition of deviant behavior and the response to it" (Black 1976, p. 2).[293] Law, then, is but one kind of social control: "the normative life of a state and its citizens, such as legislation, litigation, and adjudication" (p. 2) (cf. Gibbs 1966; Schwartz 1978b).[294] According to Black (1972, p. 1091), law is not rules, rather it is the *observable* dispositions of legal agents (e.g., police, attorneys, judges, juries, *et cetera*) and, therefore, amenable to scientific inquiry (see also Black 1973, p. 128; Scheppele 1994, pp. 400–401; but cf. Frankford 1995).[295] Consistent with Black's paradigm, law is also a quantitative variable (cf. Espeland and Vannebo 2007, p. 25; Evan 1990, p. 157). The quantity of law is "the amount of governmental authority brought to bear on a person or group" (Black 1989, p. 8).[296] Law, therefore, increases and decreases, is found more in some settings than others, and varies across time and space.[297]

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[293] "Social control is the normative aspect of social life. It defines and responds to deviant behavior, specifying what ought to be: What is right or wrong, what is a violation, obligation, abnormality, or disruption" (Black 1976, p. 105). According to Ross ([1901] 1920, p. 106), law is the "most specialized and highly finished engine of social control employed by society."

[294] Black's definition of law as governmental social control is very similar to Oliver Wendell Holmes's early formulation: "[I]n societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees…[t]he object of our study, then, is prediction of the incidence of the public force through the instrumentality of the courts" (Holmes 1897, p. 457).

Weber also locates law within a larger system of social control. "An order will be called 'law' when conformity with it is upheld by the probability that deviant action will be met by physical or psychic sanctions aimed to compel conformity or to punish disobedience, and applied by a group of men [*sic*] especially empowered to carry out this function" (Weber [1925] 1954, p. 127; see also Austin [1832] 1995; but cf. Hart [1961] 1994). Swedberg (2006, p. 66) notes that Weber believed law was no different from other social phenomena that also increase the probability that some action will take place.

[295] Karl Llewellyn ([1930] 1978, p. 3) famously wrote, "What officials do about disputes is, in my mind, the law itself," and he strongly believed that legal decisions were very rarely decided by legal rules.

[296] "More generally, the quantity of law is known by the number and scope of prohibitions, obligations, and other standards to which people are subject, and by the rate of legislation, litigation, and adjudication" (Black 1976, p. 3).

[297] While law varies across time and space, general propositions predicting and explaining the behavior of law need not be restricted to limited regions of time and space (see, generally, Black 1976).

Black's definition of law has been criticized for not encompassing all that is considered to be law (e.g., rights, enablements, *et cetera*) (see Greenberg 1983a).[298] Black (1972, pp. 1096–97) argues, however, that his definition of law is only used as a means of delineating the subject matter of legal sociology, and is not the *only* proper definition of law (see also Cooney 1986, p. 266; Tamanaha 1997, p. 128).[299] Similarly, Horwitz (1983, ) suggests that while Black's definition does not embrace all existing conceptions of law, it encompasses a rather large and homogeneous body of phenomena considered legal and firmly "locates the subject matter of the sociology of law in the realm of social science…[rather than] within [the realm of] jurisprudence" (pp. 371–72).[300]

In addition to variation in the quantity of law, there is also variation in the *style* of law.[301] The style of law is the language and logic by which law defines and responds to

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[298] According to Black (1980, p. 221), the rights of individuals (e.g., the Bill of Rights) are not laws, but rather guarantees against laws because the more these rights are respected, the less law there is. Others scholars have expanded the conception of rights to include not only immunities from government intervention, but also powers to call on the government for help (see Holmes and Sunstein 1999). Weber ([1922] 1968, pp. 666–67) defines rights as a matter of degree, stating a right is "an increase of the probability that a certain expectation of the one whom the law grants that right will not be disappointed."

[299] In series of articles, Wong (1995, 1998a,b) has criticized Black's concept of law on the basis that Black's definition of government is *unsociological*. In particular, Wong asserts that Black provides a descriptive—rather than an analytical—definition of government that erroneously views government as holistic or integrated, which either exists or does not exist. In contrast, Wong defines government as "formally institutionalized political authority" and suggests that government—as all social phenomena—is not absolute but relative (i.e., government is a matter of degree) (see also Weber [1925] 1954). Law, then, is "more or less governmental social control," resulting from the affirmative delegation of social control rights and responsibilities (Wong 1998b). Wong believes that his modifications of Black's concepts of government and law significantly extend the scope of Black's original formulation by "allowing it to reach out to private social control activities which have been endorsed by government or based upon delegated governmental social control authority." But while purporting to expand the comprehensiveness of Black's concept, Wong does not challenge any of the relationships between law and social structure articulated in Black's original statement of the theory of law.

[300] Gibbs (1968, p. 446) remarked, "Since jurisprudents show little inclination to engage in the construction of substantive theory (as opposed to purely conceptual analysis) and to undertake nomothetic research, the empirical questions about law could pass to the sociology of law by default."

[301] Black (1993, p. 5) also introduces another variable aspect of social control: its form. The form of social control is "a mechanism by which a person or group expresses a grievance." The forms of social control generally divide into two categories: those involving only principles (with or without the help of supporters) and those involving third parties who relate to the conflict as an agent of settlement. In the first

deviant behavior. Black (1976, pp. 4–6; 1984, pp. 8–12) identifies four styles of law: (1) penal, (2) therapeutic, (3) compensatory, and (4) conciliatory.[302] The *penal* style of law (seen in criminal law), the *therapeutic* style (seen in juvenile law and psychiatric care), the *compensatory* style (seen in tort and contract law), and the *conciliatory* style (seen in marital and labor law) all differ from one another along several dimensions. Each style has its own standards, questions, and solutions. Furthermore, each style attributes a different identity to the deviant and has its own focus (see Black 1993). For example, in the penal style, the deviant is regarded as an offender who has violated a prohibition and who should suffer punishment, such as deprivation, humiliation, or even loss of life. The focus of penal law is typically not the offender as such, but the conduct itself—a specific act. In contrast, the therapeutic style views the deviant as a victim who is ill and needs to receive help or assistance. The focus of this style is the victim, rather than a specific act. Similarly, compensatory and conciliatory styles differ from penal and therapeutic styles,

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category involving principles (and their supporters), law may be unilateral, flowing in a single direction from the aggrieved to the offender party, or bilateral, flowing in both directions where both parties pursue a grievance against one another (e.g., a duel or fight). In the second category, law is trilateral, requiring the intervention of a settlement agent who relates authoritatively to both sides (e.g., judges, mediators) (see also Black and Baumgartner 1983; Cooney 1998; Phillips and Cooney 2005).

The form of social control, however, did not initially appear in Black's theory of law. In fact, form—as a variable aspect of social control systems—did not figure prominently in Black's writings until he began expanding his theory to non-legal forms of social control (see, generally, Black 1984, 1990). Nonetheless, Black (2002a, p. 111) views the law as *inherently* partisan because whenever a legal official or jury decides who "wins and loses" in a particular dispute, then the law has taken sides. Law does not take sides from the beginning; a legal trial must determine the state's partisanship. Because the process by which law takes sides typically takes time, Black refers to it as *slow partisanship*. Although Black believes that law is form of partisanship, he is not referring to the subjective experience or motivation of legal decision-makers. In fact, judges and juries may typically endorse the jurisprudential idea that law is autonomous and neutral. "[T]hose accustomed to conventional legal thought may have difficulty understanding the idea of law as a form of partisanship. Some might even find it outrageously wrong and ignorant…[but] the partisanship of legal officials should not be surprising. It is the primary role of third parties who intervene in conflicts of all kinds" (p. 112). For Black all that matters, from a sociological standpoint, is what legal officials actually do: they take sides. His theory, then, predicts and explains who take sides in a conflict—including conflicts involving law: partisan is a direct function of the social closeness and superiority of one side and the social remoteness and inferiority of the other (1993, p. 127).

[302] According to Black (1993, p. 7) and others (e.g., Horwitz 1990, pp. 19–22), these four styles apply to both legal and non-legal types social control.

and one other, focusing on the consequences of the act and the relationship, respectively (Black 1984, p. 11).[303]

According to Black (1976) variation in social life, including law, can be explained by the shape of social space where it occurs—its *social geometry* (i.e., its social structure) (but cf. Frankford 1995; Luhmann 1989).[304] Black's theory of law predicts and explains the variable aspects of law—its style and quantity—based on the locations, directions, and distances of conflict in a multidimensional social space that is defined by "the characteristics of the people involved, their relationships with each other, and the larger social context in which they interact" (1979a, p. 19).[305] Black's multidimensional conception of social space is, in fact, a synthesis diverse sociological theories and concepts that have a long tradition in sociological thought (see also Horwitz 1983, p. 376; Tucker 1999, p. 6; Turner 2002, p. 664). He identifies five dimensions that define human interaction: (1) vertical, (2) horizontal, (3) symbolic, (4) corporate, and (5) normative. According to Klüver and Schmidt (1999, p. 311), "The number of dimensions of a 'space of experiences' is the number of independent options one has to take into consideration for a complete description of any experience [and that cannot be defined by combinations of other dimensions]…[g]eneral descriptions of social experiences are not dependent on the particularities of specific social groups or cultures." These five dimensions are discussed, in turn, below.

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[303] The different styles of social control (including law) also vary in severity, with penal control being the most severe, followed by therapeutic, compensatory, and conciliatory control (Black 1976, p. 106).
[304] Klüver and Schmidt (1999, p. 313) suggest that it is possible to define the main concepts of theoretical sociology in geometric terms and make geometric models of social action determined by a network of rule governed interactions (cf. Caplow 1955).
[305] Similarly, Wilson (1996) defines social structure as "the ordering of social positions (or statuses) and networks of social relationships that are based on the arrangement of mutually dependent institutions (economy, polity, family, education) of society" (pp. xiii–xiv; see also Whitmeyer 1994, p. 154).

*Vertical Space.* A vertical dimension of social space, emphasized by Marx ([1859] 1970, [1867] 1975), Tocqueville ([1840] 1969) and Weber ([1922] 1964), is present when there is an uneven distribution of wealth (i.e., social stratification).[306] A social phenomenon may be described by its vertical location, whether higher or lower in such a distribution. Social life may also have a vertical direction, moving upward (from a lower to higher elevation), downward (from a higher to lower elevation), or laterally (across the same elevation) (see also Tucker 2002). Finally, the difference in wealth itself, or vertical distance, varies as well. "Whether higher or lower in a distribution of wealth, or downward or upward in its direction, social phenomena may span a greater or lesser distance in vertical space" (Black 1993, p. 160).[307]

Law, according to Black, varies directly with rank (i.e., its location in vertical space). "This means that, all else constant, the lower ranks have less law than the higher ranks, and the higher or lower they are, the more or less they have" (1976, p. 17). Law varies with its direction in vertical space, such that downward law is greater than upward law. Again, all else constant, a complaint against someone of a lesser rank is likely to attract more law than a complaint against someone of a higher rank (see also Marx [1841]

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[306] Black's (1976, p. 11) conceptualization of "wealth" includes the material conditions of existence (e.g., food and shelter), the means by which these conditions are produced (e.g., land and raw materials), other property and luxuries that may be exchanged for the conditions of existence (e.g., money and livestock), and the ability to borrow wealth (i.e., credit). The various kinds of wealth in a society may be differentially distributed, so an individual or group may have a number of different ranks. It is possible, however, to combine these various ranks so that each individual or group has a general rank relative to all others (p. 16). Bonilla-Silva (1997, p. 469 n.5) offers a broader definition of "material": the economic, social, political, or ideological rewards or penalties received by social actors for their participation in social structural arrangements. Although Black's definition encompasses a narrower range of phenomena than Bonilla-Silva's, his conceptualization is more consistent with his emphasis on the observable aspects of social reality.

[307] There are other variable aspects of stratification, as well. For example, the degree to which wealth is distributed in layers, the number of layers, and size of these layers are all variable. Other variable aspects may include the mechanisms of wealth distribution (e.g., inheritance, occupation, and gambling), the movement of people from one layer to another (vertical mobility), and the age of wealth itself (e.g., "old money" versus "new money") (Black 1976, pp. 11–12).

1975). This implies, then, that upward deviance is more serious than downward deviance. Finally, among cases with a direction between one rank and another, the difference between the ranks (i.e., vertical distance) predicts the quantity of law; however this depends on the direction of law in each case. Law with a downward direction varies directly with vertical distance. Upward law, however, varies inversely with vertical distance. For example, all else constant, the seriousness of an offense by a lower against a higher rank increases with the difference in wealth between the parties. Conversely, the seriousness of an offense by a higher against a lower rank decreases as this difference increases (Black 1976, pp. 24–25).

As noted above, the social geometry of a conflict also predicts the style of law (see also Seron and Munger 1996, p. 204). For example, downward law is more penal than upward law. "[When] the offender's rank is below the victim's, his [or her] conduct is likely to be punished as a crime than in a case where the direction is the opposite" (Black 1976, p. 29). Upward law is more compensatory than downward law, so an offender who ranks above her or his victim is more likely to be asked to pay for her or his damage than in a case with the opposite direction (Black 1987). Similarly, upward law is more therapeutic than downward law. In situations where an offender is of higher rank than the victim, the offender is more likely to be defined as sick and in need of treatment, whereas an offender is more likely to be punished in a conflict with the opposite direction. The style of law also varies with vertical distance. In a downward direction, penal law varies directly with vertical distance, whereas it varies inversely with vertical distance in an upward direction. The likelihood of compensatory and therapeutic law also increases as the wealth of a higher rank offender increases. Conciliatory law, on the

other hand, decreases as stratification increases and is more likely to occur when parities are of equal rank (Black 1993, p. 163).

*Horizontal Space.* The horizontal dimension of social space (also referred to as morphological space) arises from the distribution of people to one another. This dimension, highlighted by Durkheim ([1897] 1951), Spencer (1876), and Simmel ([1908] 1950), includes integration, interdependence, and differentiation.[308] Black notes that every activity has a circle of participation, with people closer or further from the center, and therefore has a radial location. It may also have a radial direction, moving inward (centripetally) or outward (centrifugally) from the center (Black 1976, p. 49), as when a marginal individual makes a legal complaint against an individual who is more integrated. As with vertical space, there is also a radial distance—the difference in integration itself.[309]

Horizontal space has another variable aspect as well—the structure of intimacy (or relational distance). This is measured by the degree to which individuals participate in one another's lives, including the scope, frequency, and duration of their interaction and their linkages in a wider network (see Bonilla-Silva 1997, pp. 469–470; Caplow 1955, pp. 29–30; Sutherland 1947, pp. 6–7).[310]

Law varies directly with integration (i.e., its location in radial space). People in or near the center of social life have more law than those more marginal. For example, an

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[308] Differentiation (also know as division of labor) is a specialization of function across the parts of a whole (Durkheim [1893] 1947).

[309] Differentiation also varies across settings of every kind, including friendships, families, organizations, and societies. It is important to note that differentiation is not simply a function of the size of the population, as smaller groups may display more division of labor than larger groups (Black 1976, p. 38).

[310] Structural analysis, or social network analysis, entails the representation of actors and/or objects linked together by social connections (e.g., two persons are friends or enemies) or shared experience (e.g., they go to the same school) (Edling 2002, p. 206). Much of the social network literature has been criticized, however, for being theoretically underdeveloped. Black avoids this problem by harnessing the explanatory power of structural analysis under a single social dimension—morphological space.

offense between two employed individuals is more likely to result in legal action than an offense between two individuals who are unemployed. Conversely, a conflict between two vagrants is less likely to be reported and even less likely to result in arrest. So, all else constant, an offense between marginal people attracts less law than an offense between people more integrated into social life. Radial direction is important as well. Centrifugal law (inward law) is greater than centripetal law (outward law). An offense of a marginal person or group against an integrated person or group is more serious (i.e., attracts more law) than an offense in the opposite direction.[311] Integration, of course, is a matter of degree, so the difference between people in horizontal space also predicts and explains legal variation. Inward law varies directly with radial distance, whereas outward law varies inversely with radial distance.

Law varies directly with the division of labor, to a point, then reverses itself: the relationship between law and differentiation is curvilinear (Black 1976, p. 39). Law increases with differentiation to a point of interdependence, but declines with symbiosis.[312] There is very little law at both extremes of differentiation: when people are undifferentiated by function and when people are completely dependent upon each other. The relationship between law and relational distance (i.e., intimacy) is also curvilinear. Law is relatively inactive among intimates and increases as the distance between people

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[311] Similar to wealth, another variable aspect of integration is its stability (or, conversely, its volatility)—i.e., its age (see Bausman and Goe 2004). So, for example, legal action is more likely to occur among employed individuals with stable work histories than employed individuals with unstable work histories, all else constant. And by extension, an offense of an individual with a volatile employment history against an individual with a stable work history attracts more law than the reverse, all else being equal.

[312] Unlike Black (1976), most theorists fail to specify the functional form of the interrelations between properties (for a discussion, see Thaxton and Agnew 2004). "[F]ew of our propositions ever state the exact function—which is one of the reasons why [sociology] is not an exact science" (Homans 1967, p. 20) and "rarer still is guidance about the specific functional form of any *a priori* nonlinearities" (Beck and Jackman 1998, p. 597). This "specification error" both undermines the theorist's ability to make precise predictions and the analyst's ability to accurately test hypotheses derived from the propositions (see Berk 2003, p. 94; Gujarati 1988, pp. 455–56).

increases until this distance reaches the point which people begin living in entirely separate worlds, at which time it decreases. Relational distance rarely reaches the point where people are entirely separate in modern society, so this relationship is basically linear; although in the past that was not always the case (Black 1976, p. 41). The shape of horizontal space, similarly, predicts and explains the style of law. For example, inward law (applied against someone who is more integrated) is more compensatory, whereas outward law (applied against someone who is more marginal) more penal.

*Symbolic Space.* Drawing heavily on the work of Hegel ([1821] 1952), Parsons (1951), and Sorokin (1937), Black identifies a symbolic dimension of social space, representing the expressive aspect of social life, or culture, whether moral, intellectual, or aesthetic (Black 1976, p. 61). It includes religion, ceremony, values, ideas, language, *et cetera*. Culture, too, is quantifiable. Culture has two variable aspects: content and conventionality. Its content is measured by the number of different languages, concepts, ideas, and in the volume of religions, folklore, science, values, customs, clothing, *et cetera* (p. 63). The quantity of culture is unevenly distributed both across and within societies. Black also argues that culture can be more or less conventional, measured by its frequency.[313] Conventionality is unevenly distributed across social settings, and social life varies with its location in symbolic space. Social life may also vary with its direction and distance symbolic space, from more to less (or less to more) conventionality. The value of Black's approach to culture, then, is that differences in what are traditionally seen as strictly qualitative phenomena can, in fact, be measured (see also Cerulo 2002; Mark 1998).

[313] Ginzburg famously wrote "[i]t is significant that we say that something is 'high' or 'superior'—or conversely 'base' or 'inferior'—without considering why what we most praise (goodness, strength, and so on) must be located high" (1976, p. 31).

Law varies with both aspects of culture: its content and conventionality. Law varies directly with the content of culture. Where culture is sparse, so is law; where it is rich, law abounds. Law is also greater in a direction towards less culture than toward more culture. An offense by someone with less culture (e.g., education) than his or her victim attracts more law than an offense in the opposite direction. The magnitude of the difference in culture is also important. In a direction towards less culture, law varies directly with cultural distance. Conversely, in a direction toward more culture, law varies inversely with cultural distance.

Law also increases as it nears mainstream culture and decreases as it moves away: law varies directly with conventionality. Law is also greater in a direction towards less conventionality than towards more conventionality. The magnitude of this difference, again, is important. Downward law varies directly with cultural distance whereas upward law varies inversely with cultural distance. Cultural distance also predicts and explains the style of law. All else constant, penal law varies directly with cultural distance whereas conciliatory law varies inversely with cultural distance. The conditions for compensatory and therapeutic law, however, lie between those conditions most conducive to penal and conciliatory law (Black 1976, pp. 78–79).

*Corporate Space.* The corporate dimension of social space, emphasized by Weber ([1922] 1964, [1922] 1968) and Michels ([1911] 1962), refers to the capacity for collective action, or organization (see also Dowding 1996; Sampson 2006). This is found in all groups, whether a married couple or conglomeration of nations (e.g., NATO). The quantity (or level) of organization varies across social settings and legal behavior may be described by its location in such a distribution. Social life may also have an upward or

downward direction in corporate space. Additionally, a social phenomenon may span greater distances of organization.

The capacity for collective action predicts and explains the quantity of law: law varies directly with organization. A conflict between organizations attracts more law than a conflict between individuals. "Between organizations, the loser loses more, an appeal by the plaintiff is more likely, and so is a reversal on his [or her] behalf" (Black 1976, p. 92). The direction of a conflict in corporate space also predicts and explains legal variation. Downward law (i.e., in a direction toward less organization) is greater than upward law (i.e., toward more organization). As with other dimensions, the magnitude of the difference predicts and explains legal variation. Downward law varies directly with organizational distance, whereas upward law varies inversely with organizational distance.[314] The style of law also varies with corporate space. Penal and therapeutic law, for instance, is greater in a direction toward less organization than toward more. Compensatory and conciliatory law, on the other hand, is greater in a direction toward more organization.

*Normative Space.* The normative dimension, stressed by Ross ([1901] 1920), Cooley ([1902] 1964), and Sumner ([1906] 1940), is the final dimension of social space identified by Black. Normative space results from the operation of social control (Black

[314] Hagan (1999, p. 364) suggests that the modern criminal justice system better serves corporate than individual interests, and agencies originally thought to have emerged for the protection of individuals against other individuals are currently devoting a significant share of their resources to the protection of large affluent corporate actors. He also posits that corporate domination over our everyday lives extends far beyond criminal law. Songer and Sheehan (1999, p. 339) also discover that parties with greater organizational status are significantly more likely to prevail in federal appellate courts. Examining both published and unpublished opinions from the Fourth, Seventh, and Eleventh circuits ($N = 4{,}281$), and controlling for area of law (criminal, civil liberties, economic regulation and labor relations, and diversity of citizenship), political composition of the panel of judges, and region, they discover that big businesses enjoy greater success over smaller business and the federal government experiences greater success over state and local governments.

1979b, p. 161). Just as social control defines who is deviant, it defines who is respectable as well (Black 1976, p. 111).[315] As such, normative space includes the respectability of individuals and groups: the degree to which they have been subject to social control in the past (see, e.g., Braithwaite 1989), *and* their authority—that is, the capacity for social control (see, e.g., Shaw and McKay 1942).[316] The quantity of social control varies across social settings. While law, itself, is a form of social control, other varieties of non-legal social control exist as well, such as violence, covert retaliation (e.g., vandalism and sabotage), avoidance, negotiation, toleration, gossip, and criticism (see Baumgartner 1984; Black 1990, 2000b; Ellickson 1991; Ewick and Silbey 2003; Levi 1980; Morrill, Zald, and Rao 2003).[317] As with other dimensions of social space, law varies according to its location, direction, and distance in normative space. Social life varies with different social locations of authority and respectability, may have either an upward or downward direction (e.g., from more to less respectability or authority), and may span greater or lesser distances in normative space.

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[315] Ziegert (1980, p. 60) argues that the history of humankind has been the history over the struggle for social control.

[316] According to Louis Dumont (1981, p. 65), "[H]ierarchy is a ladder of *command* in which lower ranks are encompassed in the higher ones in regular succession...[h]ence it is a question of systematically graduated authority." Although not explicitly mentioned by Black, the capacity for respectability may be forward-looking as well: the degree to which a person or group can be viewed as moral or reputable. Irrespective of previous conduct, some individuals and groups hold the power of presumption while others do not (see Kan and Phillips 2003; Pager 2007). It is reasonable to believe, then, that members of seriously stigmatized groups may never be able to achieve similar levels of normative status to non-stigmatized groups, irrespective of their past, current, and future behavior (Cose 1993). According to Patterson (1982), it is impossible to understand the legacy of slavery and the social meaning of race in American without grasping the importance of honor. He notes that slavery is "the permanent, violent domination of natally alienated and generally dishonored persons," (p. 13) and suggests that the termination of the legal status of "slave," in itself, was insufficient to make slaves and their descendants into full members of society.

[317] These other types of social control, however, may *not* necessarily behave according to the same principles as law, so they should be investigated as well (Black 1984, p. 16). Although not initially characterized as such, Merton's (1938) five adaptations to blocked legitimate opportunities for monetary success—conformity, innovation, ritualism, retreatism, and rebellion—are primary examples of the major forms of non-legal social control employed by social inferiors against social superiors. According to Baumgartner (1984), upward social control is commonly handled through more "passive" methods, primarily because there is usually a higher cost associated with exercising social control from below (see also Black 1992).

Law is stronger where other social control is weaker: it varies inversely with social control (see, e.g., Clear 2007; Fagan and Meares 2000; Pound 1942; but cf. Liska 1997). Where other types of non-legal social control are plentiful, law relaxes (Black 1976, p. 110). Law also behaves according to its location in normative space: law varies directly with respectability. All else constant, unrespectable people among themselves have less law than more respectable people. For example, ex-convicts are less likely to complain to the police about each other than are respectable people. Even when unrespectable people invoke law against one another, they are less likely to succeed (see Anderson 1999; Black 1983; Venkatesh 2006). Conflicts also have a normative direction if the offender is more or less respectable than her or his victim. Law is greater in a direction toward less respectability than toward more respectability. The less respectable person or group is more likely to be subject to law but less likely to have its benefits. The difference in respectability is a normative distance. Downward law (toward less respectability) varies directly with normative distance. Upward law, on the other hand, varies inversely with normative distance. "The less respectable an offender in relation to a complainant, a legal official, the members of a jury, or a witness, for instance, the more law to which he [or she] is likely to be subject" (Black 1976, p. 117). This principle applies to the complainant as well. That is, law also varies directly with the respectability of the victim (see Baumer *et al.* 2000; Chesney-Lind 1989; Sundby 2003). Any record of social control is a disadvantage, with a criminal record clearly being the worst.[318]

[318] Schwartz and Skolnick's (1962) seminal study of the impact a criminal record on employment opportunities revealed that *any* contact with the criminal justice system reduced the likelihood of employment. Specifically, they sent four sets of resumes to prospective employers and varied the criminal record of applicants: (1) conviction and sentence for assault; (2) trial and acquittal for assault charge; (3) trial and acquittal for assault accompanied by a letter from the trial judge certifying the applicant's acquittal and innocence; and (4) no criminal charge or record. In all three "criminal" conditions, applicants were

Unlike physical distance, social distance (e.g., vertical distance, relational distance, cultural distance) is two-directional—measurable from both *A* to *B* and *B* to *A*; therefore it may be unequal in each direction (i.e., asymmetrical) (Black 2000a). For example, *A* may be relationally closer to *B* than *B* is to *A* if *A* participates more in *B*'s life than *B* participates in *A*'s life (cf. Gould 2002). Similarly, an asymmetrical distance in cultural space may arise if *A* speaks *B*'s native language, but *B* cannot speak *A*'s native language (Black 2000a, p. 349 n.18).[319]

In sum, Black's multidimensional conception of social space draws from five major aspects of social life that have long been emphasized in sociological theory (see also Collins 1994). By incorporating what is valuable from these various perspectives and discarding their peculiarities, Black demonstrates how these seemingly divergent approaches can contribute to a single body of theory. He recognizes, however, that other dimensions of social space may also be added to the theory if necessary and argues that his theory can readily accommodate these additions.[320] Black argues that law, like all other forms of social life, varies with its social geometry: its location, direction, and

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less likely to be considered by employees relative to the group with no record of a criminal charge or conviction.

[319] It is possible to define mathematically concepts like social nearness, degree of social cohesion, and so forth (Klüver and Schmidt 1999).

[320] Villarreal (2002, p. 479 n.5), for example, argues that Black's framework neglects the "web of obligations" in which individuals are immersed and how this influences social control. According to Villarreal, differences in status dimensions identified by Black (e.g., stratification and structure of intimacy) do not explain the power that patrons have over their clients; rather this power derives from the unequal relations of exchange in which clients are forced to engaged (see, e.g., Emerson 1962; Lindblom 1977).

It is doubtful, however, that Villarreal's "web of obligations" constitutes a new or distinct dimension of social life; rather it can be subsumed under one or more of Black's existing dimensions. In fact, Black's (1976, p. 40) *horizontal space* (i.e., morphology) specifically addresses non-mutual dependency resulting from the uneven distribution of differentiation (i.e., division of labor) and interdependence in any given setting. Similarly, his conceptualization of two-directional, and potentially asymmetrical, social distances (see above) incorporates unequal exchange relations (see Black 2000a, p. 349).

distance in multidimensional social space (cf. Tomlins 2007).[321] Furthermore, he develops numerous propositions specifying how law varies along these various dimensions. That is, how variations in law are linked to variations in vertical, horizontal, symbolic, corporate, and normative space (see also Timasheff 1937, p. 227).[322] It must be emphasized, however, that Black's theory of law extracts bivariate relationships from multivariate situations (Horwitz 1990, p. x). In discussing specific relationships, Black treats all non-sociological variables, *and* other dimensions of social space identified in the theory, as constants. This is done in order to illustrate the basic properties of these relationships under ideal conditions when "all else is equal." Although some have criticized this approach as unrealistic (see Greenberg 1983b; Hunt 1983), it is nearly ubiquitous in science. Universal laws in the physical and biological sciences are nearly always established under ideal conditions that do not exist in the natural world and become probabilistic or statistical generalizations when applied outside of these ideal conditions (Nagel 1979, pp. 508–509). Similarly, Weber ([1922] 1968) noted that his "ideal types" were unlikely to be found in pure form in reality, but nonetheless allowed the analyst to study the real world. Social theory using the covering law approach casts predictions in probabilistic terms because it involves populations that are subject to many more influences than included in the theory and available in the data (Lenski 1988, p. 168). Once the fundamental logic of the theory has been articulated through these

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[321] Similarly, Hollingshead (1941, pp. 220, 222) notes, " the essence of social control is to be sought in the organization of people" and "[the interest of social control theorists] is to search for, define, and analyze the organizational systems' functioning in a culture to determine how these regulate the behavior of the person."

[322] Luhmann (1989, p. 139) also recognized the relationship between the law and the other dimensions of social life: "Law is not politics and not the economy, not religion and not education; it produces no works of art, cures no illnesses, and disseminates no news, although it could not exist if all of this did not go on too."

bivariate associations (and subject to empirical tests), more complex (multivariate) relationships can be explored (see, e.g., Lessan and Sheley 1992; Sherman 1978).[323]

### *6.2.3 Evaluation of the Blackian Paradigm*

Harris (1979) has argued that research strategies can be evaluated and compared even prior to the examination of their subsequent theories by their focus on discovering orderly relationships.[324] Research strategies that aim to discover the maximum amount of order in the universe are superior to competitors that fail to do so (Maxwell 1974a,b). As Maxwell (1974a, p. 152) notes, "we can assess in an *a priori* fashion the relative simplicity or intelligibility of rival paradigms [by the] promises which they hold out of realizing the basic metaphysical blueprint of the science" (cf. Somers 1998, pp. 758–61). Black (1995, p. 847) argues that his research strategy is scientifically superior to earlier research programs in sociology because it avoids several of their shortcomings, namely: (1) psychology, (2) one-dimensionality, (3) units of analysis, (4) individualism, and (5) teleology (see also 2000c, p. 705; 2002b, p. 668).

*Psychology.* As discussed above, Black's reconceptualization of individual action as social action allows for the explanation of social phenomena without regard to psychology. Conversely, nearly all sociological theory, both classical and modern, either explicitly or implicitly addresses human subjectivity (Black 1995, p. 848; Mayhew 1980, p. 335), although Durkheim ([1895] 1962) initially emphasized developing explanations operating solely at the sociological level without recourse to psychological processes and

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[323] The location of an individual or group in social space, relative to others, is a status (Black 1979b, p. 161). Fisek (1998) provides a thorough discussion of important issues concerning the combination of positive and negative status characteristics. Although his work is concerned with the social psychological theory of status characteristics and expectation states, many of the points raised in his work are relevant to Black's multidimensional conceptualization of social space.

[324] Lakatos (1970, p. 155) argues that the history of science has been (and should continue to be) the history of competing research programs (see also Cohen 1985).

Simmel (1909) originally insisted on abstracting from *concrete* phenomena (Turner 2002, p. 664).[325] For example, much of sociology explains human behavior with the psychological impact of the social environment, making motives and meanings central (Black 2000a, p. 345). Black's paradigm, however, makes no assumptions or assertions about the goals, preferences, needs, values, attitudes, cognitions, or interests of individuals (but cf. Durkheim [1897] 1951; Weber [1922] 1968).[326] In fact, his paradigm entirely eliminates the individual from its formulations (see Black 1979b, 2000c). According to Black (2000a, p. 347), social phenomena, such as law, religion, and violence, cannot be explained by their psychological characteristics because they have no mind, no thoughts, and no subjectivity—they simply behave (i.e., vary). It is because the "unpsychological" nature of his approach, that Black believes his work is able to achieve a higher degree of scienticity than any previous sociological research strategy. His formulations require no psychological knowledge about individuals, therefore allowing his theories (e.g., his theory of law) to be tested by outward observation and direct measurement (see also Cooney 2002). Similarly, the removal of psychology from his paradigm permits his formulations to be highly general and parsimonious. Black (1995, p. 850) argues that highly general and parsimonious theory would be extremely difficult—if not entirely impossible—if it must address the nature of human subjectivity

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[325] "The classic sociologist most famous for insisting that sociology is different from psychology—Emile Durkheim—also addresses the subjectivity of goal-seeking individual. He psychologizes virtually every subject, even society[….] If Durkheimian sociology is not psychological, then Durkheim is not Durkheimian" (Black 2000a, p. 344).

Black (2002a, p. 102) rhetorically asks, "If it is possible to have psychology without biology, can we not have sociology without psychology as well?"

[326] "Social science explanations usually have a motivational dimension but that offers no sound basis for holding that they must have such a dimension. What is a 'good reason' relates more to the psychological than to the logical aspects of theoretical explanation: it is a fact about the expectations of the consumers of social science rather than about the necessary ingredients of social science theories" (Cooney 1986, p. 269). Similarly, Klüver and Schmidt (1999, p. 322) remark that it is unnecessary for sociologists to introduce particular 'interests' of social actors in their explanations of human behavior.

(i.e., how everyone thinks and feels) in all situations, societies, and historical periods to which they apply (see also Nagel 1979, p. 542). "Moreover, since motivations and meanings are commonly said to be rooted in particular settings, passing over them in silence allows the theorist to focus on what is common about behavior, regardless of whether it occurs in ancient India, medieval Venice, pre-colonial Zimbabwe, or contemporary America" (Cooney 2002, p. 660).[327]

*One-Dimensionality.* Unlike earlier sociological traditions that attempt to explain social life solely with the distribution of wealth (Marx and Engels [1846] 1947) or the distribution of intimacy, interdependence, and integration (Durkheim [1893] 1947; Simmel [1908] 1964) or the distribution of culture (Bourdieu [1979] 1984) (i.e., one-dimensionality), Black's paradigm synthesizes these research strategies into his multidimensional conception of social space, "incorporating and harnessing the explanatory power of diverse theories and variables" (Black 1995, p. 851).[328] Although previous attempts at "paradigm mixing" in sociology have been unsuccessful because of the "substantial differences in the underlying assumptions about the nature of human beings, society, and sociology" (Perdue 1986, p. 271; see also Tittle 1995, Chapter 4), Black's synthesis is successful because his paradigm discards the many of problematic

[327] For example, Michalski (2004, p. 652) notes, "The preoccupation with the psychology of violence and the focus on cultural orientations obscure the more salient features of social life that promote violence: the structure of interpersonal relationships."

[328] Weber developed a multidimensional theory of stratification that incorporated class, status, and party (see Collins 1994, pp. 81–91). Classes represent the economic order and are defined in terms of market situation (e.g., class position, economic interests, life chances); status groups represent the social order and are determined by the distribution of social honor (e.g., titles, awards, and styles of life); and parties represent the legal/political order and usually pursue class or status interests. Weber argued that classes, status groups, and parties are phenomena of the distribution of *power* within a community (Gerth and Mills 1958, pp. 180–95). Weber ([1922] 1968, p. 28) defines power as the "probability that an actor realizes his will in a social relationship even against the will of someone else." His three components of power—class, status, and party—are very similar to Black's vertical, symbolic, and corporate spheres, respectively. Moreover, social power, itself, is very similar to Black's normative sphere: the distribution of authority. Unlike Black, however, Weber emphasizes the importance of power and domination over all other spheres, relegating these other dimensions to sources of social power.

assumptions that plagued these earlier approaches that made them (seemingly) incompatible with one another (e.g., Berger and Luckmann 1966; Parsons 1951). Black's synthesis avoids the problem of *eclecticism*, defined as the practice of "picking and choosing epistemological and theoretical principles to suit the convenience of each puzzle" (Harris 1979, pp. 287–88). Harris believes that "eclectism guarantees that…solutions will remain unrelated to each other by any coherent set of principles…[and] cannot lead to the production of a corpus of theories satisfying the criteria of parsimony and coherence" (p. 288). Eclectism typically results in theories that do not interpenetrate each other or that are incompatible, primarily because eclectic theories are capable of generating numerous contradictory hypotheses (see, e.g., Parsons and Shils 1951). While eclectic theorists may genuinely advocate the importance of the interplay between theory and research, they fail to develop and refine core principles "capable of directing research efforts consistently along lines that could conceivably produce a coherent corpus of interpenetrating theories" (Harris 1979, p. 291). By developing a highly general, parsimonious, and coherent theoretical framework—pure sociology—Black's synthesis results in single body of theory and avoids the pitfalls of eclecticism: "middle-range theories, contradictory theories, and unparsimonious theories without end" (p. 288).[329]

[329] Harris remarked, "[E]clecticism is a prescription of perpetual scientific disaster" (p. 288). He notes, however, that eclecticism should not be confused with substantive or methodological versatility (p. 289). In fact, eclectic theories are seldom able to adequately explain the wide-range of phenomena they propose because of their contradictory assumptions and predictions (but cf. Stinchcombe 1968, pp. 4–6). Furthermore, "[t]he choice of methodology is an issue that is entirely separate from the choice of epistemological or theoretical principles. Methodologies are means one employs to test hypotheses and theories" (Harris 1979, p. 290).

Black explicitly rejects the theoretical supremacy of any dimension of social space over the other.[330] According to Black (2000a, pp. 354–55), it is impossible to rank the explanatory power of the various dimensions of social space because these dimensions lack a common unit of measurement (but see Bernard 1995, 2002). While he recognizes that it is possible, for the practical purposes of a single study, to rank the various dimensions because the comparisons reflect their measurement in one context, the dimensions cannot be ranked in a theory that applies across time and space (see also Kim and Ferree 1981).

Black's multidimensional conceptualization of social space greatly increases the comprehensiveness and generality of his work, while still remaining parsimonious and testable. Social life occurs in all societies throughout time, some of which might lack variability in vertical, horizontal, symbolic, organizational, or normative space. Theoretical approaches that attempt to explain social variation solely as a result of one dimension of social space are not only incomplete, but will have limited application in societies that are invariant along that dimension. Black's paradigm, however, identifies variability along all these dimensions, therefore tremendously broadening the scope and application of his formulations (see Black 2000a, p. 355).[331]

*Units of Analysis.* Sociological theories attempting to explain human behavior tend to focus on the microcosm (e.g., a person in a particular situation) or the macrocosm (e.g., a larger formation such as a society, region, or community), and as a result,

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[330] "Economics, the division of labor, networks, culture, organization, and social control have long vied for the pole position in the race to explain social life. In pure sociology none of these contenders wins the prize for being the ultimate explanation; they all share it equally. Every dimension of social space is as fundamental as every other" (Cooney 2006a, p. 56).

[331] Cooney (2006a, p. 56) emphasizes that "pure sociology synthesizes...meta-theoretical systems—paradigms of thought that can and have been applied to a wide variety of subjects."

explanations derive from the characteristics of these units (Collins 1981).[332] Black (1995, p. 858) argues, however, that neither persons nor societies are sources of human behavior. "Microcosms overpersonalize everything, and macrocosms oversocietalize everything." Black's shape of social space, which explains human behavior, is neither large nor small. Its size, boundaries, and duration are all variable (p. 853). Because the shape of social space is defined and measured by the social characteristics of everyone involved in every instance of human behavior (see also Goffman 1971), each has its own multidimensional location, direction, and distance in social space.

According to Black (1995), the shape of social space provides a better explanation than microcosms and macrocosms "because the precise location of social life is not persons or societies" and "to understand such phenomena as a consequence of persons or societies is inherently and incurably limited as an explanatory strategy" (pp. 857–58). He argues that people who use violence or law or religion are not violent, litigious, or religious in all social settings in which they participate. Similarly, violent or litigious or religious societies are not violent or litigious or religious in all their settings. Only particular conflicts, with particular locations, directions, and distances in social space, attract violence or law or religion (p. 857). Black suggests that the shape of social space is superior to every unit of analysis in sociology (e.g., a person, organization, or society) because it is both observable and measurable everywhere. The unit of analysis, then, disappears in social space (see also Black 2000a, p. 347 n.9).[333]

[332] According to Somers (1998, p. 750), "all theories of knowledge make a more or less explicit ontological choice between either the individual or the social structure as the basic unit of analysis."
[333] As Jasso (2006, p. 38) notes, a theory's predictions should span *all* levels of analysis.

*Individualism.* The subject matter of Black's paradigm is not the individual, rather it is the behavior of social life (i.e., social variation).[334] Social action replaces individual action and people disappear (cf. Parsons 1937). Human behavior, then, becomes a characteristic of social beings, rather than a characteristic of human beings with their own propensities.[335] The elimination of people from Black's paradigm greatly simplifies his explanation of human reality: the requirement of an understanding of human beings involved is replaced with a requirement of an understanding of the social beings involved (Black 1995, p. 860).[336] For example, his theory of law takes legal variation as its subject matter, not the behavior of people. While most socio-legal theorists attempt to explain diverse legal behavior such as calls to the police, arrests, lawsuits, verdicts, and appeals with the behavior of citizens, police, attorneys, and judges (see, e.g., Frankford 1995), Black's theory only requires an understanding of one single phenomenon—the behavior of law—which obeys the same principles throughout the social universe.[337] Under Black's framework, law is a natural phenomenon with its own patterns of behavior. Where the social structure of conflict varies, law varies. Where the social structure of conflict remains the same, law behaves the same. In Black's paradigm, it is the shape of social space, not people, that matters (Black 1995, p. 861).[338]

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[334] "Pure sociology is non-anthropocentric. Explanations make no reference to human beings as such. Social life behaves and people are merely its carriers" (Cooney 2006a, p. 53).

[335] Popper (1964) argues that methodological individualism is "the quite unassailable doctrine that we must try to understand all collective phenomena as due to the actions, interactions, aims, hopes, and thoughts of individual men [*sic*], and as due to traditions created and preserved by individual men" (pp. 155–56) (see also Mayhew 1980, p. 356; Nagel 1979, pp. 542–43).

[336] Mayhew (1981, p. 630) notes that much sociological theory is unnecessarily complex because sociologists take the individual as the unit of analysis and believe that only an extremely complex theory is able to connect individuals, as individuals, to the phenomena observed in a variety of groups and societies.

[337] According to Mears (1998a, p. 673), researchers should "develop theories that view sentencing decisions as examples of more general phenomena rather than as empirically distinct outcomes, thereby encouraging an accumulation of knowledge rather than of facts."

[338] Hunt's (1993) constitutive theory of law also urges a relational view in which the component elements of social life are not individuals or institutions, but combinations of economic, political, class, gender, and

*Teleology*. Teleological theories explain phenomena—social, physical, and biological—as a means to an end. Although the use of teleological explanations in the natural sciences has greatly diminished over time (see Burtt 1954), virtually all sociological theories explain human behavior as a means to an end. That is, sociologists assume or impute ends (e.g., goals, needs, values, purposes, interests, *et cetera*) and then explain human behavior as a means to those ends. For example, human behavior has been explained as a rational means to assumed goals or preferences (e.g., Akers 1990; Cornish and Clarke 1986; Crouch 1979; Kiser and Hechter 1991; McCarthy 2002; Parsons and Shils 1951; cf. Sunstein 2000),[339] a consequence of the opportunities available while in pursuit of assumed goals or preferences (e.g., Bennett 1991; Cohen and Felson 1979; Felson 1994), and an adaptation to a lack of opportunities to achieve assumed goals and preferences (e.g., Cloward and Ohlin 1960; Merton 1938; Messner and Rosenfeld 1994). In fact, teleological explanations are so fundamental to

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legal relations; however his theory differs from Black's theory of law in three important ways. First, Hunt argues that the major goal of socio-legal scholarship is the investigation of how law constitutes social relations. Thus in his theoretical framework, law is the independent variable. Second, Hunt writes from a Marxists perspective, making class and economic factors central to his theory. Although he acknowledges the shaky empirical status of a Marxist theory of law, he largely ignores the vast empirical literature documenting how other factors (e.g., organizational affiliations, cultural conventionality, *et cetera*) are often more influential than class and economic variables. Finally, Hunt does not develop testable propositions about how other aspects of social life vary with law. While he does underscore the importance of law in forming, maintaining, altering, and dissolving social relations, he does not attempt to systematically explain how any particular aspect of social life varies. True, law may be an important explanatory variable, but a *theory* of anything must attempt to explain the phenomenon of interest. In contrast, Black's theory makes law the dependent variable and attempts to systematically predict and explain legal behavior with testable propositions about the relationships between law and the five dimensions of social space. Also, his work does not elevate any particular social dimension over the other, recognizing that the explanatory power of the difference dimensions will vary according to the distribution of these dimensions in a particular setting. Black's theory readily acknowledges that law can be an independent variable in social theory, as are other forms of social control, but Black offers a much more comprehensive theory of social life by paying equal attention to the simultaneous influence of the four other important dimensions of social space.

[339] Cooney (1993, p. 2230) remarks, "It is striking that empirical scholars, particularly those whose work brings them into close and sustained contact with their subjects (e.g., many sociologists and most anthropologists) do not adopt a rational actor model of human behavior."

sociological research traditions, teleology has been called the "superparadigm" of sociology (Black 1995, p. 861).[340]

Black's paradigm, however, makes no assumptions about the ends of any kind—it avoids teleology. Rather than impute goals, preferences, purposes, functions, needs, *et cetera*, Black's approach simply predicts and explains social variation.[341] He abandons teleology because the ends of individuals, groups, and societies are not directly observable.[342] When the ends of people must be assumed or imputed, uncertainty is inevitably introduced into to the paradigm, severely limiting the degree to which it can be applied or falsified (i.e., its generality and testability) (Black 1995, p. 862). Teleological theory is also value-laden, with means to certain ends often becoming morally significant, even though such motivations are unobservable and unknowable (p. 863). Teleology, then, deleteriously impacts an explanatory strategy's degree of scienticity.

Black's theory of law avoids teleology by simply predicting and explaining legal variation with the shape of social space in which it occurs—its social geometry. Black makes no claims or assumptions concerning the ultimate ends, purposes, or functions of law (but cf. Evan 1990; Luhmann 1989). Nor is his theory concerned with any interests

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[340] Baumgartner (2002, p. 647) notes, for example, that although the classical theories about religion feature different consequences, they are all teleological. Durkheim explained religion as a means to promote social cohesion and overcome the dissociative tendencies of groups (Durkheim [1912] 1995). Marx claimed that religion was used by the ruling class a means to thwart the revolutionary tendencies of the poor by presenting them with hopes that their suffering would end and they would be rewarded in the afterlife (Marx and Engels 1964). Weber explained the early capitalistic behavior of Calvinist Protestants as a means by which people counteracted religious anxiety, specifically the fear of being predestined to damnation (Weber [1904] 1958).

While teleological explanations that attribute a mission or destiny to a society as a whole (e.g., Marx and Engels [1848] 1959) have been largely discredited and abandoned, most sociological explanations of human behavior remain teleological (Black 2000a, p. 346).

[341] "[P]ure sociology lacks various conceptions found in other sociological paradigms, including social life as a system of interrelated parts, a struggle for domination, an outcome of opportunities, a survival of environmental selection, a rational choice, a product of motivations with social origins, or an exercise of free will. It is has a theoretical logic of its own" (Black 2002b, p. 668).

[342] According to Black (1995, p. 863), "teleological explanation is not only bad science, but hardly science at all" (see also Nagel 1979, pp. 520–35).

promoted or undermined by the law (e.g., Chambliss and Seidman 1971) or the effectiveness of law (e.g., Savelsberg 1992). By avoiding problematic assumptions about the ultimate ends of individuals, societies, and law itself, Black's paradigm achieves higher levels of generality and testability than approaches that rest on teleological assumptions.[343]

> Pure sociology is not at all teleological…and this may be why many sociologists cannot understand or appreciate it. Many cannot conceive of an explanation of human behavior that does not regard every human action as a means to an end. They seek to divine the purpose of everything human: Why, for example, do people handle legal cases as they do? What are they trying to accomplish? Why does a police officer make a particular arrest? Why does a judge make a particular decision? Virtually always the "why" refers to how each human action is a means to an end—its purpose. But such purposes lie beyond science (Black 2002a, pp. 107–108).

In sum, the scientific superiority of Black's paradigm over previous sociological research strategies results from the removal of psychology, one-dimensionality, units of analysis, individualism, and teleology. Specifically, these five problematic assumptions undermine the ability of subsequent theoretical formulations derived from a research strategy to achieve a high level of scienticity.[344] Moreover, these assumptions make it difficult to reduce the number of substantive errors in theories derived from paradigms that rely on them (Lenski 1988). According to Lenski (1988, p. 169), the structure of the theories derived from a paradigm is of primary importance, not their content (see also

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[343] Kuhn (1970) criticized the covering law approach for being teleological, arguing that the model *is* a means to a set goal: a permanent scientific truth (pp. 171–73). This, however, would appear to be a criticism of positivism, in general, and not particular to the covering law approach (see Tamanaha 1997). As Braithwaite (1953, p. 9) suggests, "the hypothetico-deductive method [e.g., covering law model] applied to empirical material…is the essential feature of a science." Furthermore, philosophers of science have noted that causality is only a feature of universal laws (Popper [1934] 1968) and that science progresses when it can explain lower level generalizations by deducing them from more general hypotheses at a higher level (Braithwaite 1953; Lenski 1988).

[344] "Pure sociology is more scientific than most sociology because it has a more scientific location. Its subjects are more distant: They are located all over the world and across history, and they are social entities rather than people" (Black 2002a, p. 106).

Jasso 1988, pp. 2–3).[345] If the structure and basic idea of a theory are sound, the content of the theory can be improved through the interplay of theory and research (Merton 1948).[346]

### *6.2.4 The Conceptualization of Race in the Blackian Paradigm*

The legitimacy of "race" as a concept for scientific inquiry depends on the criteria for defining race and will, in turn, be related to the analytical purposes for which the concept is employed (Duster 2003, p. 258). As noted earlier in this chapter, formal legal, conflict, and interactionist explanations of the influence of extra-legal factors—particularly race/ethnicity—on the criminal charging-and-sentencing process fail to fully realize the scientific ideals of generality, parsimony, testability, and empirical validity. The failure of these theoretical approaches partially stems from their ambiguous and incomplete conceptualizations of extra-legal factors (e.g., age, gender, race/ethnicity, and region) and their inability to coherently incorporate these conceptualizations (and the assumptions on which they rest) into their broader explanatory framework (Zatz and Rodriguez 2006).[347] Contemporary formal legal theorists, for example, pay scant

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[345] "[T]he word 'theory'...refer[s] not just to an explanation of a single phenomenon, but a cluster of explanations of related phenomena, when the explanations, the deductive systems, share some of the same general propositions" (Homans 1967, p. 26).

[346] In discussing why sociology should be modeled after evolutionary biology rather than classical physics, Lieberson and Lynn (2002, p. 4) remark, "In reviewing developments from Darwin to more recent periods, we are struck by how the theory has a tolerance for problems and incompleteness that gives it a certain durability and that enables one to better cope with errors. The evolutionists do not confuse fatal errors, on the one hand, with problems stemming from incompleteness, information that is still insufficient or not yet determined, or even unresolved. The latter cases are worrisome and certainly not to be glossed over. Yet, it does not necessarily mean that the theory is to be abandoned or that Darwin was *wrong*. In evolution, *incomplete* is not the same as *erroneous*" (emphases in original).

[347] Race and ethnicity are often seen as overlapping, but conceptually distinct social constructs. According to Bonilla-Silva (1999, p. 902), race (and racism) is linked to the history of colonialism, whereas ethnicity (and ethnocentrism) is linked to the history of the nation-state. While racial identification and assertion gives primacy to phenotype (e.g., "What are you?"), ethnic identification and assertion gives primacy to place (e.g., "Where are you from?") (cf. Loveman 1999, pp. 895–96). Moreover, according to Bonilla-Silva, "race" is often an ascribed characteristic, whereas ethnicity is a matter of self-selection (cf. Gross

theoretical attention to race/ethnicity, except when it is explicitly identified in the legal code (e.g., Black Codes, Jim Crow and anti-miscegenation laws). That is, formal legal theorists simply treat race/ethnicity as a fixed, legally defined category and posit that its impact is primarily—if not exclusively—indirect, operating through the law itself. This assumption is particularly problematic considering that legal institutions have differentially conceptualized race/ethnicity over the years and there has never been societal or legal consensus as to what constitutes membership to (or exclusion from) a racial/ethnic group (see Duster 2003; Gross 1998a, 2003; Winant 2000a). In fact, judges in the nineteenth-century South repeatedly held that racial classification was not a matter of law and that juries, who represented community consensus, were most qualified to decide racial group membership (Gross 1998a, p. 109). Gotanda (1995, p. 257) notes that the U.S. Supreme Court has used at least four distinctive ideas of race: (1) race as an indicator of social status (status-race) (see also Bonilla-Silva 1997, 2003); (2) race as a biological category derived from skin-color and region of ancestry (formal-race) (see

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2003). Ethnic groups tend to share non-genetic traits or characteristics, such as surnames, language, accent, religion, culture, and national origin. The non-genetic traits are often, but not necessarily, passed down with biological families.

However, with respect to governmental classification systems (including the legal system), race and ethnicity have often been used interchangeably. For example, Irish, Polish, Italian, Greek, and Jewish immigrants were categorized as both racial and ethnic groups. As these groups became more integrated into American society, however, they began to be viewed simply as "white" (Baldwin 1985, p. xix; Bonilla-Silva 2003; Winant 2000a). Similarly, Hispanics in this nation have been categorized both as a racial and ethnic minority group, as well as members of the white racial majority (see, e.g., Gross 2003). Moreover, since the 1970s the United States government has asked all Americans to identify their "race," and separately whether they are of Hispanic ancestry; therefore Hispanics can be of any race (e.g., white Hispanic, black Hispanic, mixed-race Hispanic, *et cetera*) (Logan 2004; U.S. Bureau of the Census 2003b). In 2002, there were approximately 38.8 Hispanics in the United States, with 1.7 million self-identifying as black Hispanic (U.S. Bureau of the Census 2003b). Compared to non-black Hispanics, black Hispanics tend to have socioeconomic profiles much more similar to blacks, are more likely to marry blacks, and are more likely to reside in neighborhoods that have nearly as many black as Hispanic residents (Logan 2004).

Because the bulk of previous research on race, ethnicity and the criminal justice system have failed to make these detailed distinctions with respect to race and Hispanic origin (i.e., ethnicity), I have elected to use the term "race/ethnicity" for comparability with previous studies and to fully capture both of these groups.

Duster 1990; see also Smith 2003);[348] (3) race as past and present subordination (historical-race) (see also Baldwin 1955; Guinier and Torres 2002; Pitts 1974; West 1992); and (4) race as beliefs, culture, community, and consciousness (cultural-race) (see also Appiah 1992; Dawson 1995, 2001; Gilroy 1993; Shelby 2005; Winant 2000b). The legal status of racial/ethnic minorities and their treatment by legal institutions, however, have rarely varied according to these classifications. Furthermore, despite the tremendous variability in the definition of race/ethnicity since the early seventeenth century, there has been remarkable stability in the influence of race/ethnicity on the criminal justice process (see, generally, Hawkins 1987, 1995).

Conflict theorists conceptualize race/ethnicity as a proxy for economic and political power (see Bonacich 1991). In fact many conflict theorists believe that racial/ethnic differences in levels and rates of criminal punishment primarily result from differences in social class between racial/ethnic majorities and minorities, rather than racial bias *per se* (see, e.g., Chambliss and Seidman 1971; Quinney 1970; Reiman 1979). This conceptualization of race/ethnicity is particularly problematic considering the voluminous literature highlighting the unique effect of race/ethnicity on social life, apart from its economic and political character (Cose 1993; Dawson 1995, 2001; Feagin and

[348] Over three decades ago, Lewontin's (1972) seminal studied revealed that only six percent of genetic variation between human beings was attributable to "race" and that the genes responsible for "racial characteristics" (e.g., skin color, hair texture, *et cetera*) constitute a mere 1.5 percent of the human genetic make-up. More recently, studies employing a variety of methods and examining a broader range of populations suggest that race accounts for no more than 10 percent of the genetic variation between individuals and that genetic differences between individuals in the same racial group can be greater than differences across racial groups (see, e.g., Bamshad and Olson 2003; Brown and Armelagos 2001). But despite the dubious scientific validity of "genetic" or "biological" race, human beings continue to use race to sort their social groupings and to define their social and economic interactions, and as a result, socially constructed race groupings can (and often do) have significant biological consequences (Duster 2003). Although the effect of race on biological outcomes, such as physical and psychological health, is largely (if not exclusively) indirect, operating through more proximal factors such as socioeconomic status, racial discrimination, and so forth, this does not lessen the importance of the study the bio-social and psycho-social consequences of racial categorization, particularly as it pertains to the social organization of society.

McKinney 2003; Work 1984). For example, some analysts have discovered that race/ethnicity is a stronger predictor of arrest rates than social class in many American cities (Liska, Chamblin, and Reed 1985) and that the racial composition of communities influences both residents' perception of neighborhood crime (Quillian and Pager 2001) and police strength (i.e., per capital police force) (Kent and Jacobs 2005) *net* of the actual crime rate and economic condition of the neighborhood. Other studies have shown that poor racial/ethnic minorities are often treated with greater leniency than whites for certain offenses (Hawkins 1987; McAdams 1998). Conflict theorists' conceptualization of race/ethnicity also fails to consider potential differences in criminal processing *between* racial/ethnic minority groups and lower-class whites in the criminal justice system. This is problematic in light of the recent studies that move beyond simple "black versus white" comparisons and document significant differences between blacks, Hispanics, and Asians with respect to criminal sentencing after social class and legitimate case characteristics are taken into account (see Demuth 2003; Kan and Phillips 2003; Kramer and Ulmer 2002; Steffensmeier and Demuth 2000, 2001).

Interactionists emphasize that race/ethnicity is not defined by its content, but by the social relations that construct it (Omi and Winant 1986; Rawls 2000). According to these theorists, race/ethnicity may have as many meanings as there are social contexts (see also Lee 1995).[349] Although the greatest strength of this conceptualization is its ability to account for the malleability of the meaning of race/ethnicity across time and place, most interactionist models also ignore well-documented (and heavily theorized)

[349] Duster (2003, p. 259) argues, "[T]hat a concept is variable in its meaning does not mean it has not important analytical use. Scientific inquiry abounds in such concepts, including a range that extends from 'genetic disorders' to 'economic markets.' On close examination, these apply to widely divergent empirical sites."

uniformities concerning the social realities of race/ethnicity (Machery and Faucher 2005). Admittedly, some interactionists have acknowledged the persistent effects of social stratification on racial prejudice resulting from competition over scarce socially valued goods and a commitment to a relative status positioning of groups in a racialized social order (e.g., Blumer 1955, 1958; Bobo 1999), yet they maintain that attitudes, feelings, and beliefs concerning the racial order that arise from this stratification, and not racial stratification itself, are central to their explanations. Interactionists appear unable to explain why the categorization of groups based on phenotypic features (e.g., skin color) has remained a major source of social division across cultures at least since the early sixteenth century (Machery and Faucher 2005), even though radically different conceptualizations of race and diverse racialized practices have developed across time and place (Bonilla-Silva 1997; Skidmore 1993). Interactionists also have difficulty explaining why the relative importance of biological sex categories and early "racial" categories based on origin (e.g., Irish) and religion (e.g., Jews) (Hirschfeld [1938] 1973; Winant 2000a) has diminished over time relative to phenotypic racial categories (Duster 1990; Root 2000). Interactionists have also largely ignored the work of many scholars of race/ethnicity who continually discover that race/ethnicity, like other social constructs, has an independent effect on social life apart from the meanings individuals assign to it and the way people personally experience it (see Bonilla-Silva 2003).

The Blackian paradigm overcomes these shortcomings by providing a completely sociological conceptualization of race/ethnicity that is fully incorporated into its broader explanatory strategy. Black's conceptualization of race/ethnicity, similar to his conceptualization of law, allows his theory of law to achieve a higher level of scienticity

than rival theories. According to Black, biological characteristics such as age, sex, and race are *not* social statuses because they are not locations in social space (but cf. Steffensmeier *et al.* 1998). As a result, racial/ethnic categories have no inherent sociological significance.[350] Nonetheless, race/ethnicity achieves social salience via its systematic association with a number of objective social conditions, particularly in the Western world (Horwitz 1990, p. 14). That is, race becomes significant because of the ways in which it has been used to structure social interaction and organize society (see also Park 1950). Race/ethnicity, according to Black (1989, p. 61), may serve as a crude indicator of social status in many situations. For example, in the aggregate, blacks and Hispanics in the United States have significantly less vertical, radial, relational, corporate, cultural, and normative status than whites (Black 1999, p. 68).[351]

With respect to vertical status (e.g., economic stratification), blacks lag far behind whites in virtually every category of economic wellbeing (Hacker 1992; Oliver and Shapiro 1995).[352] In the United States, for example, blacks comprise approximately thirteen percent of the population, but own less than one percent of privately owned rural land (Thomas, Pennick, and Gray 2004) and less than one percent of the nation's total wealth (Conley 1999). Relative to whites, blacks are three times more likely to live below the poverty level and are twice as likely to be unemployed (Bonilla-Silva 2003;

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[350] According to Machery and Faucher (2005), a satisfactory conceptualization of race must: (1) not assume that races exist; (2) not assume essentialism; (3) accommodate cultural and temporal variations; (4) account for similarity of racial classification based on phenotypic features; and (5) account for individual differences in racial categorizations (see also Winant 2000b).

[351] According to Berk (2003, p. 211), "[r]ace is little more than a marker for other factors that are really behind the decision to seek the death penalty" and the "persistent associations between the race of the victim and the chances of a capital charge suggest that something structural is going on linked to cause-and-effect relationships."

[352] Poverty within predominately black communities has also been remarkably persistent over time, although inner-city poverty, in general, has undergone dramatic changes over the past 30 years (Sampson and Morenoff 2006; see also DiPrete and Eirich 2006; Wilson 1987, Chapter 2).

Gleason and Cain 2004; Terkel 1992). Blacks are less likely than whites to be granted home loans (Hillier 2003; Massey and Denton 1993; Stuart 2003)[353] and receive college scholarships (U.S. General Accounting Office 1994), blacks have one-tenth of the net worth and two-hundredths the net financial assets of whites,[354] black households have a median income that is 59 percent of white households, black households are over twice as likely as white households to have zero or negative net worth,[355] and black-owned homes are worth 35 percent of what white-owned homes are worth (Dodson 2003; Oliver and Shapiro 1995).

Even among the college-educated and middle- and upper-class, blacks significantly lag behind whites (Grodsky and Pager 2001). For example, blacks males with a college degree earn 76 percent of what white males with similar education earn and are nearly twice as likely as their white counterparts to be unemployed (Conley 1999, p. 86; Gleason and Cain 2004). College-educated blacks also posses less than one-fourth (22 percent) the wealth as college-educated whites ($15,000 versus $67,000). Middle-class whites (i.e., annual household income between $25,000 and $49,999) have more than eight times the net financial assets as middle-class blacks, and among the two highest income quintiles ($50,000 and above), blacks have one-fifth the net financial assets of whites (Oliver and Shapiro 2001).[356]

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[353] As noted above, the capacity to borrow wealth is a variable aspect of the vertical dimension of social space (see Black 1976, p. 11).

[354] *Net worth* is calculated by subtracting total assets from total liabilities. These assets include financial resources such as savings accounts, mutual funds, and equity in homes and automobiles. *Net financial assets* is calculated in a similar fashion to net worth, except home and automobile equity is not included. Net financial assets is a better indicator of short-term financial viability because it concentrates on free cash resources (Conley 1999; Oliver and Shapiro 1995).

[355] Nearly two-thirds of black households (63.2 percent) posses no net financial assets compared to 28 percent of white households (Oliver and Shapiro 1995).

[356] According to Gittleman and Wolff (2004), much of the racial gap in wealth can be attributed to differences in inherited wealth, not income, savings, and investment dynamics (see also Conley 2001). As

Blacks, in the aggregate, also have significantly less radial, relational, and functional status (i.e., integration, intimacy, and interdependence) because they are much less integrated into mainstream society, are largely excluded from white social networks, and have infrequent meaningful contact with the vast majority of whites (Allport 1954; Barndt 1972; Drake and Cayton 1945; Loury 1977; Massey and Denton 1989; Pattillo-McCoy 1999; Wacquant 1997).[357] For example, a recent study revealed that 87 percent of whites admitted that none of their closest friends were black, 89 percent of whites have never had a romantic relationship with a black person, and 95 percent of whites have a white spouse (Bonilla-Silva 2003, pp. 105, 129). Even when whites attend highly integrated or predominately minority public schools, academic tracking almost guarantees that their experience in the classroom is mostly white (Anyon 1997; Kozol 1991). In fact, no other group in the history of the United States has ever been as segregated as blacks, even for a brief historical moment (Delaney 1998; Lieberson 1980), *and* levels of black-white segregation in the United States have actually increased at the

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much as 80 percent of lifetime *net* wealth can be attributed to gifts from one generation to another and nearly 25 percent of the nation's current wealth distribution can be explained by the wealth distribution at the end of the Civil War (cf. Barsky *et al.* 2002). Due to slavery, with few exceptions, approximately twelve generations of black families were unable to accumulate and inherit any wealth. Using the price of enslaved blacks from 1790 (when the government began collecting census data) to 1860 as a proxy for slave capital, the total value of slave labor *for that seventy-year period* was estimated between $1.4 trillion and $4.7 trillion (in 1983 dollars), depending on the estimated rate of inflation and compound interest (Marketti 1990, p. 118). Considering that the first documented slaves in America arrived in 1619, some 171 years earlier, the total value of slave labor from 1619 to 1865 has been estimated to be between $5 trillion and $10 trillion (in 1993 dollars) (America 1993; Vedder, Gallaway, and Klingaman 1990). At the end of the first quarter of 2007, the *net* worth of all households in the United States was estimated at $56 trillion (Federal Reserve Board 2007). According to Oliver and Shapiro (1995), the accumulation of disadvantages against blacks is so great that if all economic forms of racial discrimination against blacks ended today, it would take several hundred years for blacks to catch up to whites (see also Bonilla-Silva 2003, p. 79).

[357] High levels of racial segregation and income inequality, interacting to produce concentrated poverty, result in blacks being exposed to far higher rates of social disorder and violence than whites. It has been argued that this long-term exposure to social disorder and violence produces a high allostatic load among blacks, leading to a variety of deleterious health outcomes (e.g., coronary heart disease and inflammatory disorders) and cognitive impairments (e.g., atrophy of memory, inhibition of synaptic learning, and suppression of neurogensis) (Massey 2004; Sampson 2003; see also Willie, Kramer, and Brown 1974).

neighborhood level over the past 50 years (Alba, Logan, and Stultz 2000; Massey and Hajnal 1995).[358] Blacks are also are more likely to be marginalized than whites (and other minority groups) because they are less likely to be employed (Wilson 1996),[359] more likely to be employed in low-skilled and unskilled occupations (Dodson 2003; Mincy 2006; Wilson 1996), more likely to have unmarried births (Martin *et al.* 2003; South and Crowder 1999; Western, Lopoo, and McLanahan 2004; Wilson and Neckerman 1986), and more likely to receive public assistance (Gilens 2000; Hancock 2004; Manza 2000).

As scholars have noted for some time, blacks' and Hispanics' capacity for collective action (corporate status) via the democratic process, relative to whites, has been severely diminished by felony disenfranchisement laws,[360] illegal vote suppression,

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[358] Since the 1970s, there has been increased integration at the state and county levels, but increased segregation at the neighborhood and (since 1950) municipal levels (Massey and Hajnal 1995). After examining trends in average black-white segregation across all metropolitan areas in the United States and noting a downward drift in the mean segregation values since the 1970s, Thernstrom and Thernstrom (1997) suggest that segregation is declining in importance. Their work has been criticized, however, for confounding two distinct trends: (1) increasing integration in newer and smaller metropolitan areas of the south and west with relatively small black populations (particularly in areas that contain colleges, military bases, large amounts of post-1970s housing); and (2) stable or slightly increasing segregation in older metropolitan areas that contain a disproportionate share of the nation's black population. By solely considering the average segregation level across all metropolitan areas (without adequately taking into account the size of the black population in these areas), the Thernstroms mischaracterize the situation of blacks because the declines in segregation are concentrated in places where few blacks live (Iceland, Weinberg, and Steinmetz 2002; Massey 2004, pp. 8–9).

[359] In 2004, 72 percent of black males in their twenties who did not complete high school were jobless (i.e., unable to find work, not seeking work, or incarcerated). By comparison, 34 percent of white and 19 percent of Hispanic males in their twenties who were high school dropouts were jobless. Even when black high school graduates are considered, nearly half of black males in their twenties were jobless (Edelman, Holzer, and Offner 2006; Mincy 2006).

[360] Uggen and Manza (2002, pp. 797–98), citing U.S. Department of Justice data, note that voting-age blacks are nearly 3.3 times more likely to be disenfranchised because of a felony conviction than the national average (7.5 percent versus 2.3 percent). In sixteen states (Alabama, Arizona, Delaware, Florida, Georgia, Iowa, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, Rhode Island, Virginia, Washington, Wisconsin, and Wyoming), the felony disenfranchisement rate for blacks is in the double digits, whereas no single state has a felony disenfranchisement rate in the double digits for its total population. Moreover, in Iowa and New Mexico, nearly one-in-four voting-age blacks is disenfranchised (24.87 percent and 24.67 percent, respectively). The total felony disenfranchisement percentages for Iowa and New Mexico are 4.65 and 6.21, respectively. Research also suggests that the racial composition of the state and state prisons are strongly associated with the adoption of felon disenfranchisement laws (Behrens

low voter turnout, racial gerrymandering, multi-member legislative districts, election runoffs, annexation of predominately white areas, and at-large district elections (Behrens *et al.* 2003; Bonilla-Silva 2003; Brown *et al.* 2003; King and Mauer 2004; Uggen and Manza 2002). According to Dowding (1996), blacks lack social power primarily because they do not have the organizational capacity and resources to carry out a nationalist program (see also Myrdal 1944; Pitts 1974; cf. Jenkins, Jacobs, and Agnone 2003; Sampson *et al.* 2005a). Moreover, blacks and Hispanics are severely underrepresented at the highest levels of federal and state elected government (Dawson 2001) and in the federal judiciary (Gryski, Zuk, and Barrow 1994). Blacks and Hispanics, in the aggregate, also have significantly higher levels of residential instability (i.e., high residential turnover), thus increasing their level of social disorganization and undermining their ability to develop and maintain strong internal ties and act as a cohesive unit (Pattillo 2007; Sampson and Groves 1989; South and Crowder 1997; but cf. Venkatesh 2006; Wilson and Taub 2006).

Blacks, in the aggregate, also have less cultural status (conventionality) and normative status (respectability and authority). In relation to whites, they are more likely to have "non-standard" names (see Fryer and Levitt 2004), less likely to speak standard English because of isolation in the ghetto (Barndt 1972; Massey and Denton 1993; cf. McWhorter 1998),[361] have less formal education (Bonilla-Silva 2003), are more likely to receive inadequate formal education (Anyon 1997; Kozol 1991),[362] are less likely to

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*et al.* 2003, pp. 596–97). Whether felon disenfranchisement laws actually reduce the turnout of African American men, however, remains a contested issue (compare, e.g., Manza and Uggen 2005; Miles 2004).

[361] Recent research suggests that blacks are more likely to be subject to discrimination in the housing market *in the absence* of personal contact because rental agents use racial "cues" derived from Black Accented English (Massey and Lundy 2001).

[362] Predominately minority schools districts are more likely to be underfunded and less likely to prevail in education finance litigation compared to predominately white districts (Edwards and Ahern 2004; Kozol

attend private schools (U.S. Department of Education 1995),[363] are less likely to graduate from college (Mincy 2006; Thernstrom and Thernstrom 2003) and law school (Ayres and Brooks 2005), are more likely to have a documented history of criminal involvement (Clear 2007; Miller 1996; Short 1997; Tonry 1995),[364] have lower levels of collective efficacy (Sampson, Morenoff, and Earls 1999; but see Cross 2003), and are less likely to depend on and benefit from police intervention (Anderson 1999; Black 1980; Pattillo-McCoy 1999; Venkatesh 2006). Also, with respect to cultural (and functional) status, the heroic, artistic, and scientific contributions of blacks to mainstream society have been largely ignored or negated by whites (for discussions, see Gates and West 2000; Graham 1999; Ross and Edwards 1998, pp. 31–32; Salzman, Smith, and West 1995).[365]

In accordance with the structure of his paradigm, Black does not relegate the social significance of race/ethnicity to one particular sphere of social life (i.e., one-dimensionality). That is, unlike other theorists, Black does not attribute the importance of race/ethnicity primarily to economic inequality (Sampson and Morenoff 2006; Wilson 1980), culture (Akers 1998; Appiah 1992; Cernkovich, Giordano, and Rudolph 2000),

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1991). Racially segregated schools have also been linked to academic underachievement and adult incarceration among blacks, and this impact has actually *increased* in recent decades (see, e.g., LaFree and Arum 2006).

[363] In general, private schools provide better educational instruction than public schools and students perform better at private institutions. The relationship between private schools and educational performance remains after taking into account the income and educational attainment of the parents of students (see, generally, Bryk, Lee, and Holland 1993). In 1995, 10 percent of white children attended private schools, whereas only four percent of blacks attended private schools (U.S. Department of Education 1995).

[364] In 2000, 32 percent of black male high school dropouts age twenty to forty were in jail or prison, compared to 7 percent of similarly situated white males (Western 2006, p. 17). For males born between 1965 and 1969, nearly 60 percent of black high school dropouts had been incarcerated by 1999, compared to 17 percent of white high school dropouts (p. 26).

[365] Bonilla-Silva (2003) remarks that perceived differences between racial/ethnic groups that were once believed to have biological origins are now largely attributed to cultural differences, "Whites may no longer think that Africans, Arabs, Asian Indians or blacks from the West Indies are biological inferior, but they assail them for their presumed lack of hygiene, family disorganization, and lack of morality" (p. 39; see also Pieterse 1992).

integration and interdependence (Massey 1995), the capacity for collective action (Sampson, Raudenbush, and Earls 1997), the capacity for social control (Sampson 1987; Shihadeh and Steffensmeier 1994), and so forth. Rather, Black recognizes that the influence of race/ethnicity on social life—particularly the operation of social control—must be understood in relation to all of the various dimensions of social space: vertical, horizontal, corporate, symbolic, and normative. Furthermore, Black's conceptualization of race/ethnicity neither rests on untestable assumptions of how individuals and groups perceive or experience their own racial/ethnic identity nor how these individuals and groups are perceived by others (but cf. Pitts 1974; West 1992).[366] Black's conceptualization is also sufficiently flexible to accommodate changes in salience of race/ethnicity across time and place. Also, recall that his unit of analysis—the shape of social space—allows for the simultaneous consideration of the micro- and macro-level dimensions of social phenomena (Horwitz 2002, pp. 642–43). Therefore, with respect to race/ethnicity, theories derived from Black's paradigm consider the influence of race/ethnicity at the micro- and macro-sociological levels (see, e.g., Kan and Phillips 2003).

It must be emphasized that Black does not suggest racial/ethnic groups actually exist. However, as a social construction, race can and does have a substantial effect on how people behave (see Duster 2003, p. 263). Similar to the interactionist model, Black believes "races" are best understood as relations and not as things (see also Weber [1922] 1968, p. 42). According to Omi and Winant (1986, p. 61), "racial formation is the

[366] Bonilla-Silva (2003, p. 54) also challenges the usefulness of studying attitudes about race/ethnicity to explain racial disparities in society, arguing "the problem of racism is the problem of power, therefore the intentions of individual actors are largely irrelevant to the explanations of social outcomes." Quoting Fanon (1967, p. 77), Bonilla-Silva (1997, p. 465) notes, "The habit of considering racism as a mental quirk, as a psychological flaw, must be abandoned."

process by which social, economic, and political forces determine the content and importance of racial categories." Similarly, Bonilla-Silva (1999) suggests that "races are the effect of racial practices of opposition at the economic, political, social, and ideological levels" (p. 901) and the task of studying racial structures is to "uncover the particular social, economic, political, social control, and ideological mechanisms responsible for the reproduction of racial privilege in a society" (2003, p. 9). Race/ethnicity, then, is important inasmuch as it accurately locates individuals and groups within the social structure and influences their social relations.[367] Therefore it is possible that racial/ethnic categorization may be more influential for some groups than others. Some racial/ethnic groups, for example, may be more homogenous with respect to their locations and relations along Black's five dimensions of social space than others. The more homogenous the racial/ethnic group, the more likely classification in that particular racial/ethnic group will impact the lives of its members, all else equal. For example, Kan and Phillips (2003, p. 85) argue that individual blacks may be more disadvantaged than members of other groups, net of their particular social status, because "the aggregate characteristics of the group haunt or help its members…members of some groups are fighting an uphill battle, while members of other groups hold the power of presumption" (see also Kang 2005; Stanko 1981/1982; Sunstein and Jolls 2006). Pager's (2007) recent audit study of the impact of race and prior criminal convictions (i.e., respectability) on employment opportunities provides some indirect support for their assertion. Her study revealed that blacks were less than half as likely (41 percent) as whites to receive a callback from employers, although the applicants had identical

[367] Anderson and Massey (2001, p. 12) suggest that racial stratification is "a multilevel process in which individual behavior is shaped by social structures that are firmly rooted in space" (see also Delaney 1998).

educational and work histories and no criminal record. Pager also discovered that whites *with* a criminal record were more likely to receive callbacks from employers than blacks *without* a criminal record, although these applicants also had identical educational and work histories. She suggests that employers may fear that blacks without criminal records may nevertheless have criminal tendencies.[368] Others have argued that the "race effect" tends to vary by degree of closeness of the racial/ethnic minority group to the dominant racial/ethnic group with respect to color (i.e., skin tone), culture, and so forth (see Bonilla-Silva 2003, p. 182; Hagan, Shedd, and Payne 2005, pp. 383–84; Portes and Rumbaut 2001, p. 47). It is questionable, however, whether skin color (i.e., phenotype) exerts an independent effect on social life, net of the status locations and relations articulated by Black's paradigm that define human interaction (but see Blair, Judd, and Chapleau 2004; Eberhardt *et al.* 2006).[369] While it is true that not all racial/ethnic minority groups share the same experiences, this is likely attributable to the fact that these different groups, in the aggregate, have different locations in the social structure. Furthermore, status mobility along these five dimensions of social space is likely to explain the changing character of racial/ethnic classifications and relations. As noted earlier, after Irish, Italians, Greeks, and Jews, in the aggregate, gained greater social

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[368] According to Western (2006, pp. 6–7), "No other group [than African Americans], as a group, routinely contends with long terms of forced confinement and bears the stigma of official criminality in all subsequent spheres of social life, as citizens, workers, and spouses. This is a profound social exclusion that significantly rolls back the gains to citizenship hard won by the civil rights movement...[i]ncarceration rates [of black males] are now so high that the stigma of criminality brands not only to individuals, but a whole generation of young black men with little schooling" (see also Harcourt 2007, pp. 162–65; Roberts 1999, p. 805; Wacquant 2005b).

[369] Duster (2005, p. 1050) notes that "[t]here is a complex feedback loop and interaction effect between phenotype and social practices related to that phenotype." Citing a classic epidemiological study on hypertension discovering that, within the black population in America, darker-skinned blacks have, on average, higher blood pressure than lighter-skinned blacks (see Klag *et al.* 1991), Duster highlights that the authors of the study concluded that it was not the color of the skin that produced the relationship, but that darker skin color in the United States was associated with less access to scarce and valued resources.

status in the United States, they stopped being categorized as "racial" groups entirely (see, e.g., Winant 2000a).

An additional advantage of Black's conceptual framework is its ability to offer a more general and parsimonious explanation of the interactive effects of age, gender, and race/ethnicity—at both the micro- and macro-sociological levels—on legal behavior. As noted above, some research suggests that age, gender, and race/ethnicity often have both direct and conditional effects on legal decision-making (e.g., Frohmann 1997; Spohn and Holleran 2000; Spohn *et al.* 1985; Steffensmeier *et al.* 1998; Zatz 2000). These researchers posit that the motivations and goals of decision-makers are central to understanding these effects (e.g., decision-makers' concerns with offender blameworthiness, the protection of the community, and the practical implications of the actual sentencing decision) (see also Albonetti 1987, 1991). Death penalty researchers have also considered the interactive effects of victim characteristics on capital case outcomes. Holcomb and colleagues (2004), for example, discover that white female-victim cases are most likely to result in a death sentence, even after holding the conduct of the victim and other legitimate cases characteristics constant . Similar to previous research on non-capital cases, Holcomb *et al.* assert decision-makers' interpretations of victim characteristics with respect to culpability and future dangerousness are of primary importance. It has also been suggested that these interpretations may be influenced by the larger social context in which these cases occur (e.g., electoral politics, correctional costs, and county racial composition) (see Baumer *et al.* 2000; Steffensmeier and Demuth 2000).

Black's theory of law also predicts that age, gender, and race/ethnicity have both direct and interactive effects on criminal processing; however the explanatory power of these variables results from the social positions that they indicate, rather than the variable interpretations that legal decision-makers place on them (Uggen and Kruttschnitt 1998). As noted above, age and gender, like race/ethnicity, are not social statuses themselves, but may serve as crude proxies for social location to the extent that they are correlated with Black's five social dimensions.[370] In modern America, for example, in the aggregate, youths have less vertical, radial, relational, cultural, and corporate status (see Black 1989). That is, holding gender and race/ethnicity constant, the young have less wealth, weaker social ties, less participation in the center of social life, less culture (e.g., education), and less capacity for collective action (e.g., youth are not allowed to vote). The normative status of youths, in the aggregate, is less straightforward—they have less capacity for social control (i.e., less authority), but they also tend to have less extensive criminal records (i.e., more respectability).[371] The situation for women is somewhat more complex—hold age and race/ethnicity constant, and women, in the aggregate, have less wealth and less authority than men, but their status locations are typically not as low as the young and most racial/ethnic minorities (Gilmore 1996; Gornick 2004; Smith 2002).

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[370] Similarly, Sampson and colleagues (2005b, p. 224) note, "Our theoretical framework does not view 'race' or 'ethnicity' as holding distinct scientific credibility…[r]ather, we argue they are markers for a constellation of external and malleable social contexts that are differentially allocated by racial/ethnic status in American society." Similarly, in commenting on the Federal Drug Administration's likely approval of the first "ethnic medicine" for heart disease targeted at African Americans, David Goldstein, director of Duke University's Center for Population Genomics and Pharmacogenetics, remarked, "Race for prescription is only an interim solution to carry us through a period of ignorance until we find the underlying causes" (Davies 2005).

[371] Kurlycheck and Johnson (2004), for example, discover that juveniles transferred to adult court receiver *harsher* penalties than adults, controlling for offense severity, prior criminal history, race, gender, and conviction mode (i.e., plea/trial) for violent crimes, but not property or drug crimes. They suggest that juveniles convicted of violent crimes in adult court may be seen as *less* amenable to rehabilitation. Kurlycheck and Johnson also discovered that the explanatory power of offense severity and prior criminal record on sentencing severity is stronger for adults than juveniles (p. 504).

On the other hand, in the aggregate, women have closer interpersonal relationships (relational status), are less likely to have criminal histories (i.e., respectability), and are more likely to play a central role in family life (radial and functional statuses) (Crowell 2004; Daly 1987; Uggen and Kruttschnitt 1998). In recent years, women in America have also surpassed men in college enrollment (cultural status) and voter turnout (corporate status) (Center for American Women and Politics 2004; Dugger 2001).

According to Black's explanatory framework, the interactive effects of these extra-legal factors are important because, at least in modern times, they provide more social information about the parties in the conflict, and therefore more closely pinpoint an individual's location in the multidimensional social space. Rather than resting on largely untestable assumptions of how legal decision-makers differentially define and interpret these social characteristics in the context of a criminal case proceeding, Black simply posits that the social locations that these characteristics represent predict and explain how the cases will be handled. It should be noted that Black does not suggest that certain combinations of these extra-legal characteristics will uniformly disadvantage a defendant in a criminal case. In fact, throughout a criminal proceeding, more specific information may be presented that will differentially locate the individuals in the conflict along the various status dimensions. However, to the extent that this information is unknown or disputed, legal decision-makers may impute the aggregate characteristics of the group in a particular case, therefore disadvantaging individuals who are viewed as members of these groups (Bodenhausen and Wyer 1985; Kan and Phillips 2003; Stanko 1981/1982). Black's theory also predicts that as age, gender, and race/ethnicity become less reliable indicators of social status, they will become less important influences on case outcomes.

Although unlikely, it is possible that certain age-gender-racial/ethnic combinations that typically disadvantage individuals in criminal proceedings today may advantage members of these groups in the future as membership in these groups is associated with higher status locations. Black's theory readily anticipates and predicts these facts as well.

According to Black (1989, p. 61), the major disadvantages that blacks face in legal life appear to be shared with others of lower status. Blacks and Hispanics, in the aggregate, "suffer legal disadvantages of any group inhabiting the bottom of society" (see also Bell 1992). Conversely, individual blacks and Hispanics who are wealthy and well integrated into society are legally better off than poor and marginally integrated members of other racial/ethnic groups (Black 1989, p. 119 n.12; Reiman 1979, pp. 97–98). Black argues that uniformity in the application of law is reserved for two situations: (1) when cases are socially similar and (2) in cases in which the outcome is trivial (cf. Blumstein 1993; Spohn and Cederblom 1991). He notes, however, that the greater amount of potential law that may be applied to a case, the more social information about those in the conflict becomes involved (or gets collected). At one extreme (i.e., very little potential for law) is a parking ticket, where very little social information is known, collected, or exchanged. At the other extreme is a capital murder case where the defendant's (and often the victim's) entire life history may be presented (Black 1984, p. 20).[372] The increased knowledge of the social diversity of a case (which corresponds, to an extent, with the potential severity of the case), therefore, increases the degree of variation of how the case in handled. "Law…remains saturated with information about the social

[372] It is also becoming increasingly common for capital defendants to present a "community health profile" during litigation—i.e., evidence of the effect of aggregate levels of drug-abuse, violence, sub-standard schooling, inadequate health-services, migration, *et cetera*, on individual and community well-being (Dudley and Leonard 2008).

characteristics of litigants and others involved in legal affairs…The abundance of this information, particularly in court, makes legal discrimination possible…The more social information, the more discrimination" (Black 1989, pp. 66–68).

### *6.2.5 Evaluation of Black's Theory of Law*

*Generality.* Black (1976) argues that his theory of law is able to explain variation in law (i.e., its quantity and style) irrespective of time, place, or structural level (see also Cooney 1997b). He notes that the classical sociological scholars, such as Durkheim ([1893] 1947), Weber ([1922] 1968), and Ehrlich ([1913] 1936) attempted to develop general theories of law pertaining to observable facts, with propositions that would apply to all legal systems (Black and Mileski 1973, p. 2). Black's theory has *explicitly* been used to predict and explain diverse phenomena such as the role of gender and familial status in criminal sentencing in contemporary America (Kruttschnitt 1981, 1982; Kruttschnitt and McCarthy 1985); the production of police reports (Black 1970), police disrespect toward citizens (Mastrofski, Reisig, and McCluskey 2002), police discretion in arrests (Black 1980; Cooney 1992; Smith 1987a; Worden 1989), citizens' discretion in calling police in the United States (Avakame, Fyfe, and McCoy 1999; Doyle and Luckenbill 1991; Gottfredson and Hindelang 1979), Canada (Gartner and Macmillan 1995), and Australia (Braithwaite and Biles 1980), legal behavior in seventeenth century New England (Baumgartner 1978), support for capital punishment (Borg 1998), legal executions and incarceration in Post-Reconstruction Georgia (Massey and Myers 1989), homicide clearance rates in urban areas (Borg 2001), the ability of complainants to garner and use legal evidence in legal disputes (Cooney 1994), the reporting behavior of fraud victims (Copes *et al.* 2001), the legal systems of squatter communities in Brazil (Sousa

Santos 1977), historical changes in the use of law in the United States (Lessan and Sheley 1992), medical malpractice litigation (Mullis 1995), speech crimes in China's Qing dynasty (Wong 2000), and the relationship between centralized political systems and state executions (Cooney 1997b).[373]

As noted above, Black argues that the sociological relevance of race/ethnicity depends entirely on the degree to which it corresponds to a social location (see also Uggen and Kruttschnitt 1998, p. 346). His conceptualization of race/ethnicity allows his explanation of the relationship between race/ethnicity and the law to achieve a higher level of generality than formal legal, conflict, and interactionist perspectives because it is able to explain and predict the same facts as these other perspectives under a single explanatory structure. For example, similar to formal legal theorists, Black's theory would predict increasing uniformity, in the aggregate, in the application of law to minority groups. Black's theory, however, would attribute this uniformity to the fact that racial/ethnic minority groups are becoming structural similar to the racial/ethnic majority group. As noted above, some racial/ethnic minorities (e.g., blacks and Hispanics) continue to significantly lag behind whites in many aspects of social wellbeing, but the gaps between these groups (in most areas) have been steadily shrinking over time (cf. Western and Pettit 2005). Recall that Black argues that cases are handled similarly (i.e., legal rules matter) when the cases are structurally similar or when the amount of potential

[373] As previously discussed, Black (1990) and others have expanded his theory to explain many forms of conflict management beyond law. For example, Black's theory has been used to explain individualistic violence among juveniles (Borg 1999), romantic partners (Michalski 2004), social elites (Cooney 1997a, 2003b), and prison inmates (Phillips 2003), as well as collective violence such as terrorism (Black 2004a, b), lynching (Senechal de la Roche 1997b), and race riots (Senechal de la Roche 1990). In addition to violence, his theory has also been used to successfully predict drug testing at the workplace (Borg and Arnold 1997), non-legal dispute resolution in suburbia (Baumgartner 1988), employee theft (Tucker 1989), and conflict management strategies among corporate executives (Morrill 1991) and nation-states in the world system (Borg 1992).

law in a case is trivial. Black's theory, then, specifies the conditions under which legal rules have their greatest influence (i.e., explanatory power). Black's theory also explains why racial/ethnic disparities in sentencing are most pronounced for the most serious crimes, such as murder and rape—these cases collect and present the most detailed information about parties in the dispute. It must be emphasized that Black's theory of law offers an explanation of legal behavior *in addition to* rather than *instead of* the formal legal perspective (Horwitz 1983; Sherman 1978).[374] That is, Black's theory of law explains legal behavior when legal rules and facts are held constant. But Black's theory also accomplishes more than just predicting legal behavior net of legal rules and facts—his theory seeks to explain the development of the legal order (Horwitz 1983, p. 372). Recall that social control is both the *definition of* and *response to* deviance; therefore his theory of law explains both the creation of legal rules and the actual behavior of legal officials.[375] For example, Black's theory of law predicts that white-collar offenders and corporations are treated more leniently under the law, *as a matter of law*, net of the actual harm done by the offender, because they typically have greater vertical and corporate status, respectively (Black 1976; Shapiro 1990).

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[374] As Robinson and Darley (2003, p. 954) note, "[T]he legal rule is just one of hundreds of variables that influence a case disposition."

[375] Legal sociology has been criticized for neglecting the empirical examination of formal legal rules (see, e.g., Ellickson 1991, pp. 147–149). Traditionally, legal sociologists have paid scant attention to the content of legal rules because much of the socio-legal literature suggests there is a substantial gap between what law says ought to occur and what actually occurs. As a result, their emphasis has been on *actual* behavior and the content of legal rules has been of secondary importance to them (Cooney 1993, p. 2221). Nonetheless, the process of enacting laws is a form of human behavior, thus the *content* of what is enacted is amenable to scientific explanation (see Parsons 1951, p. 3). As Cooney (1993, p. 2221) remarks, "[l]egal sociologists already have made considerable progress in developing a theory of legal behavior, but a complete theory of formal legal rules would constitute a major contribution to the sociology of law." As noted earlier, Black's (1976) theory of law predicts and explains the variable aspects of law: its style, form, and quantity (i.e., severity); therefore in a very meaningful way, his theory constitutes that "major contribution" to the sociology of law.

Similar to the conflict perspective, Black's theory recognizes the importance of economic and political inequality in explaining racial/ethnic disparities in criminal processing, even after holding legitimate case characteristics constant (Collins 2002). As noted above, blacks and Hispanics have considerably less wealth, capacity for collective action, and social control than whites. Economic and political power, however, are not the only important determinants of legal behavior. The horizontal (morphological) and symbolic (cultural) dimensions of social life exert an independent effect on legal behavior. Although in some contexts, the economic and political dimensions may be of primary importance, this need not necessarily be the case (Black 2000a). Black's full articulation of the social life (i.e., all five dimensions) allows this theory to explain what conflict theory explains, and more.

Both interactionist theory and Black's theory of law emphasize social relations. However, interactionists place primary importance to the ideas and meanings that are created during interaction (and influenced by the social structure), whereas Black's theory draws its explanatory power from the social positions of those in a conflict, not the motivations that presumably follow from these statuses (see Uggen and Kruttschnitt 1998, p. 345). The interactionist perspective's limited scope largely results from that fact that the meanings and motivations that are central to their paradigm are rooted in particular settings, and are unlikely to apply freely across time and place (see also Cooney 2002). While Black's theory does not discount the importance of motivations (and the middle-range theories that emphasize motivations), his focus is on the social positions and relations that give rise to these various motivations (Turner 2002, p. 667; Uggen and Kruttschnitt 1998, p. 345). Interactionists' overemphasis of the importance of

the symbolic dimension of social life (i.e., meanings, ideas, values) leads to an understatement of the importance of the independent effects of the other objective features of social life (see Brittan 1981). By refusing to give theoretical supremacy to any particular dimension of social life, while simultaneously emphasizing the tremendous importance of each social sphere, Black's theory is able to elucidate all of the relationships derived from formal legal, conflict, and interactionist perspectives under a single, highly general, explanatory framework.

*Parsimony.* Under Black's theory of law, legal behavior—including law-making and the response to law-breaking—is explained the social geometry of the conflict. As noted earlier, this social geometry is comprised of the social characteristics of the people involved, the relationships these individuals have with one another, and the larger social context in which these individuals interact (Black 1979a). Black identifies five variables in his theory, corresponding to the five dimensions that define human interaction: vertical, horizontal, symbolic, corporate, and normative. He also argues, however, that a "simple" or "elegant" theory is only preferable when it explains as much or more than a complex formulation (Black 1995, p. 838). Black's theory of law is preferable to formal legal, conflict, and interactionist perspectives because it is capable of explaining all of the relationships identified by those perspectives much more succinctly.

*Testability.* As the predictability and measurability of a theory increases, so does its testability. The most testable of theoretical formulations are those that are both falsifiable and stated in quantitative language (see Black 1995; Popper [1934] 1968). Black states his theory of law is highly testable because he explicitly identifies both the direction and functional form of the relationship between his five dimensions of social

space and the law. Like most social theory, Black's theory does not precisely specify how a change in one aspect of social space produces a defined change in law (see Horwitz 1990, p. 15); however the nonlinear relationships that he specifies provide a general idea of when a relationship is either strengthening or weakening (see, generally, Blalock 1967; Tittle 1995). According to Braithwaite and Biles (1980, p. 334), "The strength of *The Behavior of Law* lay in the fact that because it was in explicit propositional [*sic*] form, it was eminently testable." Similarly, Myers (1980, p. 854) notes that Black's theory "admirably captures an essential facet of the scientific enterprise: the reduction of phenomena to fundamental testable principles."

Nonetheless, several analysts have criticized Black for failing to clearly establish the order, organization, and interrelationships among the independent variables in his theory (see Bernard 2002, pp. 650–51; Braithwaite and Biles 1980, pp. 334, 338). These failures, according to these analysts, prevent the theory from being maximally testable. Black (2000a) has defended his decision to not rank the relative explanatory power of his dimensions of social space, arguing that these dimensions lack a common unit of measurement *and* that imposing an order among the variables undermines the generality of the theory because the relative explanatory power of the various dimensions vary across time and space. Bernard (1995) argues, however, that the complexity of the theory requires Black, to a certain extent, to specify the order or organization among his independent variables. For example, Bernard (2002) notes that researchers have attempted to test several of Black's propositions by examining whether Black's dimensions of social space explain variation in citizen's complaints to the police (e.g., Avakame *et al.* 1999; Braithwaite and Biles 1980; Gottfredson and Hindelang 1979).

These tests have been largely unsupportive of Black's theory, but Bernard (2002) argues that the unsupportive findings may primarily stem from confusion surrounding the order and organization of Black's independent variables (see also Mastrofski *et al.* 2002). As noted above, penal law is but one of the four styles of law, and as a result, there should be more penal law when there is less compensatory, therapeutic, or conciliatory law (Bernard 2002, p. 650). Therefore, if penal law (e.g., complaints to the police) is the dependent variable, the other three styles of law must become independent variables. An adequate (and accurate) test of Black's theory, then, would include eight independent variables: the five social dimensions and the three other styles of law. According to Bernard, access to the other styles of law would be most important in explaining the use of penal law. More generally, Bernard suggests that because law is "governmental social control," nongovernmental social control is the most important social dimension (i.e., the normative sphere). Because the vertical and normative dimensions of social space may be correlated (i.e., individuals with low vertical status may have less access to nongovernmental social control), a finding that individuals with less rank are more likely to mobilize penal law (e.g., call the police) would be consistent with Black's theory if these individuals had less access to nongovernmental social control. Indeed, Black (1976) expressly states that the mobilization of law remains relatively uncommon and individuals are much more likely to use non-legal forms of social control when they are available to them (see also Baumgartner 1978).

It is debatable, however, whether Black must necessarily order the theoretical importance of his social dimensions and whether the actual *styles* of law should constitute additional explanatory variables in the theory. Recall that Black specifies the bivariate

relationships of his theory under the condition that all non-sociological variables and the other dimensions of social space are held constant. Therefore a proper test of the relationship between the vertical dimension of social space (i.e., stratification) and law would require the analyst to hold normative status, which includes the capacity for non-governmental social control (i.e., authority), constant. While the normative dimension of social space may be of primary importance in some contexts, this need not necessarily be the case across all contexts. For example, in contexts where there is limited variability in the distribution of authority, normative status may be of limited explanatory importance and one or more of the other dimensions of social space may be of greater significance. As noted earlier, an *a priori* ranking of the five dimensions of social space is unadvisable and would improperly limit the generality and potential accuracy of Black's theory. The previous failures of analysts to adequately consider, operationalize, and control for the variable aspects of normative status, which includes the capacity to mobilize various forms of non-governmental social control, may more accurately reflect deficiencies in methodological rigor rather than a shortcoming of Black's theory.

A similar criticism of Black's theory is its exclusive focus on the additive—rather than interactive—nature of the dimensions of social space (see Lessan and Sheley 1992, pp. 673–74). While Black's emphasis on the additive effects of his variables may fail to fully capture the complexity of interrelationships among his five social dimensions, it allows the basic properties of the theory to be explored in a straightforward manner. That is, Black does not require the analyst to explore both the additive and nonadditive nature of these relationships to test his fundamental propositions. If his theory did require the analyst to explore such relationships, as many as 31 relationships could potentially be

included in the model (corresponding to all of the different relations among the five different social dimensions),[376] thus severely undermining both parsimony and testability. Nonetheless, Black's theory is fully capable of accommodating the various interactions among the five dimensions and their relationship to law. General statements about these interrelationships may not be advisable for the same reason that ranking the explanatory importance of the dimensions is unadvisable: such an enterprise would likely limit the generality of the theory. While the specification of such interrelationships may be useful for middle-range theories (see Turner 2002), they need not figure prominently into Black's broader explanatory framework.

It is also unadvisable to include the other styles of law as independent variables, as Bernard (2002) suggests. Black (1976, pp. 4–6) maintains that the style of law is a quantitative variable and his theory is able to explain variation in the style of law across time and space. Both the quantity of law, in general, and the quantity of each of these styles of law are aspects of the behavior of law—they are both dependent variables in Black's theoretical framework. Attempting to predict one style of law with another style of law would be circular—it reduces to "law predicts law." Bernard's analysis should be applauded, however, for underscoring the importance of not only the types, but also the various styles of nongovernmental social control. Because law varies inversely with other social control, all else constant (Black 1976, p. 107), Black's theory predicts that penal, compensatory, therapeutic, and conciliatory law will all vary inversely with penal, compensatory, therapeutic, and conciliatory styles of nongovernmental social control (Black 1983, 1990). By clearly holding the distinction between legal and non-legal (i.e.,

[376] The formula for calculating the number of different possible combinations of the five social dimensions is as follows: ${}^{n}C_{k} = n!/k!(n - k)!$; where $n$ is the number of objects in the set and $k$ is the number of objects that can be grouped (Finkelstein 1978, p. 34).

nongovernmental) forms of social control, Black's theory avoids the tautological theorizing that Bernard suggests.

It should also be emphasized that Black's form of theorizing, the covering law model, which is descriptive and focuses on identifying general patterns, is particularly consistent with the most popular analytical technique employed in the social and behavioral sciences: regression analysis. According to Berk (2003, p. 18), regression analysis is most powerful (and appropriately used) as a descriptive technique. Conventional regression analysis can provide only conditional distributions (e.g., conditional means and conditional variances). Causal inferences, on the other hand, "are based on information not in the data or the regression model [e.g., how the data were generated]…regression results are a way to describe important physical relationships of which causal links are justified elsewhere" (p. 9) (see also Heise 1975, pp. 12–17). In fact, the information that most social scientists are interested in, such as significance tests, confidence intervals, "explained variance," and causal relationships, rests on assumptions that actual social scientific data often fail to meet, but are required by the regression model.

As noted above, Black's theory of law avoids making causal statements (see Section 6.2.1). Also, when discussing supportive evidence for his theoretical propositions in *The Behavior of Law*, Black never mentions *t*-statistics, *p*-values, or the proportion of variance that should be explained. His theory simply specifies how variation in law corresponds with variation in each of the five dimensions of social space. Although his theory is explicitly stated in quantitative language and causal explanations are compatible with this theory, neither is central to the explanation of legal behavior.

*Empirical Validity.* As Cooney (1997b, p. 318) aptly notes, a theory as general as Black's theory of law must incorporate findings from multiple disciplines, including anthropology, criminology, history, and political science. Indeed, in the original presentation of his theory (see Black 1976) and in subsequent explications (see Black 1995, 2000a), Black assembles an impressive body of research literature in support of the core propositions of this theory. The bulk of the evidence presented by Black is largely indirect, drawn primarily from anthropological and cross-cultural research; yet initial explicit tests of Black's theory appeared to produce mixed results. Gottfredson and Hindelang (1979) and Braithwaite and Biles (1980), for example, discovered that lower-status individuals were more likely to call the police than high-status individual, holding the level of perceived offense serious constant—a finding in direct contradiction of Black's theory of law. Myers (1980) analysis of several decision stages in the criminal charging-and-sentencing process not only failed to find support for Black's theory, but also challenged its applicability to multiple decision stages. Conversely, early tests by Kruttschnitt and colleagues' (1981, 1982, 1985) provided support for Black's theory, discovering that gender differences in pretrial sanctions and criminal sentencing were largely explained by stratification, integration, respectability, and level of familial social control. Dannefer's (1984) analysis of the juvenile justice system also provided strong support for Black's theory, noting that greater relational distance was associated with harsher sanctioning.

The debate over the ultimate validity of Black's theory continues after 25 years of empirical testing (for discussions, see Bernard 2002; Cooney 2002). Norris and colleagues' (2006) comparative study of the potential use of police force in Mexico,

Venezuela, and the United States, Avakame *et al.*'s (1999) examination of calls to the police using National Crime Victimization Survey data, Doyle and Luckenbill's (1991) analysis of the use of law for the social control of collective problems, and Massey and Myers (1989) investigation of the relationship between informal social control and executions in the Post-Reconstruction South all find very little support for Black's theory. These studies have been criticized, however, for being marred by fundamental errors. Cooney (2002, p. 660) suggests that "the twin flaws of accepting poor evidence and rejecting good evidence" undermines critics' claim that Black's theory has received only limited support. With respect to accepting poor evidence, he argues that many researchers fail to include many of the relevant variables, such as important defendant and victim characteristics and relationships, contextual factors, and information about third parties (e.g., witnesses, attorneys, judges, and jurors).[377] Horwitz (2002) maintains that most criminologists and legal sociologists are not accustomed to thinking sociologically, and as a result their preferred research methods, such as random sample surveys, ignore the relational and contextual aspects of social situations that Black's theory uses to explain and predict law and other types social control (see also King 1997, p. 5).[378] Horwitz states, "The rigorous study of social geometry barely exists in the

[377] Similarly, Mears (1998a, p. 672) notes, "Only rarely are data about victims, court practitioners, or organization, culture, political, or social contexts considered at all, much less in a systematic manner." In recent years, however, researchers have paid increasing attention to the characteristics of third parties—particularly trial judges (see, e.g., Johnson 2006a; Spohn 1990a, b; Steffensmeier and Britt 2001: Steffensmeier, 1999 #727; Welch *et al.* 1988). Many of these studies reveal that judge characteristics do matter, but they often differ with respect to the direction and magnitude of these effects. Of particular note is Abram's (2006) recent study of the impact of defendant race on interjudge sentencing disparity in Cook County, Illinois between 1985 and 2005. Not only does Abram discover significant between-judge variation in ratio of sentence lengths between racial groups, but also that judge characteristics such as age and previous work experience as either a prosecutor or public defender predict their racial gap in sentencing.

[378] There are numerous examples of seriously flawed studies reporting unsupportive results for Black's theory. Mooney (1986), for example, purports to test Black's theory and concludes that "[the] lack of empirical support...seriously calls into question the validity of Black's propositions and empirically

discipline [of sociology]" (p. 643). With respect to rejecting good evidence, both Cooney and Horwitz note that critics of Black's theory ignore or dismiss the substantial amount of supporting evidence presented by Black and others (see, e.g., Baumgartner 1992; Horwitz 1990) because much of this evidence is historical, cross-cultural, and qualitative. Sociology, they contend, remains highly ethnocentric—rarely investigating other times and places—and preoccupied with applying precise statistical techniques to large quantities of remote data, rather than the careful collection and analysis of valid data.[379]

In recent years, scholars have also produced a substantial amount of evidence in direct support of Black's theory. Hembroff's (1987) study of the perceived seriousness of crimes revealed that the social structure of a conflict predicted respondents' seriousness rankings, net of the actual harm caused by the crime. Cooney (1992) discovered that racial discrimination in police arrests were largely explained by differences in vertical and horizontal status. He also discovered that social status is

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documents several conceptual and methodological weaknesses" (p. 742) and "Black's theory of law is an inadequate theoretical framework which ignores the complexity of the phenomena under investigation and the variables on which they are dependent" (p. 747). An examination of her methodological approach, however, seriously undermines any inferences that can be drawn from the study. Mooney surveys approximately 300 undergraduates, inquiring about their own "law use" (i.e., "any act or behavior the a student which, by its nature, initiated a legal procedure and/or invoked a legal norm for the purpose of an official decision being made) (p. 736), the "application of law" (i.e., "any act or behavior by a university official which, by its nature, imposed law on a system [member], that is, acted as a means of social control"), and measures their location on three of Black's five dimensions of social space (i.e., stratification, culture, and organization). Remarkably, Mooney fails to examine Black's key theoretical construct—the *shape* of social space—defined by the characteristics of the individuals involved, their relationships with one another, and the social context in which these individuals interact. By neglecting to include any information about the social characteristics of other principals (including supporters) and third parties, as well as failing to hold legal rules and legal facts constant, her analysis is wholly incapable of speaking to the empirical validity of Black's theory.

As noted earlier, Black's form of theorizing is consistent with the fundamental aim of regression analysis: the description of associations among variables. However, data subject to regression analysis must contain valid information about relational and contextual aspects of social situations. In fact, regression analysis has been used to explicitly model the relational and contextual associations highlighted by Black when the appropriate data are collected (e.g., Litwin 2004; Novak *et al.* 2002).

[379] Cooney (2002, p. 660) also criticizes much of the qualitative work in sociology for being "driven more by a search for meaning than for explanation, holding that something useful will result from speculating about the contents of the sealed chamber that is the human mind, as it acts in particular settings."

directly related to the amount and strength of evidence and testimony that can be gathered and used in a case *and* that legal testimony about a social inferior was more likely to succeed than identical testimony about a social superior (Cooney 1994). Mullis's (1995) examination of medical malpractice litigation revealed that the vertical, relational, and organizational distances between the health care provider and the patient were important in predicting claims and case outcomes. Philips and Cooney's (2005) study of individuals incarcerated for homicide and serious assault discovered that the third-party structure of the conflict, based on the social locations of all of the third-parties present, predicted the type of involvement of the third-parties (i.e., partisans, settlement agents, or disinterested) and whether conflict escalated to violence. At the macro-sociological level, Borg's (2001) research supports Black's theory of law, discovering that aggregate measures of stratification, morphology, culture, organization, and nongovernmental social control explain variable homicide clearance rates across locations (see also Litwin 2004).

Much of the research on racial/ethnic bias and sentencing conducted independently of Black's theory confirms the theory's predictions. Similar to formal legal theorists, Black predicts that racial/ethnic differences in criminal charging-and-sentencing will be attenuated when certain legitimate legal characteristics are taken into account; however Black's attributes this attenuation to the fact that many of the legal characteristics are themselves indicators of social status. For example, a defendant's prior criminal history is an indicator of her or his normative status (respectability) and an economic motive for a crime is often an indicator of the defendant's vertical status. Individuals' relational and radial statuses, indicated by their positions in, and strong ties

to, their communities influence the likelihood of pre-trial detention and the amount of bail required for pre-trial release (Garber, Klepper, and Nagin 1983; Hagan and Bumiller 1983).[380] Even the heinousness of a crime, whether lethal or non-lethal, can be an indicator of cultural or normative status.[381] All crimes, including murder, may be conducted in a more or less conventional manner.[382] The more heinous or vile the murder, the less respectable and more unconventional the offender will appear to be, even after holding prior criminal history constant.

Much of the research on the impact of "quasi-legal" factors on the criminal charging-and-sentencing process also supports Black's theory (Kruttschnitt and McCarthy 1985; Nobiling *et al.* 1998). Defendant characteristics such as age, employment status/history, and familial status may be directly or indirectly built into some aspects of the criminal law (Hagan and Bumiller 1983). Formal legal theorists have difficulty clearly distinguishing between legitimate and illegitimate factors because what is considered "legitimate" often varies depending on social context and from one stage of criminal processing to the other (Hagan and Bumiller 1983, p. 5). Black's theory avoids this confusion by simply recognizing that these factors are indicators of the social geometry of the case. The influence of these factors, however, will depend on the precise location and direction of the conflict in multidimensional social space.

Nonetheless, legal and quasi-legal characteristics do not completely capture the social geometry of the case; therefore other aspects of the social organization of the case

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[380] Individuals who are granted pre-trial release are more likely to respect the legal system and comply with court orders, keep their jobs and their homes, and assist in the preparation of a meaningful defense (Colbert, Paternoster, and Bushway 2002, p. 1783).

[381] Black (2004c) also suggests that the use and lethality of weapons can be predicted from the conflict structure—the more social distance adversaries are to each other, the greater the likelihood of deadly force.

[382] Cooney (2006b, p. 6) notes that certain forms of homicide, such as dueling and lynching, attracted increasingly severe sanctions after they began declining in frequency.

may be captured by the racial/ethnic characteristics of the parties in the case. Like conflict theorists, Black predicts that groups relatively low in vertical, organizational, and normative status are disadvantaged in the criminal justice process; thus, research discovering that racial/ethnic minorities receive harsher treatment in the criminal sentencing process even after legitimate legal rules are taken into account also supports Black's theory.

As Hagan and Bumiller (1983, p. 6) note, "it is very important to simultaneously consider both individual process and structural context because it is impossible to determine the specific effects occurring at one particular level without considering the effects at the other level." Black's theory emphasizes the micro and macro dimensions of social life, making the social characteristics and relationship of the parties involved in disputes central to his explanation of legal behavior. However, by recognizing that motivations cannot be precisely derived from social contexts (see Miethe and Drass 1999) and that attitudes account for only a small part of the variation in human behavior (see Worden 1989), Black's emphasis on the observable aspects of human interaction allows him to present a systematic theory of how the social geometry of the conflict predicts and explains legal behavior.

Evidence believed to support the interactionist model also supports Black's theory of law; however Black makes no reference to the human mind or emotions. Similar to interactionists, Black predicts that extra-legal factors such as age, gender, and race/ethnicity neither uniformly benefit nor uniformly disadvantage certain groups (see, e.g., Kurlycheck and Johnson 2004; Spohn and Holleran 2000). But unlike interactionists who suggest that the "interactive" effects of these extra-legal factors results from the

unique ways in which legal decision-makers define and understand these social characteristics in particular contexts (see Steen, Engen, and Gainey 2005), Black argues that the sociological relevance of these factors depends on the degree to which these characteristics correspond to a social location. According to Black's theory, young black and Hispanic males receive the harshest sentences because, in the aggregate, they are the lowest in social status (Steffensmeier *et al.* 1998). Like interactionists, Black also predicts that the larger social context in which criminal case processing occurs influences legal behavior. Recall that the social geometry of a dispute is not only defined the characteristics of the parties involved and their relationships with one another, but also "the larger social context in which they interact" (Black 1979a, p. 19). Rather than focusing on the assumed psychological impact of the social environment in legal cases (e.g., Akers 1998), Black explains the impact of the social environment on legal behavior by the manner in which differentially locates a dispute in social space. Hold the direction and distance of a dispute constant, and the location of a conflict predicts and explains its fate; therefore downward law among the wealthy will be greater than downward law among the poor, even when the law spans the same distance. Without knowledge of the larger social context in which disputes occur, the location of the dispute in social space is unknown.

A consistent finding in the literature is that racial/ethnic disparities in criminal sentencing vary across urban and rural areas, net of legal considerations; however the direction of this relationship is unclear. Analyzing case dispositions in Alberta, Canada, Hagan (1977) discovered that minorities were sentenced more harshly in rural areas. Kramer's (2002) examination of sentencing decisions in Pennsylvania after the

implementation of sentencing guidelines also revealed that minority defendants were less likely to receive downward sentencing departures in rural areas. Conversely, Myers and Talarico's (1986) research in Georgia discovered that racial/ethnic disparities were greatest in urban areas. Despite these contradictory findings, these analysts attempt to explain urban and rural differences through the impact of bureaucratization on criminal sentencing. Some analysts hypothesize that racial differences in urban contexts will be less pronounced than in rural areas because increased bureaucratization in urban legal systems leads to more rational decision making, based primarily on legally relevant factors (see Austin 1981; Miethe and Moore 1986; Pope 1976). In contrast, other theorists have argued that increased bureaucratization in urban areas will exacerbate racial differences in criminal processing resulting from an increased emphasis on efficiency, which leads law enforcement agencies to disproportionately focus on members of weak and powerless groups (Chambliss and Seidman 1971; Myers and Talarico 1987). Moreover, the latter group posits that growing minority presence in urban areas causes members of the majority group (i.e., whites and powerful elites) to increasingly rely on the coercive power of the state to reduce the threat of competition (Blalock 1967; Hawkins 1987; Jacobs and Carmichael 2002). Thus, both camps attempt to explain these completely contradictory findings with the assumed goals decision-makers in urban and rural areas.

Perhaps the primary reason for these contradictory predictions is that crude urban/rural distinctions ignore important structural differences between these social contexts (see Berk *et al.* 2005). According to Black's theoretical framework, it is not important whether a case is tried in an urban or rural location, but how these jurisdictions

may systematically differ along the five social dimensions (see also Jackson 1986). He posits that differences in criminal processing can be predicted and explained by observable differences in the social organization of these jurisdictions, and without regard to the objectives of decision-makers. For example, with respect to economic stratification, rural communities have higher poverty rates than urban communities (14.3 percent versus 11.8 percent) (George, Pinder, and Singleton 2004). Also, the economic gap between blacks and whites is greater in rural communities than urban communities and the black poverty rate in rural communities is nearly 13 percentage points higher than the overall poverty rate of those same communities (George *et al.* 2004). Blacks in rural communities are also more likely to be chronically poor and rural minority communities comprise over half of all persistent poverty counties in the United States (George *et al.* 2004).[383] Residents of rural communities also tend to have fewer years of formal education than residents of urban communities (i.e., less cultural status). The South, which has one-third of the country's rural population, is home to half of all rural adults who have not completed high school. With respect to post-secondary education, 26 percent of adults in urban communities have completed college versus 15 percent of adults in rural communities. Rural blacks and Hispanics are half as likely to have completed college and twice as likely to lack a high school diploma as rural non-Hispanic whites. Moreover, blacks in urban communities are over twice as likely to hold a college degree as blacks in rural communities (the largest attainment difference among races), and Hispanics in rural areas have the lowest education attainment of any racial/ethnic group in the nation (U.S. Department of Agriculture 2003). In terms of morphological

[383] Rural Minority Communities (RMCs) are defined as communities with at least a 33 percent minority population rate (George *et al.* 2004).

space, rural communities tend to be less racially integrated than urban communities. While whites comprise 69 percent of the total United States population, they comprise 82 percent of rural areas (George *et al.* 2004). These differences would suggest that blacks (and some Hispanics) are more likely to be "structurally disadvantaged" in these rural jurisdictions, and as a result, receive harsher penalties than whites, net of legally relevant factors.

It is also important to recognize that Blacks may not always be more disadvantaged in rural areas than urban areas. Although blacks are more racially isolated in rural areas, they may be more similar to whites in other respects than blacks in urban areas. Blacks and whites in rural areas are more likely to engage in similar activities outside of work, such as fishing and hunting, than black and white residents of urban areas (aspects morphological and symbolic space) (U.S. Department of the Interior 1999). Residential mobility among the poor in rural areas spans much shorter distances than in urban areas (Fitchen 1994), so blacks in rural areas may have greater capacities for collective action (corporate status) and collective efficacy (normative status). Differentiation (i.e., division of labor) also tends to increase with urbanization and population size and the severity of punishment increases with differentiation (Durkheim [1900] 1969). Conversely, there is less law where people are undifferentiated by function. Residents of rural areas, both black and white, are less likely to be interdependent than individuals in urban areas. This suggests that racial/ethnic disparities in criminal sentencing would be more pronounced in urban areas, holding the direction and distance of the conflict constant.

Although extremely general in scope, Black's theory of law identifies the most important aspects of social space and their relationships to legal behavior, thus providing a fairly nuanced understanding of the role of these various contexts in explaining racial differences in criminal sentencing. It must be emphasized that the preceding discussion was presented under the condition that the distance and direction of the conflict is held constant. The relative statuses of the parties in the conflict, third parities, and social distances that the conflict spans are also extremely important in understanding variation in legal behavior. Irrespective of whether a legal dispute occurs in a major metropolis or a rural township, a high status complainant will enjoy more legal advantages than her or his low status adversary. The social location of the conflict in a particular social context, however, will influence how large that legal advantage will be (Black 1976, pp. 27, 49, 68, 112).

Black's conceptualization of race/ethnicity as a proxy for social location avoids the significant problems associated with reifying race, and allows his theory of law to predict and explain the differential impact of race/ethnicity on criminal justice processing across time and place. The extensive research on racial/ethnic disparities in the capital charging-and-sentencing process reviewed in Chapter Four also supports Black's predictions. Studies conducted both before and after the *Furman* decision revealed that white-victim cases were significantly more likely to be noticed for the death penalty by the prosecutor, result in a guilty verdict, receive a sentence of death, be denied relief on appeal, and result in an execution, even after controlling for numerous legally relevant factors. These studies also discovered that black-offender/white-victim cases (both homicide and non-homicide capital cases) were the most likely to result in the death

sentence. Again, rather than explain these differences with the motivations and goals of legal officials, Black explains these differences with the social organization of the case. For example, he hypothesizes that cases with a low-status offender and a high-status victim will attract the most law (e.g., black offender/white-victim), followed by cases between a high-status offender and a high-status victim (e.g., white-offender/white-victim), then between a low-status offender and a low-status victim (e.g., black-offender/black-victim), and the least amount law in cases with a high-status offender and a low-status victim (e.g., white-offender/black-victim) (Black 1976, p. 116).

Much of the research on regional differences in the administration of capital punishment is also supportive of Black's theory. Scholars have long recognized that the former Confederate states execute a disproportionate percentage of their population, although there is very little difference in support for capital punishment between Southerners and non-Southerners (Borg 1997). Recent evidence suggests that certain structural characteristics, many of which are indicators of Black's five dimensions of social space, significantly influence the administration of capital punishment in the direction hypothesized by his theory of law. For instance, these structural characteristics influenced whether (and how quickly) states reinstated capital punishment after the *Furman* decision (Jacobs and Carmichael 2002) and how often death sentences were reversed on appeal (Gelman *et al.* 2004).

Finally, the actual *content* of capital statutes supports Black's predictions. As discussed in Chapter Two, the U.S. Supreme Court lifted the moratorium on capital punishment after approving the "guided-discretion" statutes in Georgia (*Gregg v. Georgia*), Florida (*Proffit v. Florida*), and Texas (*Jurek v. Texas*). These statutes

enumerated specific circumstances that prosecutors, judges, and jurors were required to consider when making charging and sentencing decisions. These circumstances were divided into two general groups: aggravating factors and mitigating factors. The aggravating factors were specific circumstances that were believed to make homicide defendants more culpable, whereas mitigating factors were circumstances believed to make the homicide defendants less culpable. Although some death penalty statutes do not include a specific list of mitigating factors, all death penalty statutes allow prosecutors, judges, and jurors to consider any mitigation evidence presented by the defendant (see Section 2.3).

Statutorily defined aggravating circumstances permit increases in the amount of law that can be applied to a case (*Ring v. Arizona*, 536 U.S. 584 [2002]); therefore according to Black's theory of law, they can be predicted and explained by the social geometry they reflect. Although these aggravating circumstances slightly vary from state to state, nearly all statutes include the following situations: (1) the offender had a prior conviction for a capital felony, (2) the offender was engaged in a contemporaneous felony, (3) the offender committed the murder while already incarcerated, (4) the murder was committed for the purpose of receiving money or something else of value, (5) the murder was committed against a peace officer, officer of the court, or firefighter during or because of exercise of her or his official duty, and (6) the murder was especially heinous, atrocious, and cruel or outrageously vile.[384]

[384] "Most state laws now identify six to twelve aggravating circumstances, at least one of which must be present before a convicted murdered is eligible for a death sentence...[t]he two most important aggravating circumstances, however, are the 'contemporaneous offense' and the 'vile murder' circumstances. These two statutorily designated aggravating circumstances lead all others by far, in both numbers of defendants they make death eligible and in the number of cases in which appear that actually result in death sentences" (Baldus *et al.* 1990, p. 22; see also Baldus *et al.* 1986a, p. 138).

Note that only two of these factors specifically address the conduct of the offender or the actual harm inflicted by the offender on the victim (i.e., contemporaneous felony and the heinousness of the homicide).[385] The other four aggravating circumstances differentiate murder cases irrespective of the level of harm resulting from the crime. Recall that Black's propositions predict and explain legal variation net of offender conduct. The important question, then, is "Why were these particular factors developed and not others?" According to Black's theory, several of these circumstances reflect the particular social positions of the offender and/or victim and their social relations. For example, prior conviction for a capital felony and being incarcerated at the time of the murder are indicators of the normative and radial status of the offender (i.e., respectability and integration). Ex-offenders and individuals who are currently incarcerated are significantly more likely to be marginalized and viewed as disreputable than offenders without a prior criminal record and who are not incarcerated. Murder for financial gain is often indicative of the vertical status of the offender and victim. Murder for financial gain is frequently the result of a murder-for-hire arrangement, and in these situations the victim typically has higher vertical status than the offender. The offender, an "assassin," is also more likely to be marginalized and culturally unconventional by way of his profession. The aggravating circumstance for the murder of a peace officer,

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Rosen (1986) argues that the "heinous, atrocious, and cruel" aggravating circumstance (commonly referred to as the HAC aggravator) violates the Eighth and Fourteenth Amendments due to its vagueness. Analyzing appellate decisions from various death penalty jurisdictions, he discovered that the HAC aggravator is applied inconsistently, thereby undermining the constitutional mandate established in *Furman*. According to Rosen and others (e.g., Blume *et al.* 2004), the HAC aggravator ostensibly makes every homicide death-eligible.

[385] The U.S. Supreme Court has debated the legitimacy of considering certain background characteristics of offenders in capital cases. This issue was particularly salient in challenges over the constitutionality of the juvenile death penalty. Several Justices believed that it was necessary and proper to consider numerous factors beyond the actual injury caused by the crime in capital cases when assessing an offender's culpability. As Justice Brennan noted in his dissenting opinion in *Stanford v. Kentucky* (492 U.S. at 394 [1989]): "Proportionality analysis requires that we compare the gravity of the offense, understood to include not only the injury caused, but also the defendant's culpability, with the harshness of the penalty."

officer of the court, or firefighter is indicative of the horizontal status of the victim. Recall that an important aspect of morphological space is differentiation. Interdependence, defined as the degree to which individuals need one another to survive and prosper, is a direct result of differentiation (Black 1990). Certain social positions may be more functionally important to the group (or society) than others, and consequently, individuals who occupy these positions have greater functional status (Black 2000a). In modern society, police officers, district attorneys, and judges play a central role in the everyday functioning of society, and as a result, they have greater functional status (an aspect horizontal space). Individuals in these positions also tend to have greater normative status (i.e., authority).

Prosecutors are not required to seek the death penalty when there is evidence of one or more statutorily defined aggravating circumstances in a homicide case. Similarly, most death penalty statutes do not require judges and juries to sentence an individual to death when there is evidence of one or more aggravating circumstances. A few states require judges and juries to impose the death penalty if an aggravating factor is present and the judge or jury cannot find any mitigation factor that would justify leniency; however these states broadly define "mitigating factors," so judges and juries can easily vote for leniency if they so choose.

Mitigating factors typically do not come into play until the sentencing phase of capital trials. While it is true that prosecutors may consider these factors in the charging phase and judges and juries may consider these factors in the guilt/innocence phase, the primary purpose of mitigating evidence is to assist judges and juries in deciding the appropriate punishment for a defendant who has been found guilty. It is important to

note that most death penalty statutes stipulate that judges and juries only use this evidence as a general guideline, but they are not required to vote for leniency. In contrast, evidence of aggravating factors must be present in order for judges or juries to impose a death sentence. The most common types of mitigation evidence listed in death penalty statutes are: (1) the youthfulness of the defendant, (2) whether the victim's conduct contributed to her or his death, and (3) the defendant's level of involvement in the murder.

Recall that Black's theory of law predicts and explains variation in the style of law, which he defines as the language and logic by which law defines and responds to deviant behavior. He notes that one style of law is greater than another, with penal law generally the greatest, followed by therapeutic, compensatory, and conciliatory (Black 1976, p. 106). Black also notes that, in reality, law may deviate from these styles in their pure form, combining various elements from the different styles (p. 5). In fact, capital murder cases often combine elements of penal and therapeutic law.[386] Although a murder defendant in a capital case faces the most severe punishment that the state can impose, she or he may still be seen as someone who is ill and deserving of some form of help or assistance. Just as Black's theory of law predicts and explains the quantity of law with the social geometry of the case, it also explains the quantity of each of these styles of law in a case. For example, the youthfulness of an offender is seen as a mitigating factor because age is often a proxy for normative status. In the aggregate, young defendants are more respectable than older defendants in capital cases because they have less extensive criminal records (i.e., less likely to have been subject to governmental social control in

[386] The compensatory style of law is present when families of murder victims choose to sue the offender for monetary damages. These lawsuits, however, occur in civil court, not in criminal proceedings.

the past). The more respectable the offender, the more likely she or he will be subject to therapeutic, rather than strictly penal, law. This largely explains the separate legal systems for juvenile and adult offenders—the former is primarily concerned with rehabilitation and conciliation, while the latter is primarily concerned with punishment/compensation.[387]

Hold constant the offender's behavior, and victim characteristics also predict and explain the quantity and style of *potential* law in a death penalty case (see Baumer *et al.* 2000; Sundby 2003). For example, with respect victim conduct, the victim's involvement in her or his death is often an indicator of the victim's normative and cultural status positions. A victim who assisted in her or his own death or was engaged in an activity that could reasonably result in her or his death is likely to be viewed as less respectable and less conventional (see also Luckenbill 1977; Wolfgang 1957). The less conventional and respectable the victim in a homicide case, the less amount of law the case attracts and the more likely that elements of therapeutic law will enter the case.

In sum, Black's theory of law provides a significantly better explanation of legal behavior than formal legal, conflict, and interactionist perspectives. His deliberate avoidance of psychology, one-dimensionality, microcosms and macrocosms, individualism, and teleology allows this theory to achieve the highest standards of scientific theory: generality, parsimony, testability, and empirical validity. Although the ultimate purpose of his theory is to identify permanent social processes (i.e., universal laws), the predictions derived from the theory "display a wide range of generality and observability, including predictions for spatially- and temporally-specific phenomena and

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[387] "Researchers should develop sociological theory that's applicable to juvenile justice, civil, and criminal court decision-making" (Mears 1998a, p. 717).

processes" (Jasso 1988, p. 2). As noted above, Black is able to predict and explain the same facts and relationships as the dominant theories of legal behavior under a single explanatory framework.

Black acknowledges that his theory of law is radically different from the psychological study of law. His theory predicts and explains legal behavior without regard to individuals and psychology (but cf. Frank 1930; Hunt 1993). He explicitly states, however, that his theory "is not at odds with psychological assumptions or theories…but is simply a different kind of explanation, a different way to predict the facts" (Black 1976, pp. 7–8). Following the early theoretical traditions of Durkheim ([1895] 1962) and Simmel (1909), Black advocates a purely sociological theory of law, distinct from psychology, with its own concepts, imagery, and framework of analysis (see also Mayhew 1980).

## 6.3 Research Hypotheses

In *The Behavior of Law*, Black presents his theory as a set of testable propositions, specifying the direction and functional form of the relationship between the key variables of his theory and the style and quantity of law (see Section 6.2.2). The hypotheses outlined by Black, however, are extremely abstract and need to be tailored to address the analyst's specific research questions. With respect to the death penalty process, several core hypotheses can be derived from Black's theory.

The first *five* hypotheses presented below exclusively focus on the impact of extra-legal factors *not* specifically mentioned in death penalty statutes; that is, they predict relationships between extra-legal factors and legal decision-making irrespective

of the legally legitimate characteristics present in a case. This is done for two important reasons. First, Black argues that, with two exceptions (see Section 6.2.4), the social geometry of a case successfully predicts and explains legal behavior, independent of legal rules. It is important, then, to clearly distinguish between legally legitimate and illegitimate factors when testing the theory to assess the explanatory power of Black's five dimensions. Second, Black posits that legal rules, themselves, are dependant variables in his theory of law, and as a result, can be predicted by the theory (see Section 6.2.5). Technically, one cannot properly test the "causal" effect of explanatory factors (i.e., indicators of the dimensions of social space) by controlling for other factors that are, themselves, consequences of those explanatory factors (i.e., legal rules). By holding constant something that is itself affected by the causal variable(s) of interest, one removes precisely the effect one is attempting to study (see King and Zeng 2006, p. 148; Rosenbaum 2002, pp. 73–74).[388]

The remaining *three* hypotheses control for legally legitimate characteristics in addition to the legally illegitimate (and legally suspect) characteristics identified in the proceeding six hypotheses. According to Black, the social structure of a case predicts legal behavior when the legal characteristics of the case are held constant, therefore a complete test of the theory should control for these legal characteristics (i.e., the "technical core"). He suggests, however, the technical core only successfully predicts

[388] Stated differently, if one or more control variables are "post-treatment" variables (i.e., variables that are, themselves, consequences of the treatment variable of interest), then the post-treatment variables are likely to change when the treatment variable changes, and therefore it becomes impossible to interpret the model as revealing the effect of the treatment variable on the outcome of interest when all other variables are held constant. Typically, analysts need to consider both post-treatment bias and omitted variable bias together, but unfortunately one usually cannot be addressed without making the other worse (King and Zeng 2006, pp. 148–49). Although there are no general solutions to the problem of post-treatment bias, analysts may examine "multiple-variable causal effects" (i.e., joint causal effects) because it does not require holding constant variables that not stay constant in nature (p. 149).

and explains legal behavior in cases with particular structural configurations. As noted above, controlling for an effect of the cause potentially presents an endogeneity problem and may likely lead to incorrect estimates of the impact of the social geometry of the case on legal behavior, nevertheless it is important to control for the legal factors in a case because the alternative theoretical approaches discussed earlier in this chapter, particularly formal legal and interactionist perspectives, posit that legal characteristics are primarily responsible for legal outcomes (see Section 6.1.2). The extent to which the endogeneity of legal variables impacts the results is examined in Chapter Eight.[389]

### *6.3.1 Hypothesis One*

Black conceptualizes race/ethnicity as a proxy for social status and, in the aggregate, black offenders and victims have lower social status than their white counterparts (see Section 6.2.4). Black (1976, p. 17) suggests that the social organization of cases that attracts the most law is that with low-status offenders and high-status victims (e.g., black-offender/white-victim). Cases that attract the second greatest quantity of law consist of high-status offenders and high-status victims, followed by cases with low-status offenders and low-status victims, and finally cases high-status offenders and low-status victims (see *supra*, p. 281). According to Black's theory, *black-offender/white-victim cases have the greatest likelihood of being noticed for the death penalty, receiving unfavorable plea bargains, and receiving a more severe sentence at the penalty phase*.[390]

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[389] The endogeneity issue does not undermine the testability of Black's theory—i.e., its capacity to predict facts. Moreover, endogeneity is primarily a concern for "causal inference," and therefore only indirectly applicable to the covering-law approach employed by Black.

[390] Due to the small number of cases involving Hispanic and Asian defendants/victims in Georgia, it is difficult to test research hypotheses concerning these groups. Recall from Chapter Five, that only three

Again, this does not suggest that race/ethnicity will uniformly disadvantage minority defendants or uniformly benefit white victims; however it does suggest that, in the aggregate, cases involving certain racial/ethnic combinations of defendants and victims will attract more or less law because of the social locations (i.e., status positions) these racial/ethnic groups tend to occupy and the social relations members of these groups tend to have with one another (see Section 6.2.4). Additionally, as some scholars have suggested, certain offenders and victims may be particularly advantaged (or disadvantaged), irrespective of their specific social status, because prosecutors, judges, and jurors may rely on stereotypes during decision-making based on the aggregate characteristics of racial groups (see Baumer *et al.* 2000; Kan and Phillips 2003; Stanko 1981/1982; cf. Bodenhausen 1990; Bodenhausen and Lichtenstein 1987; Bodenhausen *et al.* 1994). Moreover, because of the social structure of lethal violence (i.e., self-help in the form lethal violence is most often employed by those who lack access to the law), particular offender-victim racial combinations are more likely to reflect particular status configurations (see, especially, Black 1983; Cooney 1997a, 2003b), thereby further increasing the likelihood that they will be further disadvantaged in legal proceedings.

### *6.3.2 Hypothesis Two*

Other extra-legal factors occurring at the case-level that are indicators of Black's five dimensions of social space will also influence the capital charging-and-sentencing decisions. Black (1989) notes that age, similar to race/ethnicity, serves as crude proxy for social status and, in the absence of more specific information about the structural

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Hispanics and one Asian were on Georgia's death row. Only thirteen Hispanics and five Asian defendants were noticed for the death penalty in the time period under investigation for this study (see Chapter Seven). As noted in Chapter Four, Hispanic defendants may be at an even greater disadvantage than blacks in certain parts of the United States (i.e., the Southwest) with respect to criminal sentencing.

positions of disputants (and third-parties) in the case, can influence the administration of capital punishment. The relationship between chronological age and severity of law should be curvilinear: *hold the age of the offender and the race/ethnicity of the parties constant, and cases involving very youthful victims or elderly victims will attract the most law (i.e., most likely to be noticed for the death penalty and result in unfavorable plea bargains and sentences at trial)*.[391] Due to the fact that all capital statutes place a non-negotiable lower-limit on the age at which an alleged offender can be subject to the death penalty (see Section 2.3), much of the influence of the age of the offender has been eliminated because youthful offenders are most likely to receive leniency from judges and juries. Nevertheless, *hold the age of the victim and the race/ethnicity of the parties constant, and cases with offenders with chronological ages that place them at (or very near) the minimum age for death-eligibility will attract the least amount of law*. Also recall that Black's theory emphasized the relative status positions of disputants. As result, the interaction between offender and victim age should be most predictive: *cases involving older offenders and youthful victims should attract the most law* and *cases involving younger offenders and older victims should attract the least amount of law, net of race/ethnicity and gender*.

### *6.3.3 Hypothesis Three*

Gender is also a crude proxy for social status (see Section 6.2.4). Unlike racial/ethnic status and chronological age, however, the association between gender and

[391] Cases involving youthful victims and elderly victims (i.e., senior citizens) are likely to be handled in a similar fashion because in the aggregate, these victims—relative to their offenders—have more social status (cf. Sorenson and Berk 1998). Generally speaking, elderly victims tend to be more conventional (cultural status), respectable (normative status), integrated (radial status), and have had more time to accumulate wealth (vertical status).

the various social dimensions identified by Black are not nearly as robust—particularly in the last half-century. Nevertheless, because of the social structure of lethal violence, it is likely that female defendants and female victims in capital cases will, generally, occupy higher status locations, and as a result they enjoy greater advantages in legal proceedings. Black's theory emphasizes the relative status positions of parties involved in the conflict, so *cases involving male offenders and female victims will attract the most law and cases involving female offenders and male victims will attract the least law, net of age and race/ethnicity*.

### *6.3.4 Hypothesis Four*

As noted above, the predictive power of race/ethnicity, age, and gender is limited in that they are mere proxies for social status. Black's theory predicts that other legally illegitimate (or legally suspect) factors, which are better indicators of social status, will have a stronger influence on legal decision-making.[392] Socioeconomic status and employment status are indicators of vertical status (i.e., wealth); marital status, number of children, and employment status are indicators of horizontal status (i.e., integration, intimacy, interdependence); level of education is an indicator of cultural status; and prior drug/alcohol use is an indicator of normative status (i.e., respectability) (see Section 6.2.2).[393]

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[392] Black's five dimensions of social space are extremely broad categories, and as such, several of the variables mentioned can be indicators of multiple dimensions.

[393] Recall that organizational status, refers to the capacity for collective action and occurs when individuals or groups are drawn together to engage in a project (Black and Mileski 1973, p. 9). Measures of organization include the presence and number of administrative officers, the centralization and continuity of decision-making, and the frequency of collective action (Black 1976, p. 85). As a result, corporate status is more applicable when at least one of the disputants is a group. Nonetheless, in capital cases, the victim enjoys greater corporate status because the government is bringing the action against the defendant, and of course, the government is perhaps the most powerful collective actor (but cf. Zimring 2003). The

> [T]he handling of cases always reflects the social characteristics of those involved in it. It applies whenever and wherever law is found. It is not merely a matter of differentials according to the race of the parties, their social class, gender, or other characteristics that nowadays attract attention. Many other kinds of discrimination exists as well, such as differentiation according to degree of intimacy between parties, the cultural distance between them, and their degree of organization, interdependence, integration, and respectability. No one has ever observed a legal system without social differentiation. Discrimination is ubiquitous. It is an aspect of the natural behavior of law (Black 1989, p. 21).

The aforementioned factors should exert a direct influence legal decision-making in the directions hypothesized by Black, net of the influence of race/ethnicity, age, and gender: *holding the social status of the victim constant, cases with defendants low in vertical, horizontal, cultural, and normative status will attract the most law.*

### *6.3.5 Hypothesis Five*

Black's theory of law suggests that all social phenomena may be described by their social location—their position, whether higher or lower, in a distribution. For example, hold the difference in wealth between disputants constant, and their location in the wealth distribution explains the quantity and style of law (Black 1976, p. 17). As a result, "similarly situated" cases may be handled differently depending on the jurisdiction where they are tried. Moreover, the variability in the handling of similarly situated defendants across jurisdictions can be predicted and explained by the structural characteristics of the jurisdictions in which they are tried. Black notes, for example, that

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government's role, however, is that of a third-party supporter, not a principle (although the defendant has "technically" committed a crime against the State) (Black 1983).

Cases involving multiple offenders who work together, however, should attract the least amount of law. Conversely, cases in which multiple offenders turn against one another (i.e., incapacity for collective action) should result in the greatest quantity of law for at least one of the defendants because the government now has an additional cooperating actor. Multiple-offender cases, however, typically involve "heightened" homicides (e.g., homicides involving additional felonies), and as such, contain legally legitimate characteristics (i.e., statutory aggravating factors) that attract more law.

groups have wealth (i.e., rank) and *law varies directly with the rank of groups, not only among themselves but also in relation to individuals*. "It is even possible to rank entire societies among themselves, and also the areas of a society, its regions, communities, and neighborhoods. This may be done either according to the distribution of the wealth among the residents or according to the wealth of the society or area itself. In the first case, law varies with the proportion of the population that is more or less wealthy" (p. 20). Thus, the legal jurisdiction in which death penalty cases occur should influence the administration of capital punishment, net of extra-legal case-level characteristics.

Recall that Black's theory suggests the severity of law (i.e., its quantity) increases in conflicts among the wealthy, the economically stratified, the educated, the conventional, the organized, and the respectable, all else constant. Among the integrated and the intimate, the relationship is curvilinear: increasing to a certain threshold and then decreasing thereafter (p. 49). Also recall that law decreases among the empowered (i.e., those with the capacity for non-legal social control), all else constant (p. 112). Thus a jurisdiction's per capita income, poverty rate, and median home value (vertical status); labor force participation, residential mobility, and marriage rate (horizontal status); high school/college education rate and level of racial/ethnic integration (symbolic/cultural status); and crime rate (normative status) should influence the capital charging-and-sentencing process—net of extra-legal individual case characteristics—in the direction specified by Black's theory (see Section 6.2.2).[394] *More specifically, holding case*

[394] Crime can be both a type of social control (i.e., an expression of a grievance) and an indication of a lack of social control, depending on the purpose of crime and the level of analysis (Black 1983). When individuals use crime as a conflict management strategy (i.e., self-help), such behavior can often be viewed as a type of social control (Black 1990). Moralistic crimes, however, are but one type of criminal activity and probably only constitute a small fraction of all criminal behavior (Cooney and Phillips 2002). A jurisdiction's crime rate, however, is most likely an indicator of the jurisdiction's lack of authority (i.e., capacity for social control). As Shaw and McKay (1942) and others (Fagan and Meares 2000; Kelling and

*characteristics constant (i.e., case-level extra-legal variables), jurisdictions high in vertical and symbolic status will attract more law. Conversely, cases will attract less law in jurisdictions high in horizontal and normative status, net of case-level extra-legal variables.* This hypothesis underscores Black's assertion that the *complete* social geometry of a case predicts and explains the quantity of law it attracts because "[m]icrocosms overpersonalize everything, and macrocosms oversocietalize everything" (Black 1995, p. 858).

It should be emphasized that a jurisdiction's status location is a *composite* of its aggregate characteristics with respect to a specific dimension of social space because no single proxy for social status will fully capture the theoretical construct. Additionally, prior research on the influence of structural factors on crime reveals it is necessary to "simplify the structural covariate space" to indices in order to reduce collinearity between structural covariates when examining their effects (Land, McCall, and Cohen 1990, p. 922). For example, the bivariate correlations for the circuit-level variables for a particular dimension of social space were extremely high (typically ranging from .8 to .9). Consequently, the aforementioned structural factors that correspond to particular dimensions of social space are combined into indices so the aggregate impact of these factors on legal decision-making are explored in the subsequent analyses (for a detailed description of these indices, see Section 8.1.2 and Table 4).

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Coles 1996; Sampson 1987; Wilson and Kelling 1982) have persuasively argued, a persistently high crime rate in a community often results from the breakdown in familial and community social control (cf. Agnew 1999).

### *6.3.6 Hypothesis Six*

Black (1976) posits that the social geometry of a case predicts and explains legal behavior when the legal characteristics of a case are held constant (see also Horwitz 1983), therefore an accurate test of the theory must hold legally legitimate characteristics constant. Black (1984) mentions that legal rules are important under two conditions: when cases are socially similar or when the amount of potential law in the case is trivial.[395] "Every case has a technical core—the rules in the face of the evidence—that can be meaningfully analyzed in the jurisprudential tradition. All else being equal, including the social characteristics of all concerned—the technical core is important to the handling of case" (p. 20). He notes, however, that legal doctrines and the facts are often ambiguous, with uncertain implications (cf. Breyer 2005; Scalia 1997); moreover, legal officials often disregard the written law (see, e.g., Black 1980, pp. 180–86; Weinburg 2003).[396] In fact, empirical studies conducted in numerous jurisdictions have consistently discovered that legally legitimate characteristics only account for a modest proportion of the variance in capital charging-and-sentencing decisions (Nakell and Hardy 1987; Paternoster *et al.* 2004; Weiss, Berk, and Lee 1996). Berk and colleagues (1993, 2005) even suggest that pure capriciousness in the death penalty process may be more important than the role of illegitimate factors such as race/ethnicity.[397] Black

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[395] Cases will also be handled similarly if the social locations and relationships of the disputants (and relevant third parties) are unknown (Black 1989, p. 64). The greater amount of potential law that may be applied to a case, however, the more social information about the case gets collected or becomes involved (Black 1984, p. 20).

[396] In the opening paragraph of the seminal monograph, *An Introduction to Legal Reasoning*, Edward Levi (1949, p. 1) explains, "It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack [citing (Frank 1930)]. In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible."

[397] "It is difficult to imagine that a few covariates exist that if included as predictors would lead to clear and justified distinctions between defendants who are charged with a capital crime and defendants who are not;

(1989) suggests, however, that the handling of these cases is only capricious from a jurisprudential perspective, and can actually be systematically predicted and explained by the social geometry of the case.

Of course, many characteristics comprising the "technical core" of the case are also indicators of the social structure of the case (e.g., relative wealth, intimacy, integration, interdependence, respectability).[398] These factors provide more social information about the disputants involved in the case, and therefore attenuate the impact of crude proxies of social status, such as race/ethnicity and gender (Black 1989. pp. 61–62, 108 n.48, 119 n.12). Nonetheless, the legal and quasi-legal characteristics of a case do not fully capture its social organization (see Section 6.2.5), *so the extra-legal characteristics of a case should still exert an impact on legal decision-making in the capital charging-and-sentencing process after controlling for these legally relevant factors*. In particular, *the impact of race/ethnicity*, *age, and gender, as predicted in Hypotheses One, Two, and Three, should remain after taking into account the technical core of the case*.

### *6.3.7 Hypothesis Seven*

Building on Hypothesis Five, Black's theory suggests that *the legal jurisdiction in which death penalty cases occur should influence the administration of capital punishment, net of legal and extra-legal characteristics*. That is, even after taking into

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likewise for death sentences…if idiosyncrasies associated with the case, the defendant, or the adjudication process seem to determine a substantial part of the outcome, the adjudication process is suspect whether race is important or not" (Berk *et al.* 2005, p. 31).

[398] As discussed earlier in this chapter, statutory aggravating circumstances permit increases in the amount of law (i.e., quantity) that can be applied to a case and, therefore, can be predicted and explained by the social geometry of the case (Horwitz 1983). Many of the statutory aggravating circumstances and mitigating circumstances are, themselves, indicators of the social status of the offender and victim, and do not specifically address the actual conduct of the offender or the amount of harm inflicted by the offender on the victim.

account the technical core of the case, the structural characteristics indicating a *jurisdiction's* vertical, horizontal, symbolic, and normative location should continue to influence legal decision-making in the direction specified by Black's theory. The legal characteristics of a case, *by design*, do not take into account the structural location of the conflict, and therefore they fail to fully reflect important elements of the social geometry of the case. So, as discussed previously (see Section 6.3.5), *cases occurring in jurisdictions high in vertical and symbolic status, and low in horizontal and normative status, will attract more law*, *net of case-level legal and extra-legal variables.*

Recall that a jurisdiction's vertical status is indexed by per capita income, poverty rate, and median home value; its horizontal status is comprised of labor force participation, residential mobility, and marriage rate; its symbolic/cultural status is proxied by high school/college education rates and level of racial/ethnic integration; and its normative status is a function of its crime rate.

### *6.3.8 Hypothesis Eight*

Black also predicts that the impact of case-level factors varies across social contexts.[399] According to the theory, the social location of a conflict influences how large legal advantages (or disadvantages) resulting from status differentials between parties in a case will be (Black 1976, pp. 49, 112). Structural characteristics (based on the five dimensions of social space), then, may either accentuate or attenuate the impact of status differences between disputants. In other words, *the impact of legal and extra-legal case-level factors on the administration of capital punishment should vary across*

[399] The variable impact of micro-level factors across macro units is often referred to as *causal heterogeneity* (see, e.g., Johnson 2006).

*legal jurisdictions* and *this variability can be explained by the structural characteristics of these jurisdictions*.

Specifically, a case's vertical, horizontal, symbolic, and normative location—partially captured by jurisdictional variables mentioned above—will condition/moderate the impact of legal and extra-legal case-level factors on the administration of capital punishment. So, for example, *the impact of status differentials on the severity of law a cases attracts, as captured by differences in race/ethnicity, age, and gender should vary according to the jurisdiction's vertical, horizontal, normative, and cultural status*, *such that the effect of these status differences will be accentuated in jurisdictions that are high in vertical and cultural status, but attenuated in jurisdictions that high in horizontal and normative status*.[400]

Similarly, the *influence of legal variables should vary according to the jurisdiction's structural characteristics*. As noted earlier (see Section 6.2.5), most laws reflect the social geometry of case and, therefore, both their *content* and *impact* can be explained by Black's theory. Very few of the special circumstances outlined in capital statutes that allow a case to be eligible for the death penalty address the actual conduct of the offender or the harm inflicted by the offender on the victim; rather they reflect the particular social positions of the offender or the victim.[401] Those laws that specifically address the actual conduct of the offender (e.g., commission of a contemporaneous felony and heinous of a crime) are also explained by Black's theory—these factors are indicators of cultural or normative status. Since all crimes, including murder, can be conducted in a

[400] The impact of the other indicators of the social positions of defendant and victims (e.g., socioeconomic status, marital status, employment status, *et cetera*) should also vary according to a jurisdiction's vertical, horizontal, normative, and cultural status.

[401] Most mitigating factors also reflect the status positions of the offender or victim and not the actual level of harm resulting from the crime (see *supra*, 6.2.5).

more or less conventional manner (Cooney 1997), the more heinous or vile the murder, the less respectable and more unconventional the offender will appear to be, even after holding prior criminal history constant (see Section 6.2.5). It follows from this discussion that *the impact of the number of statutory aggravating circumstances, having a contemporaneous felony, a prior felony, and a prior violent felony on a case will vary according the jurisdiction's vertical, horizontal, normative, and cultural status, such that the effect of these case-level factors will be accentuated in jurisdictions that are high in vertical and cultural status, but attenuated in jurisdictions that high in horizontal and normative status*.

It is important to reiterate that Black's theory does not specifically discuss the interrelations among the five social dimensions (see Lessan and Sheley 1992), and critics claim that the complexity of the theory requires Black to specify these interrelations (Bernard 1995). Black does discuss, in very general terms, micro-macro interrelationships *within* a particular social dimension (Black 1976, p. 49), but fails to articulate cross-dimension interrelationships. Some scholars have note, however, that the specification of these specific relationships is unnecessary at the level of abstraction at which Black theorizes, and that derivations of Black's general propositions is an appropriate task for middle-range-theorizing for more specific research programs (see, e.g., Turner 2002). The cross-level/cross-dimensional interactions articulated in *Hypothesis Eight*, then, are an extension of Black's theory.

### *6.3.9 Summary*

These eight hypotheses comprise the core of Black's theory of law with respect to the administration of capital punishment and are examined using data collected on

Georgia's capital charging-and-sentencing process from 1993 through 2000. As noted earlier, the capital punishment process provides an ideal test for Black's theory of law because the death penalty is the greatest quantity of law (i.e., most severe punishment) that can be imposed by the government and invites the most social information about the offender(s) and victim(s) into the legal proceedings (Black 1989). The specific data sources consulted and analytical models employed are discussed in detail in the next chapter.

## 6.4 A Comment on Verification, Falsification, and Corroboration

As noted above, formal legal, conflict, and interactionist theorists make similar predictions to those derived from Black's theory of law—e.g., the greatest quantity of law in black-offender/white victim cases and the least quantity of law in white offender/black-victim cases (*Hypothesis One*) or economic inequality influences the seriousness of punishment, net of individual case characteristics (*Hypotheses Five and Seven*), but for very different reasons. As previously discussed, all three of these perspectives have received some empirical support (see Section 6.1.3), but only Black's theory is able to predict these same facts and relationships under a single explanatory framework. It must be emphasized, however, that the scientific method cannot *verify* hypotheses or establish the one "true" theory. The scientific method can, however, assess what Popper ([1934] 1968, p. 419) has referred to as the *degree of corroboration*: the extent to which theories have been *least* falsified, but that are *most* falsifiable and most tested relative to competing theories (see also Harris 1979, p. 18). Moreover, only when theories are highly general, testable, conjectural, and concise, can they "maximally expose themselves to falsification" and substantially contribute to the scientific

community's understanding of the phenomena in question (p. 17). Popper's "degree of corroboration," therefore, is akin to Black's "degree of scienticity" (see Black 2000a, p. 351). Not only do the three dominant perspectives possess, comparatively, a substantially lower degree of scienticity than Black's theory of law, researchers have also produced a fairly large amount of disconfirming evidence for the core hypotheses of each perspective (Kempf-Leonard and Sample 2001; Weitzer 1996).[402]

Lakatos (1970, p. 119) argues that falsification, alone, cannot be used to decide whether a theory is scientific. A theoretical approach that is believed to be superior to rival theories must explain existing facts better, as well as explain new facts. According to Laudan (1977, p. 120), "All evaluations of research traditions and theories must be made within a comparative context. What matters is not, in some absolute sense, how effective or progressive a tradition or theory is, but, rather, how its effectiveness or progressiveness compares with its competitors." Black's conscious commitment to discovering orderly relationships at a very high level of abstraction—what Maxwell (1974a, p. 152) refers to as "aim-oriented empiricism"—allows this theory of law to be maximally effective and progressive, and therefore superior to rival research programs and theories lacking generality, concision, and coherence (see Harris 1979, p. 25).[403]

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[402] Attempts to integrate these theories aimed at reconciling many of these conflicting findings (i.e., eclecticism) have also failed to result in a single body of theory that is at once general, parsimonious, logically consistent, and falsifiable (e.g., Albonetti 1991; Dixon 1995; Hawkins 1987).

[403] Maxwell (2005, p. 181) posits that aim-oriented empiricism is "a kind of synthesis of the views of Popper, Kuhn, and Lakatos, but is also an improvement over the views of all three." The basic idea behind aim-oriented empiricism is that science should be viewed as making not one, but a hierarchy of assumptions concerning the unity, comprehensibility, and knowability of the universe—with the assumptions becoming less and less substantial as one ascends the hierarchy, and thus more likely to be true. This hierarchy permits the disentanglement of what is most likely to be true, and not in need of revision, at the top of the hierarchy, from what is most likely to be false, and most in need of criticism and revision near the bottom on the hierarchy. The aim-oriented empiricism framework makes explicit metaphysical assumptions implicit in the manner in which physical theories are accepted and rejected, facilitating the critical assessment and improvement of these assumptions with the improvement of

knowledge by concentrating criticism where it is most needed: low down in the hierarchy (see also Braithwaite 1953).

# Chapter 7: Data and Analytical Approach

## 7.1 Data Collection

### *7.1.1 Years Considered*

The current analysis of Georgia's capital charging-and-sentencing process focuses on homicide cases with incident dates between January 1, 1993 and December 31, 2000. This particular time frame was chosen for three substantive reasons. First, as discussed in Chapter Five, Georgia's life without the possibility of parole (LWOP) legislation was enacted in 1993. The legislation was specifically designed as a sentencing alternative in capital murder trials, therefore potentially having a tremendous impact on prosecutorial, judicial, and jury discretion.[404] Second, the Georgia Generally Assembly, along with the Georgia Supreme Court, established the Office of the Multi-County Public Defender (MPD) in October 1992 as a statewide agency to serve as a death penalty defense trial resource center *and* to actively monitor all death penalty cases in Georgia's 159 counties (Mears 1999).[405] MPD began collecting detailed information on cases that were noticed for the death penalty shortly thereafter, and therefore has a fairly complete list of cases in which the prosecutor initially filed a notice of intent to seek the death penalty since 1993. Third, cases with incidence dates through the end of 2000 are analyzed because this allows for the examination of eight years of cases with sufficient time to advance from the charging phase through the (initial) penalty phase.[406] Of the 381 cases noticed for the

[404] 1993 Ga. Laws 569, § 4; Ga. Code Ann. § 17-10-30.1 (1993).
[405] In 1995, Congress substantially cut federal funding for attorneys representing indigent inmates on death row, resulting in the closing of "Resource Centers" in twenty states that provided legal services to these inmates (Wiehl 1995).
[406] Georgia law also requires all defendants convicted of murder receive, at minimum, a life sentence with the possibility of parole and serve *at least* fourteen years of their sentence before being eligible for parole.

death penalty between 1993 and 2000 in Georgia, 376 (98.6 percent) have progressed through the penalty phase.

### *7.1.2 Decision Stages Examined*

The capital charging-and-sentencing process consists of several decision stages and several decision-makers, with each subsequent decision stage being dependent on the previous stage (for a description of the *entire* capital punishment process, see Appendix A). Focusing solely on later decision stages, such as the conviction and penalty decisions, ignores both the exercise of discretion at the earlier stages and the fact these cases represent a select group of cases that may not typically be representative of the universe of cases from which they are drawn (Gross and Mauro 1989, pp. 24–26). In many situations, this "differential selection" process can be explicitly incorporated into the analysis of later decision stages and valid inferences concerning these later decision stages can be made (Sorensen and Wallace 1999). It is important, however, to begin with the universe of all cases that *could* be prosecuted capitally (Baldus *et al.* 1990; Paternoster *et al.* 2004). The more comprehensive the universe of cases, the better measures of prosecutorial, judicial, and jury decision-making can be obtained. As noted in Chapter Four, previous research suggests that the influence of extra-legal factors is typically strongest in the earlier stages of the capital charging-and-sentencing process, therefore it is important to collect information about cases that were eligible for capital punishment, but in which the prosecutor chose not to seek the death penalty.

Recall from Chapter Two that Baldus and colleagues' (1990, p. 40) seminal study of Georgia's death penalty examined five decision points in capital punishment process: (1) indictment for murder, voluntary manslaughter, or a lesser crime; (2) plea bargaining

and guilt plea; (3) guilt-trial decision for defendants not pleading guilty; (4) prosecutorial decision to advance to a penalty trial in cases that result in a capital murder conviction; and (5) jury death-sentencing decision for cases that advance to a penalty trial. Similarly, Paternoster and colleague's (2004) recent study of Maryland's capital punishment examined four key decision points (i.e., death notice, withdrawal of the death notice, advancement to the penalty phase, and disposition) and Sorensen and Wallace's (1995) analysis of Missouri's death penalty system examined three stages (i.e., death notice, conviction, and disposition). The current study examines three decision stages: (1) initial notice of the death penalty; (2) guilty plea and plea agreement; and (3) disposition at the penalty phase.

### *7.1.3 Data Sources*

It is important to begin with a comprehensive list of potentially capital cases from which discretion at the various stages of Georgia's capital charging-and-sentencing process can be properly identified and assessed. The research literature on capital punishment reveals two different approaches to collecting information on potentially capital cases from which prosecutors choose to seek the death penalty, each having its unique advantages and disadvantages. The first approach is to begin with all cases that resulted in a conviction for the crime of murder or voluntary manslaughter. Several scholars have advocated this approach because it provides a rudimentary control for the strength of evidence in the case (see, e.g., Baldus *et al.* 1990; Paternoster *et al.* 2004).[407]

[407] For their Philadelphia study, Baldus and colleagues (1998) created quantifiable measures of strength of evidence for each statutory aggravating and mitigating circumstance. Baldus *et al*. classified the evidence supporting the aggravating factors on a four-point scale and the evidence supporting the mitigating circumstances on a three-point scale (cf. Nakell and Hardy 1987, Appendix A). While these measures are appropriate for conviction and sentencing decisions because such evidence has been presented before the

Indeed, it is possible that a case may appear to be death eligible, but the prosecutor believes that her or his case is very circumstantial or that key witnesses may be unreliable. The major disadvantage of this strategy, however, is that some cases are noticed for the death sentence but result in conviction for a crime other than murder or an acquittal. By exclusively focusing on cases that result in a murder conviction, researchers may fail to consider all of the cases that prosecutors originally consider for the death penalty. In fact, it is not uncommon for prosecutors to reduce the murder charge to a lesser offense in exchange for a capital defendant's testimony against a co-conspirator(s). In Georgia, 25 death penalty cases with incident dates between 1993 and 2000 resulted in either an acquittal or a conviction for a crime other than murder.[408] Recent evidence also suggests that prosecutors are more likely to seek the death penalty in cases with weaker evidence when the defendant is a member of a minority group (Harmon 2001b; Parker *et al.* 2001). Eighty percent of the capital defendants in Georgia who were acquitted or convicted for a lesser offense were members of a racial/ethnic minority group: 16 black defendants (64 percent), five white defendants (20 percent), three Hispanic defendants (12 percent), and one Asian defendant (4 percent).[409]

*Supplementary Homicide Reports.* An alternative to focusing on cases resulting in a murder conviction is to simply begin with all homicide cases known to the police

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court, it is not well suited for charging decisions. In Georgia, for example, the prosecuting attorney must announce her or his intention to seek the death penalty at a pre-trial conference shortly after a grand jury indictment, but prior to arraignment; therefore, all that is required for the prosecutor to seek the death penalty is an indictment for a capital felony (see Georgia Unified Appeal Procedure Rule II (C) (1)). The actual determination of whether the facts in the case warrant the case being "death-eligible" is made by the judge or jury if the case progresses to the penalty phase (see Chapter Five).

[408] Of these 25 cases, 11 resulted in an acquittal (or dismissal) and the remaining 14 resulted in convictions other than murder.

[409] Fifteen of the 25 cases were white-victim cases (60 percent), six cases were black-victim cases (24 percent), two were Hispanic-victim cases (8 percent), and two cases were missing information on the race of the victim (8 percent). Nine of the 16 black defendant cases (56 percent) involved white victims.

(see Brock *et al.* 2000; Gross and Mauro 1984; Holcomb *et al.* 2004; Sorensen and Wallace 1995; Thomson 1997). The Federal Bureau of Investigation (FBI) collects data on all homicides occurring in state, disaggregated by year, month, and county of occurrence, and compiles these data in its annual release of the *Supplementary Homicide Report* (SHR). The SHR contains data on the age, race/ethnicity, and gender of the victim(s) and offender(s), the circumstance under which the homicide took place (e.g., robbery, burglary, *et cetera*), the relationship of the victim to the offender (e.g., family, stranger, *et cetera*), and the weapon used in the homicide (Fox 2005). Clearly, the major strength of SHR data is that they document every homicide known to the police.[410] These data, however, have two major shortcomings: (1) a high proportion of missing data and (2) limited information on each homicide (Songer and Unah 2006, pp. 185–86). The SHR contain data on every homicide *known* to the police, not every homicide *arrest*, and as result, these data often lack information on homicide offenders and the relationship between the victim(s) and the offender(s). In Georgia, for example, as much as 30 percent of the homicides from 1993 to 2000 have missing information one at least one variable (Fox 2005). In response to the high rate of missing data in the SHR, analysts have recently developed ways to estimate missing information (see Fox 2004; Messner, Deane, and Beaulieu 2002; Regoeczi and Riedel 2003). The second problem—limited information on each case—is a much more significant obstacle to death penalty researchers because it is often difficult to determine which cases are, in fact, eligible for the death penalty. Recall from Chapter Five that Georgia's post-*Furman* death penalty statute lists ten circumstances that, if any one is present in a case, make the case eligible

[410] Law enforcement agencies *voluntarily* report SHR data to the FBI on a monthly basis. Agencies may fail to report each month or at all, resulting in missing data on entire homicide incidents (Fox 2004).

for the death penalty. Similar to other death penalty states, Georgia's statute contains a "catch-all" circumstance that authorizes the death penalty for cases in which "the offense [of murder] was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim."[411] Cleary homicides that involved multiple victims or that occurred along with a contemporaneous capital felony (e.g., robbery, kidnapping, *et cetera*) are death eligible under Georgia's statute and can be identified in the SHR data.[412] The other circumstances, however, are much more difficult to identify with the data available in the SHR. Although it is possible to argue that the catch-all circumstance ostensibly makes every homicide death eligible, it is very unlikely that prosecutors proceed as if every homicide were, in fact, eligible for capital punishment (see Paternoster *et al.* 2004).[413]

This study adopts the first approach, collecting information on every case resulting in a murder or manslaughter conviction. As Baldus *et al.* (1998, p. 1661) explain, a "well-controlled" study is one that has statistical controls for *at least* ten non-racial characteristics. It would be impossible to include the necessary non-racial control variables relying solely on the SHR data. Since prosecutors often rely on less information than is available to researchers who select cases that ultimately resulted in a

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[411] Ga. Code Ann. § 17-10-30(b)(7).

[412] Pierce and Radelet (2005) employ this approach in their recent examination of California's capital punishment process (see also Gross and Mauro 1989). In their analyses, cases were categorized as having *one* aggravating circumstance if multiple victims OR a contemporaneous felony was present in the case; as having *two* aggravating circumstances if multiple victims AND a contemporaneous felony was present in the case; and as having *zero* aggravating circumstances if neither multiple victims NOR a contemporaneous felony was present in the case. According to the authors, these two types of aggravating circumstances are among the most common set of aggravating circumstances used by prosecutors, jurors, and judges to justify death sentences. Indeed, their examination the death sentencing in Illinois (see Pierce and Radelet 2002) revealed that the number of homicide victims was one of the strongest predictors of a death sentence, even after controlling for several other legally relevant and irrelevant case characteristics (see also Shatz and Rivkind 1997).

[413] Baldus and colleagues (1986b, p. 152) suggest that approximately 10 percent to 25 percent of murders and non-negligent manslaughters annually reported qualify as death eligible homicides.

murder conviction (Baldus *et al.* 1990, Chapter 11), expanding the pool of cases to those that ultimately fall short of a murder conviction, but that were still likely to be deemed death-eligible prior to arraignment, allows the current study to achieve the requisite depth and breath.[414]

*Georgia Department of Corrections Records.* Previous research strongly suggests that such factors as the alleged offender's: prior criminal history, contemporaneous offenses (i.e., both felonies and misdemeanors), and prior incarcerations in the state have a strong impact on prosecutorial, judicial, and jury discretion in the capital charging-and-sentencing process (Paternoster *et al.* 2004; Unah and Boger 2001; Weisburd and Naus 2001). Many of these studies also discovered that several of these factors tend to be correlated with certain extra-legal factors (e.g., race/ethnicity, gender, age) (Baldus and Woodworth 2003). The importance of legal factors may be erroneously attributed to extra-legal variables if these legal factors are not explicitly taken into account in charging-and-sentencing research (Berk *et al.* 2005). Indeed, prior research suggests that the impact of race/ethnicity on the capital charging-and-sentencing process is somewhat attenuated when these legitimate legal characteristics are considered (see, generally, U.S. General Accounting Office 1990).

Not only does the Georgia Department of Corrections (GADOC) gather information on the legally relevant factors such as prior criminal history and offense characteristics, but it also gathers information on an inmate's educational history,

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[414] It is important to note that the unit of analysis for SHR data is the homicide *incident*, not the offender. For the purposes of our inquiry, the SHR data had to be disaggregated for multiple-offender homicides so the homicide case was the unit of analysis (at the micro level). Recall that this study analyzes the discretion of legal decision-makers as it pertains to *individual* homicide cases—prosecutors seek the death penalty, and judges and juries impose the death sentence, on individual defendants. In fact, it is likely that defendants in a multiple-offender homicide are treated differently from one another depending on their involvement in the crime, their helpfulness and usefulness to the prosecution, and their unique social characteristics (Paternoster and Brame 2003).

employment status at the time of the offense, alcohol/substance abuse, and family background. The GADOC contains information on every individual incarcerated in Georgia dating back to the turn of the twentieth century.[415] The major shortcoming of the GADOC data is that they do not contain victim information for homicide cases. Fortunately, the SHR data do contain such information, so SHR data and GADOC data were combined to benefit from the strengths of both data sources.

The SHR data do *not* list the names of alleged offenders, so matching is not as straightforward as one might wish, but the data contain information on the race, gender, and age of the alleged offender, as well as the date and location of the homicide.[416] The GADOC data contain information about the race/ethnicity, gender, and age of the (current or former) inmate and the date and location of the offense, making matching between SHR and GADOC data possible (cf. Songer and Unah 2006, p. 186).

*Records from the Clerk's Office of the State Supreme Court.* To accurately examine prosecutorial discretion in seeking the death penalty, a complete list of all cases noticed for the death penalty must also be obtained.[417] According to Georgia law, all notices of intent to seek the death penalty must be filed with the Office of the Clerk of the

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[415] Records dating back to 1909 were located in the GADOC records. The GADOC also has information on individuals sentenced to probation dating back to 1973. A GADOC official indicated, however, that the data are continuously being updated and that records for extremely old cases are less reliable. Because this study only focuses on cases with incident dates from 1993 through 2000, the GADOC records are reliable.

[416] The SHR data contain information on the month and year of the offense, and within each month, homicides are numbered chronologically in ascending order. Also, SHR data do not list the actual county where the offense occurred, rather they lists the name of the local agency that reported the homicide and a corresponding agency code. This agency code includes a Georgia county code that locates the agency in a particular Georgia county.

[417] This list includes all cases noticed for the death penalty, irrespective of whether the notice was subsequently withdrawn. The rationale behind this approach is that primary interest is in the prosecutor's initial decision to seek the death penalty. There are a host of reasons why prosecutors may subsequently choose to withdraw the death penalty (e.g., local politics, strength of evidence, plea bargaining, *et cetera*). The decision to later withdraw the death notice, however, reflects a separate decision phase.

Georgia Supreme Court (henceforth, "Supreme Court's Clerk Office").[418] The Supreme Court's Clerk Office maintains a list of all the death notices filed, recording the name of the defendant, the date the notice was filed, the county in which the notice was filed, and the name of the prosecutor(s) filing the notice. For this study, the Supreme Court's Clerk Office was the primary source of information about death notices. This information was supplemented with other data sources. Routine searchers of news media sources (e.g., state and local newspapers and *LEXIS/NEXIS*) were made, as were periodic calls to the country clerks' offices and searches of GADOC records, in order to ensure that all cases noticed for the death penalty were included in the data.

The Supreme Court's Clerk Office also contained other important information on capital cases. Recall from Chapter Five that defendants sentenced to death are granted an automatic appeal before the Georgia Supreme Court. When these cases come before the Court for mandatory review, the entire record is sent to the Supreme Court's Clerk Office. Upon receipt, the record is transferred to microfilm and then either archived or returned to the county were it was initially tried. Included in the record is the report of the trial court judge. This report contains socio-demographic information about defendant and victim(s), defendant's criminal history, facts about the crime, information about the prosecutor and defense counsel, and facts about the trial. For example, the trial judge is required to indicate whether race appeared to be an issue at trial and which

[418] Under Georgia Unified Appeal Procedure Rule II(C), a prosecutor must give notice of intent to seek death at the earliest possible opportunity after indictment but before arraignment. This is the first proceeding between the judge, attorneys, and the defendant. When a prosecutor gives notice of her or his intent to seek the death penalty, a written notice of such intention must be filed with the clerk of the Superior Court. Within ten days of receiving this notice, the clerk of the Superior Court must send a copy to the clerk of the Supreme Court. If the prosecutor withdraws the death penalty, then the rule is not applicable. At a later date, however, the prosecutor may file another notice of intent to seek the death penalty against the same defendant (see also Unified Appeal Procedure Rule II(A). As of January 1, 2005, prosecutors are required to notify the Office of the Georgia Capital Defender (GCD) of their intent to seek the penalty for any person determined to be indigent (Ga. Code Ann. § 17-12-127).

aggravating circumstances were presented at trial and found by the jury. Data from the Supreme Court's Clerk Office was extremely helpful, although it was limited because the office only keeps information on cases resulting in a death sentence and only a small portion of death noticed cases result in a death sentence. Information that was missing from the record at the Supreme Court's Clerk Office was obtained from the appellate opinions of the Georgia Supreme Court.

*Georgia Supreme Court Appellate Opinions.* After the Georgia Supreme Court completes its mandatory review of a death penalty case, it produces an opinion that becomes a part of the record of the case (and published in the *South Eastern Reporter*). The court's opinions contain information about the trial judge, the county in which the case was tried, the name of the district attorney(s) who prosecuted the case, a brief summary of the facts surrounding the crime,[419] the date the death notice was filed, and a list of statutory aggravating circumstance sought by the prosecutor and found by the judge or jury.

Data from the SHR, GADOC, Supreme Court's Clerk Office, and Georgia Supreme Court opinions are extremely helpful, however, they have two shortcomings. First, they may be biased because they are all generated and compiled by official state agencies. It becomes extremely difficult to cross-validate these data because these different sources tend to build on one another. For example, the opinions of the Georgia Supreme Court are based primarily on the record obtain by the Supreme Court's Clerk Office which, in turn, is gathered for the county clerk offices. Second, there is some information that official agencies neglect to collect or are unable to collect. Therefore, it

[419] These facts typically include the date of the crime, name(s) of the victims(s), and name(s) of codefendant(s), if applicable.

is important to cross-validate and supplement these data with information from those on the other side of the aisle: capital defense attorneys.

*Case Tracking via Capital Defenders.* Baldus and colleagues (1990) suggest that attorneys who defend clients facing the death penalty can be excellent sources of information (see also Zuckerman 1997). Statewide public defender agencies have a tremendous advantage in this regard because they personally handle the vast majority of capital and non-capital murder cases in their states.[420] Recall that MPD was established in 1992 as a trial resource center for capital defense attorneys in Georgia and has actively monitored all capital cases in Georgia since that time. The majority of capital defendants were represented by non-MPD attorneys, but MPD attorneys served as lead counsel/co-counsel or consultants in a significant number of death penalty cases with incident dates between 1993 and 2000 (approximately 30 percent of these cases). MPD collected data on these capital cases by mailing two forms to defense counsel whose client was noticed for the death penalty. The first form was mailed as soon as the office became aware of the case, requesting basic information about the case, such as: (1) the name of the prosecutor(s) trying the case, (2) the name of the judge presiding over the case, (3) the date the crime occurred, (4) the date the death penalty notice was filed, (5) the charges filed against the defendant, (6) the statutory aggravating circumstances sought by the prosecutor, (7) socio-demographic information about the defendant, (8) employment

[420] Statewide agencies would not be able to provide counsel for "conflict of interest" cases and cases in which the alleged offender(s) opted for private counsel. Nevertheless, the overwhelming majority of capital defendants are either indigent or do not possess the resources to finance their defense, so state-appointed counsel usually handles capital murder cases. The same may not hold for conflict of interest cases. While the vast majority of homicide cases involve a single alleged offender (71 percent of homicides occurring in Georgia from 1993 to 2000 involved a lone defender), there still remain a significant number of cases that involve multiple defendants. Conflict of interest cases do not pose a significant problem for statewide agencies, however, because the facts surrounding the case are readily available to them.

status of the defendant at the time of the incident, (9) names of and socio-demographic information about co-defendant(s) (if applicable) and victim(s), and (10) defendant's criminal history (if applicable). MPD mailed a follow-up form to capital defense attorneys after the office received news that the case had completed the penalty phase. This follow-up tracking form requested information from defense counsel concerning matters that would likely be known by the conclusion of the penalty stage. In particular, defense counsel was asked about: (1) the sentence her or his client received, (2) whether the case was disposed of by plea or trial, (3) the type of mitigation evidence presented at trial (if applicable), (4) educational history of the defendant, (5) the mental health status of the defendant (e.g., history of mental illness, mental retardation, *et cetera*), (6) whether the defendant had a history of alcohol or substance abuse, and (7) the status of the co-defendant's case (if applicable).[421]

By in large, defense attorneys were fairly cooperative in providing case information to MPD. When defense counsel did not fully complete the forms or return them in a timely manner, they were contacted via telephone and questionnaires were resent until the necessary information was obtained. In situations were defense attorneys continued to be unresponsive, it was often possible to get the necessary information from other sources (e.g., attorneys who were familiar with the case, attorneys working on the case during direct appeal, attorneys working on the case during state and federal habeas corpus, *et cetera*).

[421] The Bureau of Justice Statistics (BJS) also collects annual data on all prisoners sentenced to death since 1973. These data include information on individuals whose sentences were later vacated or commuted. Basic socio-demographic information (e.g., age, gender, education) as well as criminal history is supplied (see U.S. Department of Justice 2004b).

*U.S. Census and Official Crime Data.* As noted in Chapter Six, scholars examining the criminal sentencing process have stressed the importance of *simultaneously* considering both case characteristics and structural contexts (see Hagan and Bumiller 1983; Ulmer 2000). Also recall that the "unit of analysis" in the Blackian paradigm is neither the microcosm nor the macrocosm, but rather the shape of social space—its social geometry. According to Black's theory of law (1979a) the social geometry of a case is defined and measured by the social characteristics of the actors involved, the relationships these actors have with one another, and the larger social context in which they interact. According to Lazarsfeld and Menzel (1969) and others (see Raudenbush and Sampson 1999), collective (i.e., contextual) properties may be analytical, structural, or global. *Analytical* properties are obtained by aggregating information from individual-level characteristics (e.g., racial/ethnic minority composition). *Structural* properties are based on the relational characteristics of members of the group (e.g., network density). Finally, *global* properties are characteristics of the collective itself that are not based on the properties of the individual members (e.g., type of indigent defense system). It is, therefore, very important to collect various types of detailed information on the characteristics of jurisdictions where these capital cases are tried.

Dozens of county-level variables, most of which are indicators of Black's five dimensions of social space—vertical, horizontal, symbolic, corporate, and normative—were gathered from the U.S. Bureau of the Census and Georgia Bureau of Investigation (GBI). Economic and socio-demographic data for each of Georgia's 159 counties were collected from the U.S. Bureau of the Census. These publicly available county-level data

were collected from both the 1990 and 2000 decentennial censuses and averaged across these two time periods for each county (see U.S. Bureau of the Census 1991, 1992, 2001a, b, 2002a, 2003a). These county-level variables include: (1) population size, (2) population density (i.e., population per square mile), (3) percent of population living in urban areas, (4) males per 100 females, (5) median age, (6) percent of population under 18 years of age, (7) percent population that is foreign born, (8) percent of population who only speak English, (9) racial/ethnic composition, (10) percent born in Georgia, (11) percent never married, (12) percent of high school and college graduates, (13) percent employed, (14) per capita income, (15) percent living below the poverty level, and (16) median home value.

The amount of crime, particularly violent crime, in a county is also likely to have a significant impact on the administration of criminal justice, especially capital punishment (Weidner *et al.* 2004). Also recall from Chapter Six that the amount of crime in a particular social setting is an indicator of normative space in the Blackian paradigm; therefore official crime statistics were collected for each county in Georgia from 1990 through 2000, and then averaged for each county. These data were gathered from the GBI and include information on reports to the police and arrests made by police for four types of serious violent offenses (also referred to "Index" or "Part I" offenses): murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault (see Georgia Bureau of Investigation 2001; U.S. Department of Justice 1991). The county-level crime measures include: (1) violent crime report rate, (2) violent crime arrest rate, (3) homicide rate, and (4) proportion of total Georgia homicides occurring in the

county.[422] Additional contextual variables were created from individual-level official homicide data (i.e., SHR data) by aggregating these characteristics to the county-level from (e.g., proportion of white victim cases, proportion of interracial homicides, *et cetera*). Collectively, these averaged data provide an accurate account of the economic, socio-demographic, and crime conditions in Georgia counties during the period of study (see Appendix B).[423]

Georgia's Administrative Office of the Courts (AOC) organized the state's 159 counties into 49 superior court judicial circuits (Judicial Council of Georgia 2003).[424] County-level data were aggregated to the judicial circuit level for two important reasons. First, in Georgia, there is one district attorney per judicial circuit. While large counties comprise a single judicial circuit, many smaller counties are grouped together to form a single judicial circuit. As a result, a single prosecutor may be responsible for charging and plea bargain decisions for several counties under her or his judicial circuit (see Table 2). Also, if a judicial circuit consists of multiple counties, trial judges rotate throughout these counties. Treating counties that share a single judicial circuit as if they were independent ignores the similarities they share in the administration of capital

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[422] Weidner and colleagues (2004) suggest using arrest data than report data because arrests are much better measure of the overall crime rate, given the high volume of drug and non-violence index offenses. Both report and arrest data for non-violent offenses, however, are questionable because drug offenses and other trivial crimes dominate these indexes. Violent crime and reports and arrests (including homicides) are used in these analyses because they are much better measures of the amount of serious crime in a jurisdiction and are most likely to have an impact on the administration of capital punishment.

[423] Johnson (2006a, p. 273) notes that using interrelated levels of data provides the most comprehensive resource for examining the multilevel contexts of criminal sentencing.

[424] Georgia's 49 judicial circuits are also organized into ten Judicial Administrative Districts: *East*, *Fulton*, *Macon*, *Middle*, *Northeast*, *Northwest*, *Southeast*, *Southwest*, *Stone Mountain*, and *West*. These districts were created by the Judicial Administration Act of 1976 to provide regional court administration to the superior courts of Georgia (Ga. Code Ann. § 15-5-2). The districts were created along Georgia Congressional District lines and each district is served by an administrative judge and district court administrator selected by the superior court judges and senior judge in each particular district. The primary function of the administrative judge is to assist chief judges in preparing, presenting, and managing local court budgets. These judges, however, do not exert any influence on the capital charging-and-sentencing process in the judicial circuits that comprise the judicial district.

punishment resulting from shared decision-makers (see also Unah and Boger 2002, p. 32). Second, death penalty cases are extremely rare events, so aggregating county-level data to the judicial circuit level allows one to observe more cases per contextual unit and better statistically estimate relationships occurring at both the case- and contextual-level without altering the dependence structure of the cases due to their clustering (see Raudenbush and Bryk 2002).

In sum, a thorough and accurate analysis of the capital charging-and-sentencing process requires data on prosecutorial discretion in seeking the death penalty and judicial and jury discretion in imposing the death penalty. Data from the (1) Supplementary Homicide Reports (SHR), (2) Georgia Department of Corrections (GADOC), (3) Office of the Clerk of the Georgia Supreme Court, (4) Georgia Supreme Court Appellate Opinions, (5) Office of the Multi-County Public Defender, (6) U.S. Bureau of the Census, and (7) Georgia Bureau of Investigation (GBI) were all important sources of information about the legal and extra-legal factors at both the case- and jurisdiction-level that potentially influence the capital charging-and-sentencing process in Georgia.[425]

[425] Data from these seven different sources were stored in *Microsoft Access*®, a program in the *Microsoft Office*® software suite. The underlying structure of *Access*® is the spreadsheet package *Microsoft Excel*®, to which *Access*® essentially adds a graphical user interface (see Viescas 1999). Initially, three separate databases (i.e., spreadsheets) were created. The first database contained all information relevant to prosecutorial discretion in charging. The spreadsheet consisted of the modified SHR data and the GADOC data. The second database contained detailed information on all cases noticed for the death penalty with incident dates from 1993 through 2000. These data were collected from GADOC, records from the Clerk's Office, Georgia Supreme Court opinions, and death penalty case tracking questionnaires collected by MPD. The third database, the contextual database, was comprised of the economic, socio-demographic, and crime data collected from the U.S. Bureau of the Census and the GBI official crime statistics. Coding conventions are listed in Appendix B.

## 7.2 Analytical Approach

### *7.2.1 Culpability Measures*

In ideal situations, social researchers are able to isolate the impact of an explanatory variable on the outcome of interest by randomly assigning individuals into one or more "treatment" groups—a process that largely eliminates the influence of confounding variables because individuals, in principal, are similar across all other characteristics, save the explanatory variable of interest (Rosenbaum 2002).[426] Examining the relative influence of legal and extra-legal factors on the capital charging-and-sentencing process has been a difficult task for analysts because traditional experimental manipulations are impossible in field settings (Cook and Campbell 1979). Complicating matters, as the courts have repeatedly recognized, is the fact that it is extremely unlikely to find two capital cases that are exactly alike, save the particular variable of interest (Katz 1999, p. 231). As a result, death penalty analysts have focused their efforts on identifying the most important determinants of death penalty decision-making (both legal and extra-legal) to develop "culpability measures" that allow for the comparison of similarly situated defendants.

*Qualitative Measures.* Some analysts have relied on qualitative culpability measures to classify cases as similar or dissimilar based on legitimate characteristics that best explain the behavior of decision-makers in the death penalty process. For example, Barnett's (1985) "three-dimensional" classification system determines the presence or absence of thirty-five specific characteristics from the factual summaries of death penalty cases to categorize cases along the following dimensions: (1) certainty the defendant was

[426] Berk (2005c) notes that proper implementation of randomized experiments is very demanding and, in some settings, alternative research designs may be preferable (see also Heckman and Smith 1995).

the deliberate killer (clearly no, clearly yes, or neither); (2) close prior relationship between defendant and victim (yes or no); and (3) vileness or heinousness of the killing (elements of self-defense, a vile killing, or neither) (pp. 1364–66). Each dimension is given a numeric score (zero, one, or two) and the classification scheme produces a total of eighteen potential categories of "legally" similar cases (see also Baldus *et al.* 1985, pp. 1381–82; Baldus *et al.* 1990, pp. 51–52). The scores are also summed to produce an overall "culpability score" to allow for comparison with more cases. While some have advocated this approach because of its intuitiveness (see, e.g., Keil and Vito 1989, 1996), the techniques used to identify these characteristics often vary considerably and the subjectivity of the measure undermines its replicability.

*Non-weighted Quantitative Measures.* Due to the shortcomings of qualitative classification systems, scholars have developed numerous quantitative measures to compare similarly situated defendants in the capital charging-and-sentencing process (see, e.g., Baldus 1980; Baldus and Cole 1977; Baldus and Woodworth 1983). Perhaps the most straightforward of the quantitative measures is the *legislative criteria* measure, which is simply the sum of the number of case characteristics that make the defendant death-eligible under a particular state's death penalty statute (i.e., statutory aggravating circumstances) (Baldus 1991; Baldus *et al.* 1985). For states with statutory mitigating circumstances, a measure indicating the number of these characteristics in each case can also be computed (Baldus *et al.* 1998). A related measure, the *salient factors* measure, relies on the appellate opinions of state courts' proportionality reviews to identify the

"most prominent statutory aggravating circumstance(s) and other relevant aggravators and mitigators" (Baldus *et al.* 1998, p. 1674).[427]

While informative, these measures suffer from several shortcomings. Perhaps the most obvious (and most disadvantageous) is the fact that cases with similar scores can be significantly different with respect to the actual characteristics present in the case. Although cases with increasing scores on the aggravation scale measure (and decreasing scores on the mitigation scale) are appropriately described as more culpable, prosecutors, judges, and jurors may view these cases very differently. Furthermore, decision-makers are likely to perceive some characteristics as more significant than others, so giving these characteristics equal weight in a summation scale fails to accurately reflect how these factors actually influence the decision-making process in death penalty cases.[428]

*Regression-Based Measures.* In an attempt to minimize the shortcomings associated with using qualitative culpability measures and non-weighted quantitative summary scales, death penalty researchers have increasingly turned their efforts to using regression-based measures (for a critical review, see Berk *et al.* 2005). In particular, these analysts have used multiple regression techniques to simultaneously estimate the impact of legitimate, illegitimate, and suspect case characteristics on the capital charging-and-sentencing process (Baldus *et al.* 1998, p. 1672). Regression models have been used to estimate the impact of various case characteristics at successive stages of the capital punishment process, as well as the effect of these factors on the entire series of decisions

[427] Gross and Mauro's (1989, p. 59) aggravation scale included the three strongest non-racial predictors of capital sentencing—contemporaneous felony circumstance, relation of victim to offender, and number of victims—found in the SHR. The effects of the three variables varied across the eight states they examined (Arkansas, Georgia, Florida, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia), but each circumstance was "more strongly associated with capital sentencing in each of the states than any other non-racial variable is in any of them" (see also Wolf 1964).

[428] The salient factors method is particularly problematic because appellate review is an *ad hoc* process, and therefore it gives very little insight into the operation of the system as a whole (Baldus *et al.* 1998, p. 1674).

(see Paternoster *et al.* 2004; Unah and Boger 2002). Due to the fact that the variables of interest in death penalty research (e.g., whether or not a case is noticed for the death penalty) violate the classical linear regression assumptions, death penalty scholars have increasingly relied on regression models for limited and categorical (i.e., truncated, count, binary, ordered, and unordered) outcomes (see Long 1997; McCullagh and Nelder 1989). Similar to the classical linear regression model, these models (often referred to as *generalized linear regression models* or GLMs) allow the analyst to uncover the *independent* effects of case characteristics on the capital charging-and-sentencing process and summarize the relationship of these variables to the outcome(s) of interest in a mathematical equation.

The most common regression model employed in death penalty research is the logit or probit regression model, used for dichotomous outcomes (e.g., sentenced to death/not sentenced to death) (see, e.g., Baldus *et al.* 1998; Gross and Mauro 1989; Paternoster *et al.* 2004; Songer and Unah 2006; Unah and Boger 2001); however researchers have also used models for polytomous outcomes (e.g., ordered and multinomial logit/probit) (Sorensen and Wallace 1999). In fact, with the expansion of possible sentencing outcomes in death penalty cases—conviction of a non-capital offense, life with the possibility of parole, LWOP, and death—models moving beyond the simple death/not death distinction may more accurately capture the relationships between case characteristics and the outcomes of interest.

*Alternative Classification Methods.* Conventional regression approaches to studying the administration of capital punishment have been criticized by some scholars because death penalty data often fail to meet the requirements of the statistical models

(Berk 2003). Several analysts have advocated using propensity scores (Berk *et al.* 2005), classification and regression trees (CART) (Berk *et al.* 2005; Klein and Rolph 1989), and random forests (Berk *et al.* 2005) to more accurately asses the impact of extra-legal factors (e.g., race/ethnicity and region) on capital charging-and-sentencing decisions. *Propensity scores* have been used in observational studies to adjust for biases resulting from non-random selection into various treatment groups. Propensity scores are the estimated probability of membership into treatment groups—typically an experimental and control group—that are computed from a separate logit or probit regression equation with different predictors and functional forms from the equation for the outcome of interest (see Rosenbaum and Rubin 1983). The propensity score methods are more flexible than conventional regression adjustments and, therefore, may more effectively reduce the biases resulting from confounding (Smith 1997).[429] In death penalty research, racial predictors must be viewed as "treatments" and propensity scores are used to control for confounded variables (Berk *et al.* 2005). This method remains problematic for death penalty research, however, because there is no theoretical justification for specifying the selection equation for racial predictors due to the fact that individuals do not have their race/ethnicity "assigned" (Berk *et al.* 2005).[430] The propensity score methods also tend to compromise model fit—relative to conventional regression approaches—because the

[429] Although propensity scoring methods may provide more flexibility than conventional regression approaches, these methods rely on rather strong assumptions that can be difficult to fulfill in practice (Imbens 2004).

[430] Experimental studies randomly altering defendants' and victims' race/ethnicity have been used to investigate the role of race/ethnicity in the criminal sentencing process; however, these studies have been criticized on two important grounds. First, these experiments have limited generalizability because they almost exclusively rely on the responses of college students who tend to be dissimilar from the general population from which juries are drawn (Field and Barnett 1978). Second, experimental approaches do not alter the fact that race/ethnicity serves as a marker for other factors that are behind prosecutors' decisions to seek the death penalty and juries' decisions to imposed the death sentence (Berk 2003, p. 211). This implies that the most fruitful research must illuminate these important mediating/confounding factors—perhaps at multiple levels of analysis.

emphasis of this approach is on isolating causal effects rather deriving a model that most closely fits the data.

The primary purpose of *classification and regression trees* and *random forests* models is to minimize classification errors rather than represent how the data were generated or how causal effects are produced (for detailed discussions of these methods, see Breiman 2001; Breiman *et al.* 1984). The goal of CART analysis is to use the relationships between the predictors and the response variable to subset the data, such that within each subset the values of the response variable are similar as possible. This is accomplished by partitioning the space defined by the data one partition at a time in recursive fashion; once a partition is constructed, it is not reconsidered when later partitions are defined (Berk 2005a).[431] CART and random forests models perform best when sample sizes are fairly large and variables are not extremely skewed because each subsequent stage splits the groups into smaller, more homogeneous, units. This requirement is particularly problematic for capital punishment research because of the infrequency in which homicide cases are noticed for the death penalty and advance to the penalty phase.

Berk and colleagues' (2005) recent reanalysis of the Maryland death penalty data (see Paternoster and Brame 2003) suggests that the race-effects reported in the study—based on logistic regression—were unreliable and, using propensity score, CART, and random forests models, they discovered that racial/ethnic effects were substantially weaker. Specifically, they used CART models to measure the impact of race/ethnicity in terms of the extent to which the inclusion of the racial variables in the analysis increased

[431] Classification trees apply to models with a categorical endogenous variable, whereas regression trees are appropriate when the endogenous variable is continuous. Both classification and regression trees allow for a mixture of categorical, interval, and continuous exogenous variables.

the accuracy of the model in predicting correct sentencing outcomes. They found that the inclusion of the racial variables had very little or no effect on the predictive power of the models, and strongly cautioned against using conventional regression approaches in death penalty charging-and-sentencing research. Conversely, Baldus and colleagues (1998) have cautioned against using CART analysis for assessing the impact of race/ethnicity on the capital charging-and-sentencing process because such analytical approaches potentially mask significant race effects that are detectable in a multiple regression framework. They argue that in order for a partition based on adding racial predictors to the model to improve the predictive power of the model in a CART analysis, the death sentencing rates for the two racial subgroups must straddle .50 (fifty percent). Baldus *et al.* suggest that there can be a substantial increase in the risk of death (e.g., from .05 to .15 or from .80 to .95) for one racial group compared to another in a particular category without any improvement in the prediction rate. "[I]n other words, as a metric, change in the correct prediction rate ignores increased risk of death associated with race, unless one race has a death-sentencing rate under .50 and the other has a death-sentencing rate over .50 in one or more (nonracial) categories" (p. 1666 n.80). The small sizes during the later stages of the capital charging-and-sentencing process in Berk *et al.*'s study also bring into question the reliability of their results based on CART and random forests models. Consequently, although Berk *et al.* strongly caution against using conventional regression approaches for causal modeling in death penalty research, their results do not seriously challenge the vast majority of death penalty studies reporting that racial/ethnic variables—particularly race-of-victim—significantly improve model fit and continue to be among the strongest predictors of capital charging-and-sentencing decisions, even

after controlling for dozens of legally legitimate case characteristics (Baldus *et al.* 1990; Paternoster *et al.* 2004; Unah and Boger 2001). Moreover, while propensity scores may be better able to reduce potential bias in the estimation of "causal" effects, and CART/random forests models may provide greater predictive accuracy (relative to conventional regression), these methods do not represent how the data were generated and are much more difficult to interpret (Berk 2003, p. 212). In other words, these models typically fail to offer answers to the questions that are of primary concern to death penalty analysts—e.g., *how* are charging-and-sentencing decisions made in the capital punishment process? In light of the serious shortcomings associated with these alternative approaches, along with the widespread use of conventional regression modeling in death penalty charging-and-sentencing research, regression-based models are used in this study.

### *7.2.2 Multilevel Regression Models*

The growing emphasis on the role of context in the criminal sentencing process has encouraged scholars to develop more elaborate theories of how differences in individual sentencing outcomes across jurisdictions may result from the influence from environmental factors, net of case-level determinates (see Dixon 1995; Eisenstein, Flemming, and Nardulli 1988; Ulmer 2000). While death penalty analysts have readily acknowledged the importance of context on the capital punishment process for some time (see, e.g., Baldus *et al.* 1986a; Gross and Mauro 1984; Kleck 1981; Nakell and Hardy 1987), few have attempted to systematically explore *how* location impacts the

administration of capital punishment.[432] As Berk and colleagues (2005, p. 31) note, "[I]f the concern is about illegitimate factors affecting capital cases, the impact of location needs to be studied in much greater depth. As now measured, a county or city is just a proxy for processes that are not analyzed." To be sure, researchers have employed multilevel models when exploring the impact of contextual-level factors on criminal sentencing outcomes in non-capital cases (see Britt 2000; Johnson 2005; Kautt 2002; Ulmer and Johnson 2004; Wooldredge and Thistlethwaite 2004). Only recently, however, have scholars developed the necessary estimation theory[433] and commercial

[432] Three notable exceptions are Jacobs and Carmichael's (2002) examination of states' reimposition of the death penalty after the *Furman* decision, Liebman and colleagues' (2002) analysis of death sentence reversals, and Poveda's (2006) study of geographic disparities in the use of the death penalty in Virginia following the *Furman* case (see Chapter Four); however these three studies were not directly concerned with the initial charging-and-sentencing process and none explored cross-level effects. Jacobs and Carmichael used a pooled time-series analysis—a technique closely related to multilevel analysis (Berk 2003, p. 180)—to examine the influence of state-level characteristics on how *quickly* states' re-enacted death penalty legislation after the brief moratorium imposed by the U.S. Supreme Court. Liebman *et al.*'s data were amenable to multilevel analysis because of the hierarchical structure of the data (i.e., individual cases were nested into counties and states), but they aggregated their case-level data to the state and county levels and focused their analyses on the influence of contextual factors on state- and county-level death-sentencing *rates* (via poisson and negative binomial regression). In a subsequent analysis, Liebman and colleagues employed multilevel models on their aggregated data—nesting states within years—to predict the probability of a death penalty reversal (Gelman *et al.* 2004). They also disaggregated their county-level data to conduct case-level analyses to examine the impact of individual case factors on federal habeas review (their third stage of review). They discovered that the number of formal aggravating factors present in a case had a strong impact on the probability that a case was reversed—the more aggravated a case, the lower the probability of a reversal. Regrettably, this follow-up study also failed to simultaneously consider county- and case-level factors. Poveda (2006) used discriminant analysis to differentiate between "retentionist" (one or more death sentences/executions) and "abolitionist" (no death sentences/executions) jurisdictions in Virginia between 1978 and 2001. Poveda's unit of analysis was the county, so case-level factors (i.e., race of offender and victim, offender-victim relationship, and homicide circumstance) were aggregated to the county-level in the analysis. Poveda's analysis revealed that certain contextual level factors (i.e., population size and percentage black) significantly distinguished jurisdictions that employed the death penalty from jurisdiction that did not employ the death penalty.

[433] For detailed reviews of restricted maximum likelihood (REML) approaches (e.g., marginal and penalized quasi-likelihood), see Wong and Mason (1985), Goldstein (1991), Schall (1991), Breslow and Clayton (1993), Longford (1993), and Rodríguez and Goldman (2001). Hedeker and Gibbons (1994), Pinheiro and Bates (1995), and Rabe-Hesketh *et al*. (2002b) discuss approximations to the marginal likelihood based on numerical integration using the Gauss-Hermite quadrature or adaptive Gauss-Hermite quadrature and Raudenbush *et al*. (2000) discuss the LaPlace approximation. For a generalization of the quasi-likelihood method to multivariate regression models, see Zeger *et al*.'s (1988) and Hardin and Hilbe's (2002) discussions of generalized estimating equations (GEE).

computer software[434] to analyze the types of data (i.e., limited and categorical variables) of primary interest to death penalty researchers.

There are important substantive reasons for employing multilevel models for nested data. The first is that such models allow the analyst to avoid committing *ecological* and *atomistic* fallacies (Luke 2004, pp. 5–6). Ecological fallacies occur when relationships observed in groups are assumed to hold for individuals. Conversely, atomistic fallacies occur when inferences about groups are incorrectly drawn from individuals. It is important to note that these fallacies are primarily a problem of *inference*, not measurement. In other words, it is permissible to *describe* higher-level data using lower-level information, but it is inappropriate to assume that relationships discovered at one particular level of analysis occur in the same fashion at some other level (King 1997). A second significant substantive reason for using multilevel models is the investigation of *causal heterogeneity*. Much social theory suggests that the causal effects of lower-level predictors are conditioned or moderated by higher-level predictors (i.e., cross-level effects)—multilevel models provide a framework under which analysts can systematically examine these effects (DiPrete and Forristal 1994).

Multilevel models also have several important statistical advantages over the classical regression model when analyzing nested data structures. First, they correctly adjust for the non-independence of observations resulting from the nesting of smaller units within larger units (i.e., clustering), therefore producing unbiased standard errors of

[434] Numerous specialized and general purpose software packages to estimate multilevel nonlinear models have become readily available over the past decade. Specialized programs include: *aML* (Lillard and Panis 2003), *HLM* (Raudenbush *et al.* 2004), *LISREL* (Joreskog and Sorbom 1996), *MIXOR/MIXNO/MIXPREG* (Hedeker 1998, 1999; Hedeker and Gibbons 1996), *MLn/MLwiN* (Rasbash *et al.* 2004), *Mplus* (Muthén and Muthén 2004), and *VARCL* (Longford 1990). Popular routines in general software packages include: *nlme/glme* in *S-Plus* (Pinheiro and Bates 2000), *PROC MIXED* in *SAS* (Little *et al.* 1996), *GLLAMM* in *Stata* (Rabe-Hesketh and Skrondal 2005), and the Bayesian Markov Chain Monte Carlo (MCMC) package *WinBUGS* (Spiegelhalter *et al.* 2003).

parameter estimates. Units in the same cluster share cluster-specific influences; however it is unrealistic to include all cluster-specific influences as covariates in the model. This results in cluster-level unobserved heterogeneity leading to dependence between responses for units in the same cluster after conditioning on covariates (the association between units in the same cluster is often referred to as the *intra-class* or *intra-cluster* correlation). Ignoring the hierarchical structure of the data often results in standard errors that are biased towards zero, increasing the risk of Type I errors. Multilevel models account for this unobserved heterogeneity by including random effects (i.e., randomly varying intercepts and slopes) to account for parameter differences across the clusters. Random intercepts represent unobserved heterogeneity in the individual level outcome and random slopes represent unobserved heterogeneity in the effects of explanatory variables on the response variable (see Skrondal and Rabe-Hesketh 2004, pp. 49–50).

Second, they provide better estimates of individual-level effects within clusters by using all available data to produce estimates that are a weighted composite of the information from a particular cluster and the relations that exist in the overall sample. Estimating separate regression equations for each cluster is problematic because many clusters may have small sample sizes, so parameter estimates are likely to be extremely inefficient (i.e., they have very large standard errors) and it becomes difficult to develop reliable predictions. Using pooled data from across all clusters, ignoring the hierarchical structure of the data, is also likely to produce bias parameter estimates because of unmodeled cluster-specific influences (Raudenbush and Bryk 2002). The weighted estimates produced by multilevel models—often called *empirical Bayes* estimates (Lindley and Smith 1972) or "shrunken" estimates (James and Stein 1961)—lie between

the group mean (i.e., cluster-specific point estimate) and the grand mean. More weight is given to the group mean when the cluster is large because these clusters contribute more information to the model than clusters with only a small number of units (Luke 2004).

Third, they allow for the partitioning of variation in the individual-level outcome into within- and between-cluster effects (Skrondal and Rabe-Hesketh 2004, p. 51). Multilevel models have a complex error structure because the total variability in individual outcomes is comprised of two components: the within-cluster variance and the between-cluster variance. Decomposing the random part of the multilevel model into unit-specific and cluster-specific effects allows the analyst determine how much variability in the outcome can be attributed to each level. It is also possible to assess model fit (e.g., calculate a $R^2$ statistic) for each level to assist in model building (Luke 2004, pp. 35–37).

Fourth, they offer a significant advance over traditional methods statistically linking macro-level data to individual outcomes. One traditional approach to account for cluster-specific influences is to add indictor variables for each cluster (except one) to the model to control for unobserved similarities among units in the same cluster.[435] The approach is limited in that it only accounts for subgroup differences, but does not allow the analyst to explain why these differences are present across clusters—an important concern of much social theory. Another traditional approach consists of adding interaction terms between individual- and cluster-level covariates in an attempt to explain variability in lower-level effects (see, e.g., Friedrich 1982). The major drawback of this approach is that it implicitly assumes that the interaction terms fully account for

[435] Alternatively, indicator variables for all clusters can be included in the model, but no intercept can be estimated.

differences across the clusters because it only incorporates random error at the lowest level of analysis. (In other words, this model rests on the unlikely assumption that there is no cluster-level heterogeneity.) Ideally, analysts could combine these two approaches to exploit their unique advantages, but this is not possible because there are insufficient degrees of freedom to estimate both the interaction effects and the indicator variables in the same model. In multilevel models, random intercepts and slopes at lower-levels become outcomes at higher-levels (Raudenbush and Bryk 2002, p. 27)—random coefficient models allow the analyst to both estimate and model the variability in these regression coefficients across the clusters.

Finally, multilevel models recognize that contextual units in a sample are a subset of the population of interest, and allow for generalizations to the larger population of interest (see, generally, Aitkin and Longford 1986). Treating the cluster effect as a random factor is appropriate when making inferences regarding the population of clusters rather than the specific clusters in the dataset (Skrondal and Rabe-Hesketh 2004, p. 51). Inferences based on traditional approaches that estimate a separate fixed parameter for each cluster are limited to the clusters included in the sample, and not generalizable to the larger population from which the sample data were drawn.

Recent advances in multilevel modeling have allowed researchers to relax several of the assumptions on which classical linear regression is based to better analyze death penalty data. In addition to the improved modeling strategies for limited and categorical dependant variables and clustered data, extensions to the conventional regression model allow researchers to accurately study cross-classified (Raudenbush and Bryk 2002, pp. 373–98; Snijders and Bosker 1999, pp. 155–65), multiple-membership (Skrondal and

Rabe-Hesketh 2004, pp. 60–63), and spatially dependent (Zhang 2002) data. Nonetheless, the validity of inferences based on multilevel models depends on the tenability of assumptions about both the structural (fixed) and random (stochastic) aspects of the model. Serious problems may arise when the functional form of the relationship between the predictor variable(s) and the outcome variable is misspecified or when the error term is correlated with one or more of the explanatory variables in the model (Gujarati 1988, pp. 455–56). These specification assumptions apply at each level in a hierarchical model *and* misspecification at one level may bias estimates in another. Moreover, because higher-level equations may have correlated errors, the misspecification of one equation can bias the estimates in another (Raudenbush and Bryk 2002, p. 253). Fortunately, diagnostic tools for model selection and model adequacy continue to be developed and applied researchers have numerous empirical procedures to assist them in the model-building process (for detailed discussions, see Raudenbush and Bryk 2002, pp. 252–87; Skrondal and Rabe-Hesketh 2004, pp. 262–81; Snijders and Bosker 1999, pp. 86–98). Due to the aforementioned theoretical and statistical issues when analyzing nested data, multilevel regression models will be used when examining the relative impact of case- and county-level factors on Georgia's capital charging-and-sentencing process. More specific details on these analytical models are provided in the next chapter.

### *7.2.3 Missing Data and Selection Bias Issues*

Perhaps two of the most useful methodological advances in regression modeling for death penalty researchers have been with respect to the proper handling of missing data (Schafer 1997; van Buuren, Boshuizen, and Knook 1999) and corrections for sample

selection bias (see Heckman 1976; Sartori 2003). *Missing Data* problems are extremely common in social science research, especially for analysts conducting survey research and using secondary data sources (Rubin 1996). The vast majority of statistical analyses must be performed on a full data matrix, therefore the common practice among social scientists is to perform *casewise* deletion by eliminating observations that have missing data on one or more variables (Little 1992). King and colleagues (2001, p. 49) report that 94 percent of political scientists use casewise deletion (also known as *listwise* deletion) to deal with missing data on one or more variables in their models and, on average, lose one-third of their observations.[436] Similarly, Royston (2004, p. 227) notes that complete-case analysis in medical research may omit as many as half of the available observations. Casewise deletion is problematic because it (1) forces researchers to potentially discard much useful information about the relationships between variables, (2) results in inefficient parameter estimates due to a reduction of sample size, and (3) may bias parameter estimates if the data are not missing complete at random (Allison 2002).

Rubin (1976) identifies three processes that generate missing data with respect to the information they provide about the unobserved data: missing completely at random (MCAR), missing at random (MAR), and missing not at random (MNAR). When data are MCAR, the probability of missing data on a particular variable is neither related to the value of the variable itself nor to the values of any other variable in the data set. In other words, the subset of cases that have complete data are simply a random sample of the universe of cases. Whenever it is possible to predict that a cell in a data matrix is

[436] Many analysts also use *pairwise* deletion for statistical procedures that work with data in pairs, such as correlations and covariances. For these procedures, statistics can be computed with complete data for pairs of items that do not need to account for missing data with other variables. A major limitation of pairwise deletion is the difficulty in computing standard errors or other measures of uncertainty because parameters are estimated on different sets of units (Schafer and Graham 2002, p. 155).

missing, the MCAR assumption is violated. Data are MAR when the probability that a particular variable will be missing depends on the other observed variables, but not the variable itself. Unlike MCAR, the MAR assumption is untestable (Schafer and Graham 2002, p. 152). If MCAR or MAR assumptions are not met, the missing data mechanism is MNAR (also referred to as *nonignorable*). When data are nonignorable, the pattern of missingness is non-random and cannot be predicted by other variables in the data set, therefore it is necessary to model the missing data mechanism to obtain unbiased estimates.

As noted above, the SHR is missing data on a significant proportion of Georgia homicide cases (see also Messner *et al.* 2002, p. 458). If casewise deletion were performed on the SHR data, nearly three-fifths of the observations would be discarded from the analysis and statistical inference about the population of potentially death eligible homicides would be based on a subset of the data (i.e., the fully observed cases). If the missing data were MCAR, the subset of cases would be a random sample of the population and the resulting parameter estimates would not be biased, although their standard errors would be significantly larger (Schafer and Graham 2002, p. 156).[437] The advantage of examining the entire population of cases, rather than a random sample, is that statistical inference based upon sample statistics (i.e., *p*-values) need not apply in the conventional sense because there is no sampling error (see Berk *et al.* 2005; Steffensmeier and Demuth 2001).[438] However, as noted above, when it is possible to

[437] Petrin (2005, p. 8) suggests that missing data may pose particular problems for parameter estimation and inference in multi-level models *even* when the data are MCAR because the sample sizes at each level (e.g., number and size of clusters) influence statistical power for all of the parameters in the model.
[438] When examining the entire population of cases, one primarily focuses on the direction and magnitude of the observed relationships, rather than the generalizability of these relationships to the larger population, as indicated by tests of statistical significance (Berk 2003).

predict the probability that a variable is missing information for an observation (using information from other covariates in the data), the MCAR assumption is violated and casewise deletion may generate bias parameter estimates.[439] According to Regoeczi and Riedel (2003, p. 180), "analyses using listwise deletion for homicide data are on based on what are almost certainly not a random subset of the full range of cases." Complicating matters, death penalty cases in Georgia (and elsewhere) are *very* rare occurrences (see Chapter Five), so it is crucial to retain as many cases as possible in the analysis of the capital charging-and-sentencing process.[440]

Over the past two decades, methodologists have developed several approaches to "guess" the values of missing data by using information about the association of the variable of interest with other variables in the data. Hot deck imputation (Reilly 1993), predictive-mean matching (Landerman, Land, and Pieper 1997), and propensity scoring (Rosenbaum and Rubin 1983) are popular approaches to imputing missing data, but may perform poorly when the proportion of missing cases is large, missing data are multivariate, and the pattern of missingness is non-monotone (see Allison 2000; Pérez *et al.* 2002).[441] Messner and colleagues (2002) recently advocated using a log-

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[439] When the proportion of cases with missing data is small, departures from the complete case analysis assumptions often have to be quite large to have a substantive impact on the results (Brame and Paternoster 2003, p. 74).

[440] Biostatisticians studying rare diseases commonly confront a similar problem because discarded cases may contain a large proportion of participants possessing the particular condition (Schafer and Graham 2002, p. 156).

[441] Mander and Clayton (2005) developed an algorithm combining hotdeck imputation with propensity scoring. Classic hotdeck imputation is a semi-parametric method for imputing values in a single variable that is based on observed empirical distribution of the data and makes no other distributional assumptions. Mander and Clayton's procedure uses Rubin's (1987, p. 124) propensity scoring method to improve the accuracy of the imputations by stratifying the data based on the probability of missingness and imputing data within strata independently. They note, however, that this approach is appropriate when patterns of missingness are *monotone*. Data have a monotone missing pattern when a variable is missing for a particular individual implies that all subsequent variables are missing for the same individual (Schafer and Graham 2002, p. 150). When data have a monotone missingness pattern, the analyst has greater flexibility in the choice of imputation methods.

multiplicative association model to predict unknown victim-offender relationships for official homicide data. While Messner *et al.*'s approach has the advantage of being robust to the "ignorability" assumption necessary for most parametric methods, it seriously underestimates the uncertainty associated with imputation/classification algorithms. Messner *et al*. also concede that, as a practical matter, violations of the ignorability assumption will be inconsequential if the imputation model is well specified (see also Rubin 1996; Schafer 1997). In fact, Regoeczi and Riedel's (2003) analysis of homicide data in Chicago and Los Angeles suggests that the ignorability assumption is very reasonable, especially when a few important predictors (e.g., clearance status) are included in the imputation model. A comparison of Messner *et al.*'s log-multiplicative approach and regression-based approaches that assumed data were MAR (Pampel and Williams 2000) suggests that there is very little difference in the imputations derived from the different techniques.[442] The regression-based approaches, however, can be easily extended to more realistically reflect uncertainty surrounding the imputations and, therefore, offer a preferable alternative to hot deck, predictive-mean, and log-multiplicative association models.

Rubin's (1976, 1987) regression-based *multiple* imputation approach provides a significant improvement over simple imputation methods and traditional single imputation strategies. In brief, Rubin proposes a three-step approach to the estimation of incomplete data models. First, observed data are used to impute missing values and

[442] Fox (2004, p. 240) notes that while the MAR assumption may be suitable for the age, race, and gender characteristics of perpetrators, it may be unsuitable for offender-victim relationship data because unsolved homicides are more likely to be committed by a stranger or an acquaintance, rather than a close friend or intimate even after controlling for the characteristics of the victim or the incident. He cautions, however, that techniques for estimating data that are nonignorable may perform worse than techniques which assume the data are MAR.

incorporate estimation uncertainty (resulting from analyzing a finite number of observations) and fundamental uncertainty (resulting from unmodeled variation in the dependent variable and represented by the stochastic component of the model) in their prediction of plausible values (see also King, Tomz, and Wittenberg 2000, pp. 348–49; Schafer and Graham 2002, p. 167).[443] This process is repeated $M$ times ($M > 1$) to create $M$ complete data sets, with each data set containing different plausible values for missing variables to account for the uncertainty surrounding the imputations.[444] Second, a complete-case analysis is repeated on each data set. Finally, the point estimate of each parameter is obtained by averaging across the $M$ separate point estimates for that particular parameter (Rubin 1987). The variance of the point estimate is computed by averaging across the $M$ estimated variances from within each completed data set, plus the sample variance in the point estimate across the data sets (multiplied by a factor that corrects for bias) (Little 1992, p. 1235).[445] King and colleagues (2001, p. 53) emphasize that the purpose of the imputation model is to create predictions for the distribution of each of the missing values, not causal explanation of parameter estimates.

Several different imputation algorithms have been developed to create plausible "guesses" of missing values (see Dempster *et al.* 1977; King *et al.* 2001; Meng and Rubin 1993; Schafer 1997; Tanner and Wong 1987; van Buuren *et al.* 1999; Vermunt *et al.*

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[443] Rubin (1987) initially proposed using the Expectation Maximization (EM) algorithm, an iterative procedure, to compute imputations for each missing value in a data set. In simple applications, the EM algorithm proceeds by (1) estimating parameters based on available data, using these parameters to impute missing values, (2) updating the parameters based upon imputed values, and (3) iterating until the change in parameters is negligible (Dempster, Laird, and Rubin 1977, p. 11).

[444] The fraction of missingness, $\gamma$, governs the number of imputations, $M$, needed to obtain efficient estimates. The efficiency of an estimate based on $M$ imputations is approximately $(1 + \gamma/M)^{-1}$ (Rubin 1987, p. 114). For example, when $\gamma = .30$ and $M = 10$, the standard error is 2.9 percent larger than its minimum possible value.

[445] Reiter and Raghunathan (2007) note Rubin's rules for combining point and variance estimates are inappropriate in those settings where data is missing to protect confidentiality or to correct for measurement error.

2008), each with its on unique advantages and disadvantages. The "fully conditional specification" (FCS) approach, developed by van Burren and colleagues (van Buuren *et al.* 1999), offers the greatest flexibility in creating multivariate imputation models because it allows for specialized methods that are impractical under the other approaches. The FCS algorithm imputes the data on a variable-by-variable basis by specifying an imputation model for each variable, which is then used in the imputation of the next variable (i.e., "chained equations"). This process repeats—using a Gibbs sampling procedure to impute missing values—until convergence (van Buuren *et al.* 2006). FCS allows the analyst to preserve unique features of the data such as bounds, skip patterns, interactions, bracketed responses, and appropriate constraints between different variables in order to avoid logical inconsistencies in the imputed data (Raghunathan *et al.* 2001).[446] FCS can also be modified to incorporate design features, such as stratification and clustering (Reiter, Raghunathan, and Kinney 2006; Yucel, Schenker, and Raghunathan 2006).[447] Although the statistical properties of FCS have been difficult to establish, simulation work has shown that FCS performs well in a variety of applications (see Cranmer 2007; Raghunathan *et al.* 2001; van Buuren *et al.* 2006).

It must be emphasized that imputation approaches are only appropriate when the missing values actually exist, but are unobserved in the data. Also, whenever possible, it

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[446] Since FCS permits separate models for continuous and categorical variables, it avoids the potential bias introduced by algorithms using a multivariate normal distribution that impute categorical variables as if they were continuous and require the analyst to "round" the value to the nearest discrete value in the dataset (see Horton, Lipsitz, and Parzen 2003; van Buuren 2007). As Schafer (1997, p. 148) explains, rounding is appropriate when the missing data take on many values and the marginal distribution is approximately unimodal and symmetric.

[447] Ignoring the complex design features of the data during the imputation stage will result in invalid design-based inferences (Raghunathan *et al.* 2001, p. 93). Reiter and colleagues (2006) show that the inclusion of indicator variables in the FCS framework for cluster effects greatly reduces the bias relative to disregarding the hierarchical structure of the data. The indicator variable approach is even superior to hierarchical imputation models when data are missing from several continuous and discrete variables or when cluster effects follow a non-normal distribution.

is preferable to use external sources to discover the "true" values of the missing data rather than to estimate these values from the data. While it is reasonable (and advisable) to use external sources to find the true values for missing data for cases that enter the capital charging-and-sentencing process, it is much more difficult to find information about these true values for death-eligible cases that were not noticed for the death penalty or did not result in a homicide conviction because significantly less information is known about these cases. Recall that the GADOC contains information on every case resulting in a murder conviction, so these data can be used to supplement SHR data; however, GADOC data are usually limited to offender and crime characteristics and contain very little information about the homicide victim(s). Fortunately, much of the missing data in the SHR is with respect to victim characteristics, so GADOC data can be most useful in supplementing these data. Special care was taken to cross-validate the data using multiple sources, but it was impossible to uncover all the information about every single case. As noted earlier, MPD opened a file on every homicide case noticed for the death penalty with an incident date between 1993 and 2000 and attempted to collect all necessary information about the case, therefore the data are reliable for cases that actually *entered* the capital charging-and-sentencing process. Another important advantage of the data is that the outcome variables (e.g., death noticing decisions, sentencing decisions, *et cetera*) are fully observed, so there is no concern over whether they are imputed efficiently (Little 1992).

*Selection Bias*. As noted earlier in the chapter, sample selection bias in criminal sentencing research may arise when some component of the decision to convict or incarcerate is relevant to the sentence determining process (Mears 1998a; Wooldredge

1998). In other words, when some determinants of the incarceration decision are also influencing the length of the sentence received. When the relationship between the incarceration decision and sentence length is purely through observed variables, one may simply account for this relationship by including the appropriate variables in the sentencing model. However, if unobservable factors affecting the incarceration decision are correlated with the unobservable factors affecting the sentencing decision, the error term for the sample used in the sentencing-decision model does not have a conditional mean of zero and is correlated with sentencing length. When these unmeasured factors responsible for selection into a subsample are correlated with the observable factors, a crucial assumption of conventional regression is violated and failure to include an estimate of the unobservable factors will lead to incorrect inference regarding the impact of the observed variables on sentencing length. Stated more technically, the regression functions will confound the substantive parameters with the parameters of the function determining the probability of inclusion into the subsample and lead to bias parameter estimates (Berk 1983; Winship and Mare 1992). According to Sorensen and Wallace (1999):

> Sample selection bias is most likely to result when the pool of cases is limited to those in which a decision was made overtly during the later stages of case processing, such as the sentencing decision in a pool of convicted first-degree murderers who have advanced to the penalty stage of a capital trial. When samples are limited in this manner, the effects of racial discrimination occurring at earlier decision points are not taken into consideration. Cases involving particular racial combinations of offenders and/or victims may be systematically included or excluded from the pool of convicted capital murder cases because of bias in the pretrial stages of case processing. At the same time, the sentencing decision may be found to lack racial bias, thus giving the appearance that the system of capital punishment in the jurisdiction studied is not influenced by race.

> If murders involving particular racial combinations (e.g., blacks who kill whites) are regularly selected for prosecution as capital murder, even in the least aggravated cases, then during the sentencing phase, when legally relevant case criteria are taken into consideration, one should expect a lower death-sentencing rate among those cases than among cases involving other offender/victim racial combinations. A finding of no difference in the rate of death sentencing among racial combinations actually could indicate racial bias, masked by researchers' failure to consider decisions made earlier in the process.
>
> Studies that include a broader pool of cases and earlier decision-making stages are not immune from sample selection bias if the decisions are analyzed consecutively. Most studies that have analyzed both pretrial and trial decisions have not found evidence of racial bias in sentencing [*citations omitted*]. To determine whether sentencing decisions are influenced indirectly by earlier decisions, one must factor into subsequent models the effects of race on pretrial decision making [*citations omitted*]" (pp. 563–64).

Several sentencing studies of non-capital cases have revealed that failing to correct for sample selection bias tends to underestimate the impact of race/ethnicity on the sentencing outcomes (Albonetti 1997; Kempf-Leonard and Sample 2001; Peterson and Hagan 1984). Unfortunately, the vast majority of death penalty studies (e.g., Baldus *et al.* 1990; Gross and Mauro 1989) fail to correct for sample selection bias (for a notable exception, see Unah and Boger 2002). Although many of these studies report that race/ethnicity continues to exert an effect in the later stages of the process, their estimates of this impact are likely to be grossly underestimated. As Sorensen and Wallace noted above, selection bias models are often necessary to capture the true impact of race/ethnicity (and other extra-legal factors) in the later stages of the death penalty process.[448] Failing to properly account for selection bias may be particularly problematic

[448] Conviction and "in/out" incarceration decisions occurring at earlier stages are not of particular concern in death penalty cases because the vast majority of homicide cases, once noticed for the death penalty, result in a conviction *and* most serious felony convictions in Georgia have mandatory minimum sentences attached to them. The few cases that were noticed for death, but did not result in a murder conviction may, in fact, differ from the other cases in unobserved ways, but these cases are so rare that they are unlikely to

because, as Paternoster and colleague's (2004) Maryland study suggests, disparities occurring at the early stages of the process are not likely to be corrected through the advancing stages.

In series of influential papers, Heckman (1974, 1976, 1979) identified the selection problem as omitted variable bias (i.e., specification error)[449] and advocated modeling the probability of selection with a probit equation (i.e., a selection equation) and using the predicted values as an additional regressor in the substantive equation.[450] Heckman's work was primarily concerned with continuous outcomes in the substantive equation (e.g., wages from work), but his work has been expanded to include dichotomous and polytomous logit models for the selection equation (see Dubin and Rivers 1990) and substantive models with discrete outcomes (Miranda and Rabe-Hesketh 2006; Sartori 2003; van de Ven and van Praag 1981). The primary restriction of Heckman's approach, however, is that there needs to be at least one predictor variable in the selection equation that is not correlated with the outcome variable in the substantive equation (after controlling for the other covariates) for the model to be identified (sometimes called the "exclusion restriction") (Bifulco 2002; Bushway, Johnson, and Slocum 2007; Puhani 2000). Many analysts have remarked that it is extremely difficult to find a variable that influences selection in a subsample but does not influence the

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have a significant impact on parameter estimates. As a result, it appears most appropriate to adjust for potential selection bias at the death penalty charging and plea bargaining phases.

[449] Omitted variable bias encompasses both selection bias and endogeneity bias because each of these forms of bias causes inferential problems by inducing a correlation between the explanatory variables and the disturbance term (Foster 1997; Greene 2000, Chapter 11; Heckman 1978; King and Zeng 2006; Miranda and Rabe-Hesketh 2006).

[450] In subsequent work, Heckman (1980) suggested performing a statistical test for the presence of selection bias. Essentially this test allows the research to examine whether the error terms in the selection and substantive equations are correlated in the overall population. As Achen (1986) notes, however, even if the error terms are not correlated in the overall population (as indicated by significant tests), they are correlated in the sample and can bias parameter estimates (see also Stolzenberg and Relles 1997, pp. 503–504).

outcome of interest and, if fact, many theoretical models suggest that no such variable exists (Achen 1986; Vella 1998). When an identical set of explanatory variables is included in both the selection and substantive equations, the model is identified solely from the functional form of the hazard rate (i.e., selectivity index) and inferences are extremely sensitive to the choice of the nonlinear function used and the choice of predictor variables in the selection model (Clogg and Shihadeh 1994, pp. 173–76).[451] In light of this potential limitation, both the Heckman "two-step" model and an alternative sample selection bias correction approach based on a multivariate probit specification are employed in this study (see discussions in Sections 8.3.5 and 8.4).

## 7.3 SUMMARY

In conclusion, seven different data sources were consulted to gather case- and county-level information on Georgia's capital charging-and-sentencing process from 1993 through 2000. These data include a wide range of information with respect to the defendant, the victim(s), the crime, other important legal officials (e.g., judges and prosecutors), and the larger social environment in which these cases occurred. The greatest strength of these data is that multiple official sources, as well as information directly from capital defense attorneys, were used for cross-validation, improving both the richness and reliability of the data. As noted in Chapter Six, many of these factors are indicators of Donald Black's five dimensions of social space (i.e., vertical, horizontal, symbolic, corporate, and normative) and therefore are used to explicitly test several of his

[451] The use of Heckman's selection bias correction in sentencing research is not with critics. Some scholars have strongly advocated Heckman's approach (see Peterson and Hagan 1984), while others have cautioned that the approach can possibly result in more harm than good when inclusion of the hazard rate leads to high multicollinearity among predictors in the model (Bushway *et al.* 2007; Stolzenberg and Relles 1997).

core hypotheses concerning the behavior of law. Drawing from previous research, primary attention is given to three decision points in the death penalty process: (1) initial death notice; (2) guilty plea and negotiated sentence; and (3) conviction at trial and sentence at penalty phase.

Following the work of Baldus and colleagues (1990) and others (see Paternoster *et al.* 2004; Unah and Boger 2001), multiple regression techniques are used to simultaneously explore the impact of dozens of legal and extra-legal factors on the death penalty process. As discussed earlier, regression analysis is preferred over alternative approaches (i.e., propensity scores, CART, and random forests) because these alternative approaches are likely to mask racial/ethnic effects that are detectable using multiple regression (Baldus *et al.* 1998). Moreover, these alternative approaches do not allow the analyst to explicitly test theoretical derived hypotheses and are very difficult to interpret when a large number of explanatory variables are considered (see Berk *et al.* 2005).

This study also offers three significant methodological improvements over previous death penalty studies. First, it explicitly accounts for the hierarchical nature of death penalty data and attempts to explain the contextual variation in death penalty decision-making, net of case-level factors, using multilevel analytical models (cf. Unah and Boger 2002). Second, the problem of missing data is addressed using multiple imputation approaches developed by Rubin (1987) and others (see van Buuren *et al.* 1999). Recall that traditional casewise deletion approaches to handling missing data may have serious consequences when the missing data are not a mere random sample of the population of cases. Multiple imputation provides a statistically appropriate way to fill in "guesses" about missing data and preserve valuable observed data from cases that would

otherwise be excluded from the analysis. Finally, this study uses well-established methods to explicitly analyze non-randomly selected samples. Selection bias correction models are often necessary to capture the impact of racial/ethnic bias in the later stages of the death penalty process (Sorensen and Wallace 1999). To date, no single death penalty study has simultaneously considered these three important issues. The following chapter describes the specific models analyzed in this study and presents their results.

# Chapter 8: Results

## 8.1 Preliminary Matters

### *8.1.1 Multiple Imputation*

Slightly less than three-fifths (58.3 percent) of the data contain a missing value on at least one variable. As discussed in the previous chapter, plausible guess of missing values were imputed via the FCS algorithm (see Section 7.2.3). All case-level variables were included in the imputation equation (for a description of the variables, see Appendix B and Table 3). To properly take into account the nested structure of the data, indicator variables were included for each cluster (minus one) (Reiter *et al.* 2006). An initial imputation model was specified with 100 cycles of sequential regression chains and the imputations made at each cycle for every variable was recorded (see Royston 2004). Imputed values were created based on a bootstrap estimation of the parameter estimates, rather than from the posterior distribution. The bootstrap method is more robust because it does not assume the distribution of the parameter estimate is multivariate normal. Following completion of the final cycle, a "time-series" of the imputations were plotted in order to determine when the imputations stabilized. Examination of these graphs revealed that imputations of variables generally stabilized between 30 and 50 cycles, depending on the distribution of the particular variable and the proportion of missingness. Ten complete datasets were created and quantities of interest were combined using the methods discussed in the previous chapter (see Section 7.2.3).[452]

[452] The *HLM* software automates "Rubin's rules" for combining point estimates and standard errors, and making statistical inferences (Raudenbush *et al.* 2004, pp. 183–84). Unfortunately, *HLM* has very limited abilities to conduct different tests. Those tests that could not be performed in *HLM* were conducted in *Stata*

### *8.1.2 Statistical Inference and Parameter Interpretation*

*Statistical Inference*. Recall that the data consist of the entire population of homicide cases, and not a mere sample. Statistical inference based on sample statistics, in the conventional sense, does not apply when the analysis encompasses the entire population; rather, attention is given to the direction and magnitude of the effects (Berk 2003). Statistical inference based on the models estimated on these data fall somewhere in between sample-based and population-based methods because of the missing data issue discussed earlier. The multiple imputation approach employed permits use of the entire population of cases, but missing values were filled-in based on the conditional distribution of the variables. As a result, while all cases in the population are fully observed, not all cases have fully observed values and some of those values for certain variables had to be imputed. Treating the data as a subsample would likely present too conservative of a test, while treating the data as fully observed for the population may be problematic as well. In the discussion that follows, the parameter estimates are interpreted as being derived from the entire population because all cases are included and the imputed values are based upon the observed distribution of the variables from the entire population;[453] nonetheless, significant tests (i.e., *p*-values) are also included in the interest of comprehensiveness.[454]

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8.2. *Stata* has several built-in routines for analyzing multiply imputed data, and perhaps more importantly, permits the to write simple programs that automate Rubin's rules to a wider range of applications.

[453] Also recall that all outcome variables in the study (e.g., death notice, plea bargain, death sentence) are fully observed (see Section 7.2.3).

[454] The "population-based" approach is preferable because no out-of-sample inferences are being made. The purpose of the study is to examine the capital charging-and-sentencing system in Georgia in the time period specified, and not to make inferences about non-Georgia death penalty systems or about different time periods. Indeed, capital punishment statutes and practices very considerable across states, so generalizing from one system to another—particularly a system in a different region of the country—is unadvisable.

*Parameter Interpretation*. It is common for analysts to include "standardized" parameter coefficients when presenting results from multiple regression in order to directly compare the effects of variables that have different metrics (Long 1997). These standardized coefficients are typically presented as either fully-standardized or semi-standardized effects. In the fully-standardized context, both the endogenous and exogenous variables are standardized to have a mean of zero and a standard deviation of one. In the semi-standardized context, either the endogenous variable or the exogenous variable(s) are standardized, but not both. Usually the exogenous variables are standardized because the analyst wishes to directly compare those effects. Fully-standardized coefficients have the greatest applicability in the linear regression framework, while semi-standardized coefficients are used when the endogenous variable is discrete (e.g., binary, count, *et cetera*) because the latent variable is, essentially, already "standardized" (see Allison 1999). But standardized coefficients lack intuitive appeal when the exogenous variable(s) of interest is binary because the mean and standard deviation typically fail to provide the analyst with directly useful information.

In the models analyzed in this study, all but five case-level variables are dichotomous, so a "one unit" change in the binary exogenous variable is directly comparable to all other binary exogenous variables. The "continuous" variables are: number of defendants, age of the defendant, number of statutory aggravating circumstances (i.e., special circumstances) charged, number of victims, and age of the victim(s) (see Appendix B). All circuit-level variables are continuous as well (see Table 4). Due to the extremely high correlation between variables that are proxies for the different dimensions of social life, variables were combined in scales corresponding to

each of Black's five social dimensions (see Section 6.3.5). Per capita income, percent of individuals and families living below the poverty line, and median home value variables were combined into a "Vertical Dimension" scale ($\alpha = 0.87$); percent in labor force, percent living in a different home, and percent number been married variables were combined into a "Horizontal Dimension" scale ($\alpha = 0.83$); violent crime rate (UCR index), murder rate, and proportion of state's total murder rate variables were combined into a "Normative Dimension" scale ($\alpha = 0.97$); and percent of high school and college graduates, black-white exposure index, percent foreign born, percent who only speak English, and percent born in Georgia variables were combined into a "Cultural Dimension" scale ($\alpha = 0.93$).[455] All contextual variables were standardized so their effects are directly comparable.

### *8.1.3 Death Eligibility*

As discussed in the previous chapter, the initial challenge in examining the impact of legal and extra-legal factors on the capital charging-and-sentencing process is determining what cases qualify as "death eligible." Some analysts posit that nearly any homicide in Georgia could be deemed eligible for the death penalty because of Georgia's felony murder statute and the "catch-all" statutory aggravating circumstance: "In Georgia...any homicide is potentially a capital offense" (Kuziemko 2006, p. 137, n.15).[456] While this may be theoretically true, as a practical matter, this definition is over-inclusive—it is extremely uncommon for a prosecutor to *solely* charge the "catch all"

[455] For a discussion of the calculation and interpretation of the alpha ($\alpha$) reliability measure, see Cronbach (1951).
[456] Recall that felony-murder rule is a doctrine holding that any death resulting from the commission or attempted commission of a felony is murder (see Ga. Code Ann. § 16-5-1(c)).

special circumstance without charging other, more specific, statutory aggravators. Nonetheless, this overly broad classification is employed as one type of death-eligibility measure: every homicide case resulting in a murder conviction—proxy for strength of evidence—was deemed as eligible for capital punishment.

A different approach, which is becoming more common in the empirical literature on the death penalty, defines death eligible defendants as those who qualify for the death penalty under either the "B1" or "B2" statutory aggravating circumstances (see note 412). Recall that, under B1, the defendant is eligible for the death penalty when "[t]he offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony."[457] According to the B2 statutory aggravating circumstance, a defendant is eligible for the death penalty when "[t]he offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree" (see Section 5.2.1). Defendants who were convicted of contemporaneously committing these crimes were categorized as death eligible.[458] Defendants convicted of murdering multiple victims were also categorized as death eligible because multiple victim homicides satisfy the requirements of the B2 statutory aggravating

[457] Also recall that, under the Georgia statute, capital felonies are defined as murder, rape, armed robbery, or kidnapping (see Chapter Five)

[458] The major limitation of this measure is that the Georgia Department of Corrections does not technically distinguish between felonies committed during the actual commission of the murder and felonies that the defendant was convicted of during the same trial as the murder. To assess the plausibility of the "contemporaneous felony" assumption, I randomly selected several cases from the Department of Corrections website that lists the separate offenses (if a multiple offense case) by the incident date. In the vast majority of these cases, the murder and other felony were committed on the same day. This suggests that, for most cases, the B2 measure is valid.

circumstance.[459] Admittedly, these two factors are under-inclusive and ignore a host of other factors listed in the statute. Unfortunately, the SHR data only provide data on these two factors. It is worth noting, however, that prior research has identified these two factors as "the most commonly used factors in death sentence cases, and thus account[ing] for a high proportion of death eligible cases" (Pierce and Radelet 2002, p. 66).

Twenty-nine percent of the cases in the overall population of murder and manslaughter convictions in Georgia from 1993 through 2000 qualify as "death eligible" according to the B1 or B2 categorization. This statistic is consistent with the other studies examining the proportion of death eligible homicides. For example, Baldus *et al.* (1986b, p. 152) suggest that between 10 and 25 percent of murders and non-negligent manslaughters are death eligible. Similarly, Paternoster and Brame (2003) reported that 22 percent of homicides in Maryland between 1978 and 1999 were death eligible.

Since both approaches have their unique advantages and disadvantages, I analyze models predicting death-noticing decisions using both definitions of death eligibility (see Tables 5, 6 and 7 for summary statistics of the subsamples).

## 8.2 Model Specifications

As explained in Chapter Seven, the hypotheses presented in Chapter Six are examined through a series of multilevel models. In particular, a set of random-intercept and random-slope logistic regression models (when applicable) are estimated, each

[459] To be sure, the multiple victim measure is imperfect because it is possible that a defendant murdered multiple victims on different days, or even possibly on the same day but in unrelated situations. The vast majority of cases, however, are single victim (87.3 percent), so this measure, in of itself, does not influence the categorization of most defendants. Perhaps more importantly, the B1 and B2 criteria are not mutually exclusive—in fact, they share considerable overlap. It is possible, even likely, then, that a defendant's categorization as death eligible will be valid on one or more of these measures.

testing specific predictions derived from Black's theory of law and applied to the capital charging-and-sentencing context. The random-intercept logistic regression model takes the following form:

$$P(Y_{ijt}=1|\mathbf{x}_{ijt}, \mathbf{w}_j, \gamma_t, \zeta_j) = F(\beta_{0j} + \beta_1 X_{1ijt} + \beta_2 W_{2j} + ... + \beta_q X_{qijt} + \beta_q W_{qj} + \gamma_t + \zeta_{0j}), \quad [1]$$

where $F$ is the cumulative logistic distribution,[460] $i$ indexes the case, $j$ indexes the judicial circuit, and $t$ indexes the year. This model makes the following assumptions: (a) conditional on $\mathbf{x}_{ijt}$ and $\mathbf{w}_j$, $Y_{ijt}$ is an independent Bernoulli random variable with probability given by [1]; (b) $P(Y_{ijt} = 1)$ depends on $\mathbf{x}_{ijt}$ and $\mathbf{w}_j$ through the logistic function; (c) $P(Y_{ijt} = 1)$ is governed by a vector $\boldsymbol{\beta}$ of $q$ common structural parameters, $T$ – 1 incident-year dummies, and $\zeta_{0j}$ (*zeta*) (Raudenbush and Bryk 2002, pp. 457–58). *Zeta*, the deviation of the cluster-specific intercept from the mean, represents the combined effect of all omitted circuit-specific covariates that influence $P(Y_{ijt} = 1)$, where $\zeta_j \sim N(0, \psi)$. The total *conditional* variance of $Y_{ijt}$ is $\text{Var}(\zeta_{0j} + \varepsilon_{ijt}) = \psi + \theta$, where $\psi$ (*psi*) is the between-cluster variance and $\theta$ (*theta*) is the within-cluster variance.[461] The intraclass correlation, $\rho$ (*rho*), represents dependence among the dichotomous responses in the same cluster, given $\mathbf{x}_{ij}$ and $\mathbf{w}_{ij}$, and is analogous to the proportion of total residual variance that is due to the between-cluster (i.e., between-circuit) residual variance: $\rho = \psi/(\psi + \theta)$.

In all of the analyses employed, **x** and **w** are, respectively, vectors of case and judicial circuit characteristics. This model specification, often referred to the *reduced*-or

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[460] The cumulative logistic function is defined as: $F(z) = \exp(z)\times[1+\exp(z)]^{-1}$ (Skrondal and Rabe-Hesketh 2004, p. 23).

[461] The total *unconditional* variance of $Y_{ijt}$ is equal to: $\text{Var}(\beta + \zeta_j + \varepsilon_{ij})$ (Rabe-Hesketh and Skrondal 2005, p. 7). Since logit model assumes $\theta = \pi^2/3$ (Skrondal and Rabe-Hesketh 2004, p. 60), $\varepsilon_{ijt}$ is typically excluded when writing out the equation for the model, as in [1].

*mixed-effects form* (Luke 2004), differs from the two-stage formulation popularized by Raudenbush and Bryk (2002), but yields identical results (Skrondal and Rabe-Hesketh 2004, p. 50).[462] The random-coefficient model relaxes the assumption that the cluster-specific intercept is uncorrelated with the regressors and permits slope estimates to vary across clustered units (e.g., judicial circuits). Equation [1] is extended to include a random intercept for the specified $\mathbf{x}_{ij}$ regressors:

$$= F(\beta_{0j} + \beta_1 X_{1ijt} + \beta_2 W_{2j} + ... + \beta_q X_{qijt} + \beta_q W_{qj} + \gamma_t + \zeta_{0j} + \zeta_{qj} X_{qijt}). \quad [2]$$

Equation [2] can be extended to include cluster-level predictors of the randomly varying slope(s):

$$= F(\beta_{0j} + \beta_1 X_{1ijt} + \beta_2 W_{2j} + ... + \beta_q X_{qijt} + \beta_q W_{qj} + \gamma_t + \zeta_{0j} + \zeta_{qj} X_{qijt} + \beta_q X_{qijt} W_{qj}). \quad [3]$$

The inclusion of a cluster-level predictor(s) of the varying slope estimate is commonly referred to as a "cross-level interaction" (Rabe-Hesketh and Skrondal 2005, p. 88; Raudenbush and Bryk 2002, p. 159).[463] The intra-class correlation, ρ, for randomly varying slopes can also be computed (Raudenbush and Bryk 2002, p. 78). In contrast to the random-intercept model, however, the random-slope model induces heteroscedastic responses since the conditional variance depends on the value of the $X_{ijt}$, as well as the intraclass correlation (Skrondal and Rabe-Hesketh 2004, p. 54):

$$= F[(\beta_{0j} + \zeta_{0j}) + (\beta_q + \zeta_{qj}) X_{qijt} + \gamma_t). \quad [4]$$

Now $\zeta_{0j}$ is the residual deviation of the level-1 intercept, $\beta_{0j}$, from the population intercept after the level-1 intercept has been predicted from the level-2 predictor; therefore $\zeta_{0j}$ represents the part of the deviation between the cluster-intercept and overall

[462] The *HLM* software requires the two-stage formulation, whereas *Stata* permits both types of specifications (via the *GLLAMM* feature) (Rabe-Hesketh and Skrondal 2005, p. 88).

[463] Vector notation for the random coefficient model is: $y_{ijt} = \mathbf{x'}_{ijt}\boldsymbol{\beta} + \mathbf{z'}_{ijt}\boldsymbol{\zeta}_j + \varepsilon_{ijt}$, where $\mathbf{x}_{qijt}$ denotes covariates with fixed coefficients and $\mathbf{z}_{qijt}$ covariates with random coefficients (Skrondal and Rabe-Hesketh 2004, p. 55).

intercept that cannot be predicted from the $W$ (see Cohen *et al.* 2003, pp. 554–55). The random intercept variance and the correlation between the random intercept and slope are sensitive to the location of $X_{ijt}$, and the interpretation of these random components largely depends on the whether a "zero" value for the $X_{qijt}$ (and $W_{qj}$) is meaningful (Raudenbush and Bryk 2002, p. 32). As discussed early, all but five of the case-level covariates are binary, therefore based on the coding conventions adopted in this study, a "zero" value on the variable indicates an absence of that particular characteristic. The five non-binary case-level variables are grand-mean centered and, due to standardization of the contextual variable scales indicating Black's various social dimensions, those variables are centered at their means—consequently, a "zero" value is interpreted as the mean value of those particular variables.

It is worth nothing that level-one (case-level) slope coefficients may also be specified as non-randomly varying—i.e., the variation in the effect of the variable across clusters is solely a function of the $W_{qj}$—the cluster-level predictors. This approach is advisable when, after taking into account the effect of $W_{qj}$, the residual variation in $\beta_{qj}$ is negligible (Raudenbush and Bryk 2002, p. 30).

These multilevel models are used estimate the impact of legal and extra-legal factors on the likelihood of a defendant: (1) being noticed for the death penalty (for both the murder conviction (MC) and death eligible (DE) subsamples; (2) pleading to LWOP after being noticed for the death penalty; and (3) receiving the death sentence at the penalty phase.[464] The result for each hypothesis articulated in Chapter Six is discussed, in turn, below.

[464] The likelihood that a defendant accepts a plea bargain is also analyzed (for both the death eligible and death noticed subsamples. These models are not discussed in detail in the text, but are briefly mentioned

## 8.3 Assessment of Hypotheses

In order to assess the appropriateness of employing the multilevel modeling framework, several null (i.e., intercept-only) models were estimated to determine whether there was significantly between-cluster variation in the outcome measures at the three decision stages (see top panel of Appendix C). These exploratory analyses strongly suggest that there is significant between-cluster variance to justify using mixed-effects models. With respect to prosecutorial discretion in seeking the death penalty, over 60 percent of the residual variation is between-cluster (67.9 percent and 62.9 percent for, respectively, the murder conviction and death eligible subsamples). For death-noticed cases that resulting in a plea bargain, 18.5 percent of the variability is between-cluster (Model 3). Finally, 19.2 percent of the variability on the likelihood of receiving a death sentence for case that advanced to the penalty phase is between-cluster (Model 4).

The models in the bottom panel of Appendix C account for the impact of three of the status dimensions mentioned above: vertical, normative, and horizontal. The correlation between the horizontal dimension and cultural dimension indices was extremely high ($r = .92$), so the cultural dimension was dropped from the analysis. As expected, the models reveal the inclusion of the judicial circuit-level predictors reduces total proportion of between-cluster residual variation (between five and eight percent reduction depending on the model), but significant the between-cluster residual variation remains.

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during the discussion of model specification checks. The results from the plea bargaining models are presented in Appendix D.

The first three hypotheses rely on Black's theory to make predictions about the impact of race/ethnicity, age, and gender on capital charging-and-sentencing decisions. These hypotheses intentionally omit other important legal and extra-legal variables, only including controls for the number, race/ethnicity, age, and gender of defendants and victims the cases. More elaborate models that control for other relevant variables specified in the theory are examined later. Those fully specified models also employ special approaches that adjust for potential bias that may result from non-random selection due to death penalty noticing and plea-bargaining decisions (see also Section 7.2.3).

### *8.3.1 Hypothesis One*

According to Hypothesis One ($H_1$), black-offender/white-victim cases attract the most severe forms of law. Table 8 displays the effects of the racial organization of the case on the three decision points mentioned above. To make the interpretation of racial combination effects as intuitive as possible, cases are organized by their racial structure (i.e., race-of-defendant/race-of-victim) and compared to a reference category. Since the groupings use the same binary metric, both comparisons to the reference (omitted) category and the other groups are possible.[465] The three racial combination slopes estimated are black defendant/white victim (b/w), white defendant/white victim (w/w),

[465] Parameterizing the racial groupings in this manner was done for other practical concerns as well. It is not uncommon for binary regression models to suffer from perfect prediction problems, resulting in numerical instability, when there are a limited number of unique covariate patterns (for a detailed discussion, see StataCorp 2003). Due to the small number of cases that were noticed for the death penalty during the period under investigation (381 cases), the covariate patterns are necessarily limited, particularly when controlling for numerous variables. When confronted with perfect prediction issues, the analyst typically must omit the variable(s) causing perfect prediction or reparameterize. The conventional approach to estimating defender/victim race interactions resulted in perfect prediction, so the current approach was adopted in order to properly estimate the models. These types of issues are not uncommon in death penalty research because of the infrequency in which the death penalty is used (Weiss *et al.* 1999).

and Hispanic defendant/white victim (h/w). The omitted category includes black defendant/black victim (b/b) and white defendant/black victim (w/b); however, because less than two percent of the cases involve a w/b combination, the reference group is essentially b/b.[466] It is also important to note the inferences about the effect of the h/w combination relative to other groups may be questionable because of the small number of Hispanic offenders in the data (less than three percent of offenders in the overall data and less than four percent in the death penalty subsample).

The coefficients presented in these models (logit coefficients or log odds) lack an intuitive interpretation. But these coefficients can be used to calculate the *percent change* in the odds of being noticed for death, receiving an LWOP plea, *et cetera*, with the formula: $100 \times [(exp(\beta \times \delta) - 1]$; where *exp* is the antilog, $\beta$ is the logit coefficient, and $\delta$ is the value of the variable (Long 1997, p. 22). So, for example, based on this calculation, a b/w combination increased the odds of a case being noticed for death by 260 percent and 144 percent relative to a b/b combination, according to, respectively, Model 1 (MC) and Model 2 (DE).[467] Table 8 reveals that all three racial combinations had a greater likelihood of being charged as a death penalty case relative to the b/b combination. A comparison of slope coefficients for Model 1 reveals that b/w cases were most likely to be noticed for death, followed by h/w, and then w/w. These results are consistent with the prediction of $H_1$: low-status defendant/high-status victim cases attract the most law, followed by high-status defendant/high-status victim cases. The

[466] Again, I was necessary to parameterize this way in order to avoid numerical instability and nonsensical results. As a robustness check, the models were reanalyzed with the w/b category explicitly omitted and the results were nearly identical.
[467] MC: $100 \times (\exp(1.282) - 1) = 260.38$; DE: $100 \times (\exp(.895) - 1) = 144.7$.

coefficients from Model 2 imply a slightly different ordering (i.e., h/w, b/w, and w/w), but the overall implications are the same.

The same cannot be said, however, for other decision points in the capital charging-and-sentencing process. Model 3 suggests that b/w cases are more likely to result in a LWOP plea than b/b cases (84 percent increase in the odds), but h/w and w/w cases are less likely to result in a LWOP plea (32 and 16 percent decrease in the odds, respectively). With respect to Model 4, h/w and w/w cases are much more likely to result in a death sentence (360 and 50 percent increase in the odds, respectively), but there was, essentially, no difference between b/w and b/b cases (only a 5 percent decrease in the odds).

### *8.3.2 Hypothesis Two*

Hypothesis Two ($H_2$) proposes that the relationship between age and the severity of law is curvilinear: cases involving very young and very old victims attract more law, independent of the race/ethnicity and gender. To assess functional form of the relationship, a quadratic term is included in the model. The "simple slope" (i.e., main effect) of victim age is interpreted as the marginal effect of the victim's age on the outcome variable (e.g., the likelihood of being noticed for the death penalty) when the victim's age equals "zero" (Aiken and West 1991, p. 73). As discussed earlier, the victim's age in centered at its mean, so the main effect is the impact of the victim's age when the victim's age is at its mean (which is 27.6 years for the uncentered victim age variable). The slope coefficient for the quadratic term is the change in the marginal effect of victim age for a one unit increase in the victim's age. For Models 1 and 2 in Table 8, the slope of main effect is negative and the slope of quadratic term is positive, meaning

that the negative effect of age on the severity of law decreases (and ultimately changes direction) victim age increases. Model 3 (likelihood of a LWOP plea) suggests that the severity of law increases with the victim's age to a point, and then decreases, while Model 4 shows that the probability of receiving a death penalty decreases much more steeply as the victims get older.

Figure 3 visual depicts the nonlinear effect of victim-age on the severity of law. The graphs in the top panel present effect displays for the two death-notice models (Models 1 and 2) and the bottom panel presents the effect displays for the plea bargaining and death sentence models (respectively, Models 3 and 4). These figures suggest strong support for $H_2$ for Models 1 and 2—cases with extremely young and extremely old victims have the greatest likelihood of being noticed for the death penalty. Models 3, however, does not support the predictions $H_2$ and Model 4 only provides partial support (i.e., cases with extremely young victims have the highest probability of receiving the death sentence at the penalty phase, but cases with older victims have the lowest probability).

Recall that $H_2$ also predicts that very youthful offenders will attract the least amount of law. Figure 4 presents the effect displays with respect to the relationship between defendant's age and severity of law. The main and quadratic effects are interpreted in the same fashion as previously discussed for the age-of-victim effects. The top panel, again, presents graphs for death noticing decisions, whereas the bottom panel presents effect displays for plea bargaining and death sentencing decisions. These figures reveal mixed support for $H_2$: the graphs in the top panel (i.e., likelihood of a death notice) directly contradict $H_2$, whereas the graphs in the bottom panel provide partial support—

youthful offenders attract less law than middle-aged offenders. The graph in the bottom-right quadrant (i.e., likelihood of a death sentence at the penalty phase) reveals that cases involving extremely young *and* extremely old offenders attract the least law. In general, by the time offenders reach their late-30s (at the time of offense, not at trial), they are less likely to be noticed for the death penalty and receive the death sentence than youthful offenders. Only the model predicting pleading to LWOP provides the clearest support for $H_2$: youthful offenders have the lowest probability of pleading to LWOP and older offenders have the highest.

With respect to the interaction between offender and victim age, $H_2$ predicts that cases with older defendants and youthful victims should attract the most law and cases with younger defendants and older victims should attract the least amount of law. The most straightforward to examine this relationship is to calculate the difference between age-of-defendant and age-of-victim for each case and include this difference as a regressor. If $H_2$ is correct, then slope coefficient for this regressor should be positive because very small values (i.e., negative values) reflect a young defendant and a much older victim, whereas very large values indicated an older defendant and a much younger offender. The effect should also be nonlinear, so the slope actually increases as the disparity increases in the direction of older defendant/younger victim. The hypothesized positive and nonlinear relationship is captured with the inclusion of a quadratic term. Figure 5 presents the effect displays for Models 1, 2, 3, and 4. As with the previous nonlinear graphs, the top panel models death noticing decisions and the bottom panel models plea-bargaining and death-sentencing decisions. The two graphs on the top panel and the graph in bottom-right quadrant reveal mixed support for $H_2$: larger

defendant/victim age disparities increase the severity of law, irrespective of the direction of the disparity (i.e., regardless of whether the defendant is much older than the victim or the victim is much older than the defendant). The bottom-left panel directly contradicts $H_2$: the greater the age disparity, the less amount of law the case attracts. Only Model 4 (i.e., likelihood of a death sentence) provides unequivocal support for $H_2$.

### *8.3.3 Hypothesis Three*

Hypothesis Three ($H_3$) argues that male-defendant/female-victim cases will attract the most law and cases with female-defendants and male-victims will attract the least amount of law, holding the race/ethnicity and age of the parties constant. Similar to the models examining the impact of various defendant/victim racial combinations, cases are organized by their "gender structure" to assist in interpretation of gender combination effects. Effects are estimated for male-defendant/female-victim (m/f) and female-defendant/male-victim (f/m), with male-defendant/male-victim (m/m) and female-defendant/female-victim (f/f) serving as the reference category.[468] All four models reveal that m/f cases attract the most law (see Table 8). The percent *increase* in the odds of the outcome variable for Models 1, 2, 3, and 4 are, respectively, 173 percent, 161 percent, 69 percent, and 39 percent. Also consistent with $H_3$, f/m cases attracted the least amount of law, with the percent *decrease* in the odds of the outcome variable for Models 1, 2, 3, and 4 being 29 percent, 7 percent, 12 percent, and 58 percent, respectively.

As previously discussed, the variance components of the random-intercept model can be analyzed in order to determine how much of the total residual variance in the

[468] Approximately three percent of the death eligible sample consisted of f/f cases, so the reference category is, essentially, m/m. As discussed early, it was necessary to parameterize the gender effects in this manner for numerical stability (see note 466).

outcome can be attributed to between-cluster variance—which, in our case represents judicial circuit (i.e., regional) effects. Table 8 reports the between-cluster residual variance (ρ) for all of the models. This residual variance ranges from 63 percent (Model 1) to 12 percent (Model 3), indicating that there is significant between-circuit residual variation, after taking into the race/ethnicity, age, and gender of the defendants and victims.[469] It should be emphasized that $\beta_{0j}$ represents the expected log odds of the outcome variable (e.g., being noticed for death) when the values of all predictor variables are zero (Luke 2004, p. 24). In the models previously estimated, $\beta_{0j}$ is the expected log odds of the outcome for a case with the average number of defendants (1.5), average number of victims (1.2), a black male defendant of average age (approximately 27), and a black male victim of average age (approximately 36). The variance of $\beta_{0j}$, $\psi_j$, is interpreted as the variability in the expected log odds for this type of case across judicial circuits.

### *8.3.4 Hypothesis Four*

Recognizing that race/ethnicity, age, and gender are mere proxies for social status, Hypothesis Four ($H_4$) predicts that other legally illegitimate/legally suspect factors, that are more proximal indicators of social status, will have an appreciable impact on legal decision-making *and* should attenuate the impact of race/ethnicity, age, and gender. As noted in Chapter Six, socioeconomic status and employment status are indicators of vertical status; marital status, number of children, and employment status are indicators of horizontal status; level of education is an indicator of cultural status; and prior drug

[469] Raudenbush and Bryk (2002) note that a ρ higher than .1 indicates that multilevel modeling techniques may be appropriate.

use is an indicator of normative status. An ideal test of Black's theory would include variables for both the defendant and the victim, but current data limitations preclude such a test. Nonetheless, these measures, on balance, should influence legal decision-making at the various stages analyzed in this study.

Table 9 present the effects of these variables on death noticing, plea bargaining, and death sentencing. All of the models control for the effects previously analyzed for $H_1$, $H_2$, and $H_3$. These results provide mixed support for Black's theory. In fact, only the effect of defendant's prior drug (normative status) and defendant being a stranger (horizontal status) is consistent with $H_4$ across all four models. For example, consistent with the theory, being a high school graduate (cultural status) and employed (vertical status/horizontal status) decrease the likelihood that defendant receives an LWOP plea or is sentenced to death (Models 3 & 4), *but* increase the likelihood that a defendant is noticed for the death penalty (see Models 1 & 2). A defendant's socioeconomic status (vertical status) increases the likelihood of being noticed for the death penalty and is sentenced to death (inconsistent with $H_4$), but decreases the likelihood of pleading to LWOP (versus LS) (consistent with $H_4$). The effect of being married (horizontal status) is consistent $H_4$ for all models except Model 3, while the effect of having children is contrary to the prediction of $H_4$, except for Model 3.

A possible explanation for these mixed results is that the models do not adequately take into account the social status of the victims. The previous models analyzing $H_1$, $H_2$, and $H_3$ were able to examine the *relative* characteristics of the parties involved—i.e., racial/ethnic, age, and gender *differences*. Black's theory places a premium on the *relative status* positions of the parties in a conflict, so the unsupportive

results mentioned above may result more from data limitations than with the actual theory itself; nevertheless, several of the predictions derived from Black's theory of law are supported by the data.

Recall that $H_4$ also posits the models including the more proximal indicators of social status will better predict legal decision-making than models only including racial/ethnic, age, gender variables. Several measures are available for comparing the fit of competing models. Two statistics commonly used to assess model are the Akaike Information Criterion (AIC) and the Bayesian Information Criterion (BIC).[470] The AIC and BIC are defined as:

$$\text{AIC} = -2 \times L_1 + (2 \times k) \quad [6],$$

$$\text{BIC} = -2 \times L_1 + [k \times \log_e(N)] \quad [7],$$

where $L_1$ is the log-likelihood of the fitted model, $k$ is the number of parameters estimated in the model (including the intercept) and $N$ is the number of observations (Akaike 1973; Schwartz 1978a). The AIC favors model complexity, whereas the BIC favors model simplicity (Greene 2000). For the purposes of this study, the AIC statistic is preferred because it is important to take into many predictors in order to have a "well controlled" study (see Baldus *et al.* 1998); nonetheless, both AIC and BIC statistics are reported below the models in Tables 8 and 9. Comparison of the AIC statistics reveal that the three of the four models including the more proximal measures of social status—i.e.,

[470] The likelihood ratio test ($LR$), commonly used to compare nested models, determines whether inclusion (or exclusion) of covariates improves the fit of the model: $LR = -2 \times (L_1 - L_0)$; where $L_0$ and $L_1$ are the log-likelihood values association with the full and constrained models, respectively. The $LR$ is approximately $\chi^2$ distributed with $d_0 - d_1$ degrees of freedom, where $d_0$ and $d_1$ are the model degrees of freedom associated with the full and constrained models, respectively (Gujarati 1988, p. 281). A *constrained* model is a model in which one or more estimated parameters is fixed to zero (i.e., excluded from the model). The constrained model, then, is the "simpler" model in that in includes less information than the unconstrained model.

socioeconomic status, marital status, *et cetera*—fit the data better than models without those variables. Model 3 is the exception, with the AIC favoring the model in Table 8.

An examination of *rho* (ρ) also reveals that, even after taking into account several additional measures of social status, there remains significant between-cluster variation—ranging from 63 percent (Model 1) to 18 percent (Model 3).[471] As discussed earlier, $\beta_{0j}$ must be interpreted as the expected log odds of the outcome for a case with the average number of defendants, average number of victims, a black male defendant of average age who did not graduate from high school, who was unemployed at the time of the offender, who is of lower socioeconomic status, has no children, does not have a history of drug abuse, and a black male victim of average age who knew the defendant.

### *8.3.5 Hypothesis Five*

According to Hypothesis Five ($H_5$), the legal jurisdiction where a case occurs influences legal decision-making in the capital charging-and-sentencing process, net of extra-legal case-level factors. The between-cluster residual variation, *rho* (ρ), discussed earlier clearly indicates that a substantial portion of the variation in legal outcomes are attributable to judicial circuit-level influences (between 63 and 12 percent of the residual variance, depending on the model analyzed) (see Tables 8 and 9). $H_5$ also predicts a jurisdiction's structural characteristics will influence the legal outcomes of cases involving similarly-situated defendants (see p. 293)—i.e., a judicial circuit's vertical, normative, horizontal, normative, and cultural status will exert influence on the administration of capital punishment, net of case-level characteristics. As discussed

[471] The value of *rho* (ρ) slightly increased for Model 3 (plea bargaining), suggesting that the between-cluster residual variance has increased with the addition of the more proximal social status variables in the model. This is not uncommon with multilevel models, and the increase suggests that one or more of the predictors included in the model has a differential effect across judicial circuits (i.e., causal heterogeneity).

earlier, the structural characteristics of the judicial circuits that were proxies for the various social dimensions were highly correlated, so the variables were combined into scales corresponding to the various dimensions of social space (see Section 8.1.2). The scales for the horizontal and cultural dimensions were highly (negatively) correlated ($r$ = .92), so the cultural dimension variable was excluded from the estimated models.

Table 10 presents the results from the models estimating the impact of the structural factors on capital charging-and-sentencing decisions. A jurisdiction's vertical status has a negative impact on the likelihood that a case is noticed for the death penalty (see Models 1 and 2) (contrary to $H_5$), but a positive impact on the likelihood of pleading to LWOP and receiving a death sentence (consistent with $H_5$). According to Black, law is stronger where other social control is weaker, so the higher the jurisdiction's violent crime rate, the more law a case should attract net of case-level characteristics. The results from Table $H_5$, however, suggest the opposite: higher violent crime rates decrease the severity of law in three of the four models—only Model 3 (plea bargaining) is consistent with $H_5$. Also recall that $H_5$ predicts the impact of a jurisdiction's horizontal status on the administration of capital punishment is curvilinear—increasing to a certain threshold and then decreasing thereafter. As stated before, to capture the nonlinear relationship, a higher-order polynomial (quadratic) is included in the models. The results in Table 10 provide support for this assertion: the slope coefficient of the quadratic term is negative across all four models, indicating that the negative effect horizontal status on severity law becomes "stronger" as horizontal status increases. Figure 6 presents the effect displays for the nonlinear relationship. These graphs reveal strong support for $H_5$: horizontal status increased the severity of law that a case attracts to a certain point, and

decreases thereafter. Jurisdictions that are more integrated, intimate, and interdependent attract the least amount of law, net of case-level extra-legal case-level characteristics.

Surprisingly, the inclusion of these judicial circuit-level variables fails to appreciably reduce the residual between-clustered variation. Moreover, a comparison of the contextual effects models to the previous models that did not include the contextual variables fail to substantial improve model fit according to AIC and BIC statistics. Granted, the AIC for the Model 4 (probability of receiving a death sentence) is slightly smaller than the similar model that does not include the circuit-level variables, but the improvement in model fit is minimal.

*Discussion*. Table 10, presenting results from the most complete specification and including all the case-level extra-legal and circuit-level predictors, provides mixed support for Black's theory of law. In fact, with a few exceptions, there is very little difference in model fit between specifications that include more control variables and those that do not. Important differences pertain to the effects of the racial structure of the case. After including additional covariates for the extra-legal variables and jurisdictional social structure (see $H_4$ and $H_5$), Black's theory is supported for all combinations except the b/w effect on death sentencing (Model 4). As noted earlier, these mixed findings may result from the fact that the victims' social status is not adequately taken into account in the analyses.

It must be emphasized that the above models likely suffer from misspecification because these models intentionally omit relevant legal variables. As noted earlier, the exclusion of these variables was done in order to determine the impact and predictive ability of all extra-legal variables. Since Black's theory also explains the *content* of legal

rules, controlling for the legal variables would likely result in an attenuation of the effect of social geometry of the case because most legal rules, themselves, reflect the social organization of a case. These variables are included in the models presented below and diagnostic checks are performed to determine whether the inclusion of those variables distort the estimates of the extra-legal predictors (see Section 8.4).

*Selection Bias*. Another type of misspecification results from the fact that the plea-sentencing and trial-sentencing models analyze subsamples that are likely to result from two types of non-random selection. The first type of non-random selection occurs when a prosecutor decides to seek the death penalty against a defendant. The models presented earlier that analyze death penalty notice decisions strongly suggest that extra-legal factors are predictive of these decisions. The potential problems that arise from this type of non-random selection were discussed in Section 7.2.3. Another form of non-random selection likely happens when a case advances to trial rather result in a plea bargain. Obviously a plea-bargain requires a "meeting of the minds" between the defendant and the prosecutor—one party must offer and the other party must accept (Baker and Mezitti 2001). Appendix D presents results from models predicting plea bargaining (see Models 2 and 3). Model 2 and Model 3 predict the likelihood of plea bargaining in, respectively, the "death eligible" and death noticed subsamples. These results suggest that extra-legal factors occurring at both the case- and circuit-level play an important role in reaching plea agreements. Moreover, the proportion of residual variation that is between-cluster is fairly large (.39 for Model 2 and .35 for Model 3).

As already explained (see Section 7.2.3), if unobservable factors influencing the decision to notice a case for death or a plea agreement are *also* relevant to the actual

sentencing decision, model misspecification will result and parameter estimates of the sentencing decision will be biased because they confound the substantive parameters with the parameters of the function determining the probability of inclusion into the subsample. In an attempt to correct for this possible bias in the plea-sentencing model (i.e., LWOP versus straight life plea), the joint probability of being noticed for the death penalty and entering a plea agreement was estimated via a bivariate probit and included as a regression in the multilevel analysis. A similar procedure was conducted for the trail-sentencing model (death sentence versus non-death sentence), in that the joint probability of being noticed for the death penalty and going to trial was estimated and included as a regressor in the multilevel analysis (see Johnson 2006). The death noticing and plea-bargaining models (i.e., the selection models) include all of the covariates in the sentencing models (i.e., substantive model), save the number of statutory aggravating circumstances sought by the prosecutor.[472] Inclusion of these probabilities estimated from the selection equation, in theory, should "absorb" the effect on any unobserved variables that are correlated with the outcome of interest and the other variables in the model.

It should be emphasized that the biased-corrected models are estimated only for the fully specified models including all case- and circuit-level extra-legal factors and legal variables. While it is possible to re-estimate the partial models ($H_1 - H_5$) with the sample-selection correction, the results from these models would be misleading because those models do not include the full set of covariates that appear in the death noticing and plea-bargaining models. The exclusion of these variables in the partial models alters

[472] The number of statutory aggravators could not be included in the selection models because those variables are only observed for the cases actually noticed for death.

what the error term for each equation represents, and as a result, the multivariate probit is not properly adjusting for the shared unobservable characteristics relegated to the error terms (see, generally, Bollen 1989).

The estimation of the probability of selection in the subsample and inclusion of that probability in the sentencing models, generally referred to as the "two-step" approach, has been used to examine sentencing decisions in the multilevel context (Johnson 2006), but this procedure may be particularly problematic for the models analyzed in this study (see Bhattacharya, Goldman, and McCaffrey 2006). The procedure outlined above is employed when analyzing Hypotheses Six and Seven, and the robustness of these results is examined in Section 8.4.

### *8.3.6 Hypothesis Six*

Legal variables are included in the models presented in Table 11. In particular, these models control for the presence of contemporaneous felonies, prior felony conviction, prior conviction for a violent felony, and for Models 3 and 4, the number of statutory aggravating circumstances charged by the prosecutor. It is also likely that *at least* two variables included in all of the partial models estimates—the number of defendants and victims—can also be considered legally relevant. The direction of the impact of number of victims is straightforward: cases with more victims should attract more law. The effect of the number of defendants, however, may be more dubious. One the one hand, a defendant and codefendant who *work with each other* should have more organizational status (capacity for collective action), and thereby attract less law, all else constant. On the other hand, defendants and codefendants who turn against one another (i.e., one or more of the defendants cooperate with the government) are likely to attract

more law. It is also likely that multiple defendant cases may be particularly aggravated (see note 393). Without more information about the interaction dynamics between codefendants in a particular case, it is impossible to accurately predict the direction of the effect.[473]

As the results in Table 11 reveal, the legal variables in the models sometimes have rather counterintuitive effects. Defendants with contemporaneous felony charges are *less* likely to be noticed for the death penalty (see Models 1 and 2), but more likely to plea to LWOP and be sentenced to death (Models 3 and 4). Defendants with prior felonies are *less* likely to be noticed for the death penalty, plea to LWOP, and be sentenced to death. Having a prior violent felony increases a defendant's likelihood of being noticed for the death penalty (Models 1 and 2) and pleading to LWOP (Model 3), but decreases the likelihood of a defendant being sentenced to death (Model 4).

The effect of the number of statutory aggravating circumstances charged against the defendant for plea-bargaining decisions and death sentencing decisions are presented in Models 3 and 4. In the plea bargaining model (Model 3), the number of statutory aggravators has the expected effect—it increases the likelihood of pleading to LWOP ($\beta$ = 0.594). The same variable has the opposite effect in penalty phase sentencing model, though the effect size is very small ($\beta$ = -0.098). There is a 81 percent *increase* in the odds of receiving an LWOP plea for an additional statutory aggravator. Is important to keep in mind, however, the effect a change in odds is multiplicative, not additive. As a result, there is a 494 percent *increase* in the odds of receiving an LWOP plea is a

[473] The number of defendants in a case has a positive effect on the likelihood of being noticed for the death, but a negative effect on pleading to LWOP and being sentenced to death. This suggests a "collective action" effect because, typically, the later decision-stages (Models 3 and 4) permit the co-defendants to work together, whereas the death noticing decisions usually involve only the prosecutor. As expected, the number of victims has a positive effect on the severity of law across all decision stages.

defendant is charged with three statutory aggravators (100 × (exp(.594 × 3) – 1) = 494.2). With respect to death sentencing decisions, a one unit increase the in number of statutory aggravators results in a nine percent *decrease* in the odds of being sentenced to death, and a three unit increase results in a 25.5 percent decrease.[474]

As hypothesized, the inclusion of the legal variables has very little impact on the effect of race/ethnicity and gender across all four models (compare Tables 10 and 11). The change in the direction of the effect for the b/w racial combination variable results from the sample bias correction included in Model 4 in Table 11. Similarly, the legal variables do not mitigate the impact of several of the other extra-legal variables (e.g., marital, educational, socioeconomic status). Moreover, the inclusion of the legal variables does not improve model fit, as seen by comparing AIC and BIC statistics between the models Tables 10 and 11.

### *8.3.7 Hypothesis Seven*

Table 11 shows the effects the various dimensions of social space on the capital charging-and-sentencing process, net of all case-level legal and extra-legal characteristics. As predicted, a jurisdiction's vertical status is positively related to the severity of law in three of the four models. The effect of a jurisdiction's normative status, again, runs counter to Black's theory (except for Model 3), while a jurisdiction's horizontal status is consistent with the theory (see Figure 6). These models clearly demonstrate that the social dimensions identified by Black's theory are important when studying the legal behavior. Also recall that the variables constituting the vertical, normative, and horizontal dimensions of a jurisdiction were standardized prior to

[474] 100 × (exp(-.098 × 1) – 1) = 9.33; 100 × (exp(-.098 × 3) – 1) = 25.47.

constructing the scale, so the scales have a mean of zero and approximately a standard deviation of one (see Section 8.1.2).[475] Due to this standardization, it is possible to *roughly* compare the coefficients of the structural effects with the coefficients of the legal variables. As Table 11 reveals, when you compare within models, several of the social dimensions have a stronger effect (in absolute value) on legal decision-making than the legal variables.

The proportion of the residual variance that is between-cluster remains rather high across the four models (ranging from .57 [Model 1] to .324 [Model 2]), suggesting that the random-intercept model is appropriate. Similar to the discussion of $H_5$ (see Section 8.3.5), the inclusion of the circuit-level predictors slightly increases the between-cluster residual variance, suggesting that the effect of one or more the legal variables in the model varies across jurisdictions.

### *8.3.8 Hypothesis Eight*

Black's theory proposes that the impact of case-level legal and extra-legal factors on the administration of capital punishment will vary across jurisdictions and the variation in these effects can be explained by the social location (i.e., social status) of the jurisdictions (see Section 6.3.8). Unfortunately, due to the very small sample sizes associated with plea bargaining and death sentencing decisions for death-noticed defendants, it is infeasible to estimate multiple random effects for Models 3 and 4. Instead, attention is focused on the decision to seek the death penalty for defendants who qualify as death-eligible according to the B1 or B2 statutory aggravators. While this is categorization is under-inclusive, as discussed earlier, it appears consistent with the

[475] The standard deviations for the vertical, normative, and horizontal status scales are, respectively, .862, .974, and .91.

proportion of death-eligible case that studies in other jurisdictions have discovered (see 8.1.3).

Black's theory implies numerous cross-level interactions, but this study limits its focus to cross-level interactions with the racial/ethnic and sex/gender combination variables, as well as legally legitimate factors. This decision was made for both practical and substantive concerns. On the practical side, estimating more than one or two random effects when average cluster-size is small often results in numerical instability and the estimation algorithm typically fails to converge, so the random-slopes typically need to be estimated one at a time (Raudenbush and Bryk 2002). Examining a model for each potential cross-level interaction would require estimating 19 different models and potentially 57 cross-level interactions.

On the substantive side, the bulk of the discussion of the impact of extra-legal factors on legal decision-making—particularly as it pertains to proportionality (or lack thereof)—presented in prior chapters has focused on racial/ethnic, gender, and regional differences in the administration of capital punishment. While the exploration of cross-level interactions for other extra-legal (or legally suspect) variables included in the model is important, especially as it pertains to the development and refinement of Black's theory of law, such analyses are not central to the present aims of this study.

Table 12 reports the results from the cross-level interaction models. Again, the intercept in the model represents the expected log odds of being noticed for the death penalty when all covariates are at zero (see discussion in Section 8.3.4). The "main effect" for the b/w racial combination variable represents the marginal effect in a jurisdiction that is average in vertical, normative, and horizontal status, and reveals that

cases with a b/w racial combination increases the odds of being noticed for the death penalty by 102 percent (100 × (exp(.704) – 1) = 102.2). A jurisdiction's normative and horizontal status conditions the "racial" effect in the hypothesized direction: when the level of social control decreases, the odds of a b/w case being noticed for death increases by 206 percent (100 × (exp(.704 + .416) – 1) = 206.5). A jurisdiction's horizontal status attenuates the impact of the b/w combination: it only results in a 29 percent increase in the odds of being noticed for death when a circuit's horizontal status increases (100 × (exp(.704 - .444) – 1) = 29.7). While the impact of a jurisdiction's vertical status on b/w cases is also in the predicted direction, the effect is extremely small, only increasing the odds that the b/w case is noticed for the death penalty by five additional percent (100 × (exp(.704 + .025) – 1) = 107.3).

Model 2 presents the results from the cross-level interaction between a circuit's social status characteristics and the w/w racial combination. In jurisdictions with average vertical, normative, and horizontal status, w/w cases increase the odds of being noticed for the death penalty by 98 percent (100 × (exp(.686) – 1) = 98.6). Consistent with Black's theory, normative status attenuates the effect;[476] however, contrary to Black's theory, horizontal status slightly accentuates and vertical status attenuates the effect.

Model 3, examines cross-level interactions between the m/f gender combination and a jurisdiction's social dimensions. In a jurisdiction with average levels of vertical, normative, and horizontal status, a m/f gender combination increases the odds that a defendant will be noticed for death by 195 percent (100 × (exp(1.082) – 1) = 245.2). The gender disparity decreases as the vertical status of the jurisdiction increases, and

[476] Recall that the normative status variable is a measure of the violent crime rate in a jurisdiction, so it represents a "lack" of social control.

increases as normative and horizontal status increases—all of these effects conditional effects conflict with Black's theory.

Models 4 and 5 show the conditional effects of prior felony and prior violent felony convictions on the likelihood of being noticed for the death penalty. The likelihood of a defendant with a prior felony conviction being noticed for the death penalty increases as the judicial circuit's normative and horizontal status increases, but decreases as vertical status increases (Model 4). These effects contradict Black's theory. A prior violent felony increases the odds of being noticed for the death penalty by 155 percent ($100 \times (\exp(.939) - 1) = 155.7$) in a jurisdiction with average vertical, normative, and horizontal status (Model 5). The conditional effects a prior violent felony conviction all support Black's theory of law: a unit increase in a jurisdiction's vertical status increases the effect of a prior violent conviction on the odds of being noticed for the death penalty by 322 percent ($100 \times (\exp(.939 + .501) - 1) = 322.1$). Also, as aggregate normative status decreases, the effect of a prior violence conviction on the odds of a death notice increases by 281 percent ($100 \times (\exp(.939 + .399) - 1) = 281.1$). Consistent with Black's theory, jurisdictional horizontal status decreases the effect of a prior violent felony on death noticing as well.

## 8.4 Specification Checks

Multilevel models rest on several assumptions pertaining to both the structural (fixed) and random portions of the model (Raudenbush and Bryk 2002, pp. 255–56). Similar to traditional (i.e., pooled) regression models, the estimated models assume that case- and judicial-level predictors are uncorrelated with random effects within and between levels. Under those assumptions, the parameter estimates are unbiased. The

accuracy of hypothesis testing (i.e., standard errors of parameter estimates and confidence intervals) depends on the tenability of assumptions with respect to the random portion of the model. As discussed earlier (see Sections 7.2.3 and 8.1.2), statistical inference based on the sampling distribution of the parameter estimates does not apply because these data analyzed consist of the entire population of cases. Moreover, no attempt is made to make inferences about the capital charging-and-sentencing process outside of Georgia and the timeframe explored in the study (see note 454).

Misspecification of the structural part of the model remains problematic because any omitted variable at the case-level that is related to both the outcome variable and one or more of the case-level covariates will lead to biased parameters. If that biased parameter estimate is modeled at the judicial circuit-level, that circuit-level model will also be biased. With respect to cross-level interactions, omitted-variable bias confounds inferences when three conditions hold: (1) the omitted variable is related to the outcome variable *after* controlling for other covariates in the model; (2) the omitted variable must be related to a case-level covariate in the model; and (3) the association between the omitted variable and the case-level covariate must vary from unit to unit and the strength of that association must be related to the circuit-level predictor (Raudenbush and Bryk 2002, p. 261).

As series of diagnostic checks were performed on the structural portion of the fully specified case-level models (see Appendix E). Several goodness-of-fit measures strongly suggest that the models adequately fit the data (Long 1997, Chapter 4). For example, the Hosmer-Lemeshow $\chi^2$ goodness-of-fit statistic for the models rejects the hypothesis that the models are misspecified (for an explanation of the statistic, see Cameron and Trivedi

2009, pp. 457–58). The proportion of correctly classified responses ranged from .73 to .84—a figure consistent with previous death penalty research that included many more covariates (Unah and Boger 2001). Similarly, receiver operating characteristic (ROC) analyses also indicate that the models fit the data reasonable well (Cleves 2002). The area under a ROC curve is a measure of a model's predictive power, ranging from .5 (no predictive power) to 1 (perfect model fit). The area under the ROC curve for the fully specified models in this study ranged from .77 to .84. Finally, the pseudo-$R^2$ statistics reported in Appendix E provide another measure of model fit. The pseudo-$R^2$ statistic ranges from .27 to .41, indicating fairly good model fit considering that the pseudo-$R^2$ underestimates model fit relative to the $R^2$ statistic in linear regression models (Long 1997).

Raudenbush and Bryk (2002) note that the analysis of model residuals plays an important role in assessing model specification at each level of a hierarchical model. Unfortunately, residual analysis from generalized linear models (e.g., logistic regression) is not as helpful as in the linear regression context because the residuals are non-normal and heteroskedastic. As a result, the numeric and graphical approaches to assessing model misspecification may not be particularly helpful when attempting exploring the possibility of omitted variable bias (Cohen *et al.* 2003, p. 514).

Model diagnostics of the level-2 equations also suggest that the equations do not suffer from any serious misspecification. The circuit-level equations predicting both the random intercept and the random slope include identical predictors, therefore any bias that would result from misspecification in one of equations is avoided (Raudenbush and Bryk 2002, p. 272–73). Since the data are unbalanced (i.e., cluster sizes vary), the

estimates of the random intercept and slope models are only asymptotically independent, and therefore only asymptotically unbiased. Graphical plots of the residuals examining the distance between the predicted and observed residuals for each group suggest that the random effects were approximately normally distributed (Raudenbush and Bryk 2002, p. 274).[477] As noted above, the departures from normality are not of primary concern because the data represent the entire population of cases.

*Selection Bias Specification*. As noted above, the previously estimated models take into account non-random selection by estimating the joint probability of being noticed for the death sentence and accepting/rejecting a plea-bargain and including those predicted probabilities as a regressor in the plea-sentencing and trial-sentencing models—the "two-step approach" (see Table 11: Models 3 and 4). Recent evidence suggests that a multivariate probit approach to correct for possible selection bias is superior to the two-step approach when (1) the outcome variable in the substantive equation is binary; (2) there are multiple processes influencing selection; and (3) the probability of the dependent variable is extremely low or extremely high (i.e., close to zero or one) (see Bhattacharya *et al.* 2006).[478] All three conditions are applicable to the current analysis because of the necessity to consider both the death-noticing and plea-bargaining decisions and the extremely small proportion of cases that are noticed for death and result in a death sentence.

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[477] Some of these analyses revealed that certain clusters were outliers (typically one to three at the most). Models were reestimated without these clusters and produced similar results, so the results including all clusters are presented.

[478] It has been demonstrated that the two-step approach—estimating the probability of differential selection into the subsample and it including this probability as a regressor in the substantive equation (i.e., the sentencing equation)—is inconsistent because the second-stage probit equation is maximizing a misspecified likelihood (see Bhattacharya *et al.* 2006, p. 412).

In brief, these models take into account any shared unobserved factors that simultaneous influence all three decisions—that is, death charging, plea bargaining, and sentencing—by jointly estimating the correlation between the error terms across the models (see Greene 2000, p. 849). In principle, these models can be estimated within a multilevel modeling framework (see Grilli and Rampichini 2007; Rabe-Hesketh, Skrondal, and Pickles 2002a); in practice, however, this proved infeasible due to computational complexity and convergence problems when sample sizes are small because additional fixed-parameters and random effects (at both levels) must be estimated for the additional selection equations (Grilli and Rampichini 2007). As an alternative, the multivariate probit estimator is employed, via simulated maximum likelihood, without a multilevel specification (for a discussion of the algorithm, see Cappellari and Jenkins 2003).[479]

The results from these analyses are presented in Table 13, with the initial probit coefficients re-scaled to logit coefficients so coefficients across the models are directly comparable (Liao 1994, p. 25).[480] The *r* statistics at the very bottom of Table 13 for each model indicate the correlations of the error terms across the three equations for the plea-bargaining and death-sentencing models.[481] Equations 1, 2, and 3 refer to, respectively, the sentencing decision, the death noticing decision, and plea bargaining decision. So $r_{12}$

[479] The simulated maximum likelihood estimator is sensitive to the number of random draws from the upper-truncated normal distribution, so setting the number of draws to the square root of the sample size is advisable. In the above analyses, the number of draws was set slightly higher than the square root of the sample size.

[480] The parameter estimates of the sentencing models are of primary importance, so those results are presented in Table 13. Results for the equations predicting death penalty noticing and plea-bargaining decisions are omitted from Table 13, but can be found at Table 11 (Model 2) and Appendix D (Models 2 and 3).

[481] Technically *r* should be represented as the Greek letter *rho* (ρ), denoting a population statistic; however the sample statistic notation, *r*, is used to avoid confusion with previous definition of *rho* given in the multilevel context.

is the correlation between unobserved factors affecting both the sentencing and death noticing decisions, $r_{13}$ is correlation between the unobserved factors at the sentencing and the plea-bargaining decisions, and $r_{23}$ is the correlation between the unobserved factors influencing the death noticing and the plea bargaining decisions (Cappellari and Jenkins 2003). It is clear from Table 13 that unobserved factors the death noticing and plea-bargaining decisions are also impacting the sentencing decisions.

The results of the multivariate probit estimator are similar to the results from the two-step with respect to the direction of the effects, although the magnitudes of the effects changed substantially for several variables. These models also suggest that, to a significantly degree, the results from the previous two-step specifications adequately model the direction of the effects, which are of primary importance in assessing whether the relationships predicted by Black's theory are observed in the data.

*Endogeneity*. There may also be a potential endogeneity problem with the models that include legal variables because, as previously stated, Black's theory also predicts that the *content* of legal rules are themselves explained by his theory (see Section 6.3). The estimated effect of a regressor on an outcome is inconsistent when that regressor is determined simultaneously with that outcome (Greene 2000). Recall that legal rules often reflect the social geometry of the case, and not the actual conduct of the defendant or the harm to the victim—this is particularly true for capital statutes. Specification tests were performed to assess any potential endogeneity bias that may result from inclusion of the legal variables. In particular, unconstrained models including the legal variables were compared with constrained models that excluded the legal variables in order to determine whether there were any systematic differences between the coefficients (Cameron and

Trivedi 2009, pp. 182–83).[482] This specification test, commonly referred to as a "Hausman specification test" (see Hausman 1978), follows a $\chi^2$ distribution and is calculated as:

$$H = (b - B)'(\mathrm{V}(b) - \mathrm{V}(B))^{-1}(b - B), \quad [8]$$

where $b$ is the coefficient vector for the unconstrained model, $B$ is the coefficient vector for the constrained model, V($b$) is the covariance matrix for the unconstrained model, and V($B$) is the covariance matrix for the constrained model. The estimate of (V($b$) – V($B$)) may not be well-defined, particularly in small samples (Schreiber 2008), so a generalization of the Hausman test that is always admissible is preferable:

$$H = (b - B)'(\mathrm{V}(b) - \mathrm{cov}(b, B) - \mathrm{cov}(B,b) + \mathrm{V}(B))^{-1}(b - B), \quad [9]$$

where $b$, $B$, V($b$), V($B$) are defined as above, and cov($b$, $B$) and cov($B$,$b$) are the covariance matrices of the shared coefficients between the constrained and unconstrained models (Weesie 1999).[483] The null hypothesis is that the coefficient vectors systematically differ, so failure to reject the null hypothesis suggests the estimates are not biased by inclusion of the legal variables. These tests indicate that endogeneity bias is not present in the models predicting: (1) death noticing for the murder conviction sample ($\chi^2 = 22.97$, $df = 29$, $p = .78$); (2) death noticing for the death eligible sample ($\chi^2 = 24.37$, $df = 29$, $p = .71$); (3) pleading to LWOP for cases noticed for death ($\chi^2 = 7.87$, $df = 30$, $p$

[482] "The Hausman test is best interpreted not as a test for the endogeneity or exogeneity of regressors per se but rather a test of the consequences of using different estimation methods on the same equation" (Baum 2006, p. 212).

[483] The traditional Hausman test, unlike other tests, relies on asymptotic arguments not only for its distribution, but also for its ability to be computed. Weesie's (1999) generalization of the statistic relaxes the assumption that the covariance matrices of the two estimators are uncorrelated, thereby allowing the test to always be defined.

= 1.00); or (4) cases resulting in a death sentence that advanced to the penalty phase ($\chi^2$ = 18.29, *df* = 30, *p* = .95).[484]

## 8.5 SUMMARY

The empirical analyses discussed in the preceding section provide mixed support for Black's theory of law. Many of the hypotheses derived from Black's theory of law and tested against the data receive moderate to strong support, while others were directly contradicted by the data (see Table 14 for a summary of results). The numerous models (and alternate specifications) clearly reveal that extra-legal factors remain important determinates of legal decision-making, but always in the direction predicted by Black's theory. The following chapter (Chapter Nine) describes some these results in greater detail and presents possible explanations for the mixed-results. Perhaps more importantly, the random-intercept and random-slope models strongly suggest that social contexts in which these cases occur influence the capital charging-and-sentencing process net of case-level characteristics. Although many of the direct effects on the structural characteristics of the jurisdiction on the various stages of legal decision making were weak to modest, they remained robust to the inclusion of many important case-level factors. The cross-level interactions were also very illuminating, particularly considering the small cluster sizes and restricted distributions (i.e., skewness) of most of the variables under study. At minimum, the analysis of the impact of the contextual factors explored in this study highlight the importance of the interplay between individual behavior and social structure.

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[484] The endogeneity tests compare models with and without the legal variables, collectively. Additional analyses were performed comparing models including and excluding individual legal variables and the results were similar.

In addition to underscoring the importance of micro- and macro-level dynamics in legal decision-making, the models also clearly demonstrate the importance of taking into consideration the impact of non-random selection into subsequent stages of the capital charging-and-sentencing process (see Unah and Boger 2002). The correlations between unobservable factors influencing the death noticing, plea-bargaining, and sentencing decisions (see Table 13) suggest that prior studies ignoring this differential selection have likely reported biased parameters estimates and drawn incorrect inferences from their regression analyses. As noted earlier (see Section 7.2.3), only one other study has attempted to account for non-random selection based on death-noticing and plea bargaining decisions. The study, examining the impact of both case- and county-level factors on the death penalty charging-and-sentencing process in North Carolina, used a bivariate probit estimator to correct for possible sample selection bias (Unah and Boger 2002); however, there are two problematic aspects of their model specifications that may undermine the validity of their results. First, the study did not explicitly model the hierarchical structure of the data—all intercepts and slopes were modeled as fixed-effects. A cross-level interaction between the prosecutor's political party affiliation and the percentage of the county's population that was non-white was also examined, but this interaction was modeled as non-randomly varying (see Raudenbush and Bryk 2002, p. 30).[485] Due to their estimation strategy, Unah and Boger's analyses fail to provide valuable information concerning possible between-cluster variation in their outcome measures or slope estimates.

[485] The authors estimated robust standard errors to take into account clustering at the county-level (White 1980).

The second problem with Unah and Boger's analysis is that they incorrectly attempt to model a complex multivariate process as a simple bivariate process. The authors attempt to model *four* different selection processes—plea agreement, death penalty noticing, conviction, and death sentencing—within a bivariate probit framework. This is accomplished by using non-randomly selected samples in the *selection equations* to model non-random selection in outcome equations (Unah and Boger 2002, p. 16); however, the entire model is misspecified when the selection equation is misspecified (Manning, Duan, and Rogers 1987). The multivariate probit selection models employed in the current study properly estimate the interrelationships between the three selection processes and avoid the misspecifications of Unah and Boger's models.[486]

[486] It is also puzzling that the authors report a regression coefficient for the selectivity index (i.e., the regressor obtained from the selection equation) from a probit sample selection model (see Unah and Boger 2002, Tables 2 and 4). The maximum-likelihood probit models with sample selection that the authors report estimating in *Stata 6* ("heckprob") does not provide that parameter. *Stata 6* estimates the correlation between the error terms of the selection and substantive equations (technically, *Stata* estimates the hyperbolic arctangent of the correlation for numerical stability, and then transforms this statistic to the correlation) (Baum 2009, p. 267). This statistic cannot be interpreted as a regression coefficient, as such, but as the relationship between the shared unobserved variables impacting the two decision processes (see Section 8.4). Unah and Boger "transform" the correlation between the two equations into a logit coefficient and taking its antilog to obtain the odds-ratio of the effect of the index. This procedure cannot produce a coefficient that lends itself to any meaningful interpretation. The correlation is not a probit coefficient, and therefore cannot be re-scaled to logit coefficient. This interpretive *faux pas*, along with mispecifications of the selection equations, suggests the authors misunderstand the underlying statistical theory motivating the use of selection models.

## Chapter 9: Summary and Discussion

Science advances through the reasoned criticism of received knowledge (Sampson 2006, pp. 149–50). The aim of this project was to use improved theory, data, and methods to inform both the scholarly literature and the policy debate concerning the capital charging-and-sentencing process. Donald Black's theory of law was applied to the death penalty context to predict and explain legal decision-making *purely at the sociological level*—a form of theorizing in the tradition of early Marxian (Marx [1857] 1973), Durkheimian ([1897] 1994), and Simmelian (1909) social thought. Jonathan Turner (2002) has argued that the power of highly general and abstract theories is realized when analysts working in specialized fields derive hypotheses from the abstract theory and carefully link abstract propositions to concrete phenomena. Since the death penalty is the most severe form of punishment that can be applied by the government, the capital punishment process provides an ideal test of Black's theory.[487] The greater amount of potential law that may be applied to a case, the more social information about those in the conflict becomes involved (or gets collected) and the greater the potential for more discrimination (Black 1989, pp. 66–68).

Many socio-legal scholars refuse to accept that it is possible to predict and explain legal behavior without reference to psychology (e.g., Frankford 1995). Indeed, Kuhn (1970, p. 148) noted, "[n]either side [of competing research strategies] will grant all the non-empirical assumptions that the other needs in order to make its case." Nonetheless, Black's commitment to explaining human behavior without regard to human subjectivity

[487] Analysts have explicitly employed Black's theory of law to examine variation in the commission of (and response to) lethal violence, including *attitudes* about capital punishment (Borg 1998; Kan and Phillips 2003), however, this study is the first to use Black's theory examine *legal decision-making* in the capital charging-and-sentencing process.

not only permits his theoretical propositions to be maximally general and parsimonious, but also firmly establishes sociology as a branch of social science unique from psychology—complete with its own concepts, imagery, and framework of analysis. A century ago Simmel ([1908] 1950, p. 21) stated "the [essential] task of the science of society" is to use "geometric abstraction" to investigate human interaction. And for quite some time, sociologists working outside of Black's theoretical tradition have also advocated a science of human behavior based on geometric principles of human interaction and without reference to human subjectivity (see, e.g., Mayhew 1980). Klüver and Schmidt (1999, pp. 312, 322) have explained that "[i]t is possible to define several main concepts of theoretical sociology in geometrical terms and to make geometrical models of social actors and interactions...[and it] is neither necessary to speculate about the influence of human nature upon history...nor to introduce particular 'interests' of social groups[.]"[488] Geometric models of social interaction permit and facilitate the development and analysis of governing principles of human behavior: "[s]ocial systems are to be understood as sets of social actors whose interactions are determined by specific rules; these rules generate the dynamics of social systems" (p. 313).

Black's theory focuses on the observable dispositions of legal agents, rather than legal rules (cf. Llewellyn [1930] 1978); nevertheless, this project has demonstrated that the actual content of death penalty statutes can be predicted and explained by Black's theory of law. Capital statutes require the collection and consideration of social information about parties that reflects the social geometry of the case. Much of this

[488] Klüver and Schmidt (1999, p. 311) identify three dimensions of social differentiation: segmentary ("us" vs. "them"), stratificatory ("above" vs. "below"), and functional ("action role" vs. "client role").

information has very little, if anything, to do with the conduct of the defendant or the actual harm to the victim, and much more to do with status positions of the parties.[489] To a non-trivial extent, then, this project highlighted the ability of Black's theory to contribute to the foundation of a theory of formal legal rules—a worthwhile endeavor that legal sociologists have largely abandoned (Cooney 1993). As noted earlier, Black's theory explains why white-collar criminals are treated more leniently *as a matter of law*, net of the actual harm done by the offender (see, e.g., Shapiro 1990). Black's theory also explains other aspects of legal decision-making with respect to the death penalty *apart* from the behavior of prosecutors, judges, and jurors. For example, Black's theory has successfully predicted how the larger social context influences: (1) the level of support for capital punishment; (2) the likelihood and rapidity of reinstatement of the death penalty following *Furman*; (3) the rate of death sentence reversals on appeal; and (4) the likelihood and frequency of executions and commutations.

Empirical studies of legal decision-making have consistently discovered that legally legitimate case characteristics account for only a modest proportion of the variation in criminal sentencing, but analysts have failed to adequately explain why and under what conditions do legal rules matter. Black's theory provides an answer to both of these questions. According to the theory, legitimate legal characteristics matter when they reflect the social structure of the case *and* will have the greatest explanatory power when cases are structurally similar or when the amount of law applied to the case is trivial.

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[489] In fact, capital defense attorneys who do not collect a wealth of information about their client(s) to present as mitigation evidence during the penalty phase of a death penalty trial may be deemed as providing ineffective assistance to their client(s) (see, generally, *Strickland v. Washington* (1984)) .

Comprehensive sociological analysis and explanation requires a theory to be subject to both *epistemological* and *empirical* scrutiny (see Jasso 2006). Chapter Six argued that Black's overall explanatory framework, pure sociology, as well as his specific theory of law, were superior to the theoretical perspectives most frequently employed in criminal sentencing research—i.e., formal legal/jurisprudential, conflict, and symbolic interactionist theories. Specifically, it was demonstrated that Black's theory of law was more general, parsimonious, testable, and novel than those rival explanations (compare Sections 6.1.3 and 6.2.5). By extending the theoretical analysis well beyond Black's own epistemological defense of his work (see Black 1995, 2000), and reconceptualizing the sociological salience of race/ethnicity, gender, and geography in social life in general, and in conflict situations in particular, it was shown that Black's theoretical paradigm was able to offer a more complete understanding of these phenomena, and their interaction, with respect to legal behavior, while remaining completely consistent with the structure of his explanatory framework (see Section 6.2.4).

With respect to race/ethnicity, it was demonstrated that blacks, in the aggregate, lag far behind whites in almost every category of economic well-being (vertical status), even among the college-educated and upper-class (Conley 2001; Grodsky and Pager 2001; Oliver and Shapiro 1995), and poverty within predominately black communities has been remarkably persistent although inner-city poverty has undergone dramatic changes over the past three decades (DiPrete and Eirich 2006; Massey 2004; Sampson and Morenoff 2006). It was also shown that blacks have significantly less radial, relational, and functional status than whites (horizontal status), resulting from residential, professional, and interactional segregation (see, e.g., Bonilla-Silva 1997; Massey and

Denton 1989). The legacy of residential instability, extreme high community disorganization, racially motivated vote suppression and felony disenfranchisement laws, and significant underrepresentation at the highest levels of government and the judiciary has also seriously hampered blacks' capacity for collective action (corporate status) (Gryski, Zuk, and Barrow 1994; Sampson and Groves 1989; South and Crowder 1997; Uggen and Manza 2002). Finally it was demonstrated that blacks, in the aggregate, have less cultural status (conventionality) and normative status (authority and respectability) due to their: use of "non-standard" names and "black-accented" English; lower levels of formal education; and higher levels of documented criminal histories (independent of aggregate levels of actual criminal involvement) (Austin and Allen 2000; Blumstein 1993; Fryer and Levitt 2004; Massey and Lundy 2001).

Black's theory was also applied to the interactive effects of race/ethnicity, gender, and region. Unlike symbolic interactionist perspectives, Black's theory does rest on the questionable assumptions about how legal decision-makers perceive these categories and how those perceptions vary across different contexts (see Section 6.2.3); rather Black's theory focuses on the status locations those characteristics indicate. According to Black, these characteristics will not uniformly advantage or disadvantage a criminal defendant in a case, but legal decision-makers are likely to impute the aggregate characteristics of the group when the specific information about the defendant is unknown (see, e.g., Kan and Phillips 2003; Stanko 1981/1982).

Similarly, Black's focus on both the micro- and macro-dimensions of human interaction underscores the fact that factors such as race/ethnicity and gender will have different effects depending on the larger social context. While other theorists have made

contradictory predictions (and produced contradictory results) concerning the direct impact of structural features on legal decision-making, as well as the indirect effect of these structural factors on legal decision-making through their interaction with race/ethnicity, based on their differing assumptions about how these factors influence the motivations of actors, Black's theory simply focuses on how social contexts differ along the five social dimensions. For example, with respect to the "urban versus rural" distinction frequently examined in the criminal sentencing literature, it was argued that Black's theory is capable of explaining the contradictory results by simultaneously examining multiple dimensions of social organization. Blacks in rural areas typically have less vertical and cultural status, but more relational and functional status (i.e., horizontal status) (see Section 6.2.5). By highlighting the importance of considering *all* of the various social dimensions, Black's theory provides a more complete description of the social geometry of a case, as well as a more nuanced account of the relational dynamics potentially at play: "[t]he number of dimensions of a 'space of experiences' is the number of independent options one has to take into consideration for a complete description of any experience" (Klüver and Schmidt 1999, p. 311). As King *et al.* (1994, p. 34) note, "[D]escription has a central role in all explanation, and is fundamentally important in and of itself."

*Empirical Results*. Of course, the litmus test of any theory is how well it holds up to empirical scrutiny. The focus on empirical validity, however, does not minimize the importance of theoretical analysis; rather it assists in restricting or expanding theoretical concepts and propositions through the interplay of theory and research (Merton 1948)—the structure of the theories derived from a general explanatory framework is of primary

importance. All of the alternative theoretical perspectives previously described are informative in that they predict and explain some of the widely recognized empirical relationships, but only Black's theory is capable of predicting and explaining the wide *diversity* of facts under a single explanatory framework (see Chapter Six).

Similar to other direct tests of Black's theory of law in areas outside of capital punishment, the empirical results from the current study provide only weak to moderate support for the several of hypotheses derived from the theory and applied to the death penalty context (for a detailed description of the hypotheses and empirical results, see Chapters Six and Eight). While numerous hypotheses receive mixed support across models, several general observations can be made with respect to those findings that were either uniformly supportive or uniformly unsupportive. Results that were consistent with Black's theory across all models involved the racial and gender organization of the cases, defendants' marital status, defendants' prior drug use and violent criminal history, and the relationship between the defendant and the victim (see Tables 11 and 13: Models 1 and 2). The unsupportive results for the impact of prior criminal history and jurisdictional horizontal status were consistent across models with respect to their direct effects, but not their cross-level interactive effects (see Tables 12 and 14). The specific findings with respect to race/ethnicity, gender, and criminal history are discussed in greater detail below.

*Racial Structure*: The racial organization of cases was hypothesized to influence legal decision-making, net of case- and circuit-level legal and extra-legal variables. Although race/ethnicity is a crude proxy for social status, as explained earlier, it is strongly correlated with Black's five dimensions. If it were possible to take into account

all (or even most) of the direct/proximal measures of social status, then Black's theory would predict that these categories would be sociologically meaningless (at least with respect to explaining human behavior in conflict situations);[490] but this is highly unlikely and, as previously mentioned, the aggregate characteristic of a group are often assumed in situations where specific characteristics are unknown and the decision-making task is complex or likely to evoke negative emotions (e.g., Bodenhausen and Lichtenstein 1987; Bodenhausen, *et al.* 1994). The empirical analyses reveal that white-victim cases attract the most law across all models, although black-defendant/white-victim (b/w) cases did not always attract the most law relative to other white-victim cases (see Tables 11 and 13). The finding of white-victim bias is consistent with every study on capital punishment since 1990 except one (Nebraska) (Baldus and Woodworth 2003). Half of those studies (five out of ten) also discovered that b/w cases were more likely than any other offender/victim racial combination to be noticed for the death penalty or sentenced to death (see Section 4.2.2). It is worth noting that several of these studies examined well over one hundred legal and extra-legal variables (see, e.g., Paternoster *et al.* 2004; Unah and Boger 2001), while others only examined a few dozen, but the findings were very similar across the different model specifications. It is also important to note that, although the current study only examined three legal variables (or five if one also counts the number of offenders and victims), the predictive power of the models (i.e., the percent of case outcomes correctly classified) was very similar to those studies that analyzed over one hundred different covariates (see Unah and Boger 2001).

[490] Black recognizes that it may impossible to observe how a phenomenon varies, so it must be measured by its relationship to other phenomena that are observable.

Although Black's theory does not explicitly discuss the interrelationships among the five social dimensions, either within or between levels of analysis (and has he been criticized for neglecting to do so), this project examined several *cross-level/cross-dimensional interactions* with respect to the variable impact of the racial structure of a case across jurisdictions that should be consistent with Black's general framework (see Sections 6.3.8 and 8.3.8).[491] It was hypothesized that racial disparities will be greater in jurisdictions that are higher in vertical and normative status, and lower in horizontal status. The first set of racial cross-level models support these predictions: b/w cases were more likely than b/b cases to be noticed for the death penalty in judicial circuits high in vertical and normative status and low in horizontal status (see Tables 12 and 14). The second set of racial cross-level models examining w/w racial differences (relative to b/b) produced mixed results, however. Only the normative status of a jurisdiction interacted with w/w cases in the hypothesized direction: the higher the violent crime rate in a jurisdiction (i.e., low social control), the more powerful the racial disparity between w/w and b/b cases becomes.[492] The effect of a jurisdiction's vertical and horizontal status on the effect of w/w cases was essentially zero (-0.036 and 0.009, respectively).

These results concerning the racial organization death penalty have interesting implications for the capital charging-and-sentencing system in Georgia. First, the race/ethnicity of *both* defendant and victim continue to play a non-trivial role in legal decision-making at *every* stage of the process: death noticing, plea-bargaining, sentencing

[491] Recall Black argues that, irrespective of social context, a high status complainant will enjoy more legal advantages than his or her low status adversary; nonetheless, the social location of a conflict will influence how large legal advantages will be (see Section 6.2.5).
[492] As explained earlier, cross-level interactions between jurisdictional social status and h/w cases was infeasible because h/w cases only occurred in six of the forty-six judicial circuits.

for cases disposed by plea, and sentencing for cases advancing to the penalty phase. These relationships were robust to multiple model specifications.

Second, it appears that the LWOP legislation enacted in 1993 may have altered the impact of the racial organization of case on legal outcomes—at least with respect to b/w homicides. During the time-period under investigation in this study, LWOP could only be used as a sentencing option in death penalty cases (see Section 5.2.4), so LWOP became a "bargaining-chip" for prosecutors. Indeed, some Georgia prosecutors have openly admitted to seeking the death penalty in order for LWOP to be a sentencing option both during plea bargaining negotiations and during jury trials (see, e.g., Failor 2001). The empirical results reveal that b/w cases are much more likely to be noticed for the death penalty and receive a LWOP sentence resulting from a plea-bargain relative to w/w and b/b cases, but only slightly more likely to result in a death sentence relative to b/b cases and much less likely than w/w cases to result in a death sentence (compare Table 11: Models 1 and 2 with Table 13: Models 1 and 2). The b/w "racial-disparity effect" is significantly reduced by the time a case advances to the final phase of the capital charging-and-sentencing process, but at the price of b/w cases receiving the harshest plea-bargains. It is possible (even likely) that b/w cases advancing to the penalty phase are significantly "less-aggravated" than other cases that advance to the penalty phase of a capital trial (see Sorensen and Wallace 1999). The following evidence is suggestive of this fact: the average number of statutory aggravating factors charged in a b/w case that plead was 2.35, whereas the number for b/w that when to trial was 2.06—a difference of 0.29. By comparison, the average number aggravators charged in w/w cases that plead was 2.02, whereas the number for w/w that went to trial was 2.05. Since

prosecutors have tremendous (and largely unregulated) discretion in the plea-bargaining process (Scott and Stuntz 1992), it is plausible that the LWOP statute simply shifted *some of* the influence of racial bias to the plea bargaining phase. Also recall that recent evidence suggests that prosecutors, at both the state and federal levels, are more likely to seek the death penalty in cases with weaker evidence when the defendant is a member of a minority group (Bruck, Burr, and McNally 2006; Harmon 2001a, b; Parker, Dewees, and Radelet 2001).

Third, the cross-level interactions suggest that the variation in the effect of the racial combination on legal decision-making across jurisdictions is *not* completely random; rather, it can be partly explained by the aggregate social status of the legal jurisdiction along one or more of Black's five social dimensions. According to Black, the handling of cases is only "capricious" from a jurisprudential perspective, and can be predicted and explained by the social geometry of the case. These findings suggest that "racial disproportionality" must be explored at multiple levels of analysis. Baldus *et al*.'s (1990) landmark study of Georgia's capital punishment system in the 1970s documented geographic disparities between circuits with respect to death noticing and death sentencing rates, after adjusting for case-level factors, in the pre- and post-*Furman* eras; however they did not attempt to systematically link these disparities to structural features of the circuits.

Unfortunately, it is difficult to imagine how the Georgia Supreme Court could reasonably modify its proportionality review to take the structural features of judicial circuits into account. The court is already aware of the geographic disparities in the use of the death penalty, and it is unlikely that a more nuanced understanding of how the

effect of the racial organization of a case varies across judicial circuits will appreciably influence current practices by the court. Granted, the impact of the structural characteristics on the capital charging-and-sentencing process is likely to be viewed as problematic by the court, but it is doubtful that the court would believe that it would be competent to devise a workable method to mitigate those effects during proportionality screening. The "regional effects" of racial disparity in the capital-charging-and-sentencing process is eerily similar to the regional problems associated with executions. Recall from Chapter Two that state authorities began centralizing executions at the turn of the twentieth century because local officials consistently "botched" executions. Racial disparities in sentencing are indicative of a "botched" charging-and-sentencing system in these jurisdictions.

*Gender Structure*. The gender organization of a case was also hypothesized to influence legal decision-making, net of case-level and circuit-level factors. Like race/ethnicity, gender is a proxy for social location according to Black's theory. Women, in the aggregate, have higher status along some dimensions (e.g., horizontal and cultural), but lower status along others (e.g., vertical and normative [authority]) (see Section 6.2.4), According to Black's theory, male-defendant/female-victim (m/f) cases should attract the most law and female-defendant/male-victim cases should attract the least law. Both of these predictions are strongly supported by the evidence (see Tables 11 and 13). Surprisingly, none of the hypotheses concerning the cross-level interactions with the gender organization of the case are supported by the data. In fact, all of the effects are opposite of the hypothesized, although those effect sizes are fairly small.

The robust direct of effects of the gender structure of a case is likely best explained in terms of cultural, relational, and normative status. All crimes, including murder, may be conducted in a more or less conventional manner (see Cooney 1997), and typically, the less conventional the crime, the more law the crime attracts. The conventionally of a crime can be measured by both the conduct *and* characteristics of the parties. Over 67 percent of homicides are intra-gender, so inter-gender crimes are unconventional. Relational status is also important, and many homicides committed by female defendants involve victims not only known to the defendant, but often under the care of the defendant. Female defendants are also likely to murder an intimate partner with whom there is a history of domestic violence against the defendant, thus the victim is likely to be lower in normative status (respectability), all else equal. These three factors—the unconventionality of the crime, the relational distance between the defendant and the victim, and the (lower) normative status of the victim—represent a social geometry that greatly increases the severity of law for m/f cases and greatly decreases the severity of law for f/m cases.

The gender disparities described have not attracted much attention from death penalty analysts or members of the capital prosecution and capital defense bars. Approximately ten percent of all murder and voluntary manslaughter convictions in Georgia during the time period under investigation in this study were of women. This figure mirrors the national data (Streib 2002). Only one woman has been executed in Georgia since 1900 and there is only woman currently on death row in Georgia. According to law professor Victor Strieb, women's lives are treated as being more valuable when they are either defendants or victims (Streib 2002). The thing that is most

interesting about the persistence of (and blind-eye to) bias favoring women in the death penalty process is that it is an overt (and unapologetic) acceptance of the influence of an extra-legal factor. From a jurisprudential standpoint, any role that gender plays in the death penalty process is just as impermissible as race/ethnicity—it is a diffuse status characteristic that should have no bearing on a case apart from its association with doctrinally relevant factors in a case (e.g., level of aggravation and mitigation). This fact underscores the reality of both the force *and* acceptance of "extra-doctrinal" phenomena in legal decision-making. As Black (1989, p. 21) has noted, "The handling of cases always reflects the social characteristics of those involved in it. It applies whenever and wherever law is found.... No one has ever observed a legal system without social differentiation. Discrimination is ubiquitous. It is an aspect of the natural behavior of law.

*Normative Structure (Case-level)*. Most of the case factors deemed "legally legitimate" reflect the social organization of the case. Capital statutes enumerate many "special circumstances" that make a case eligible for the death penalty which have nothing to do with the actual conduct of the offender of harm done to the victim. Several of these "legitimate" factors address the defendant's past criminal/deviant conduct—the defendant's normative status. Black's theory predicts that defendants with criminal backgrounds, particularly serious documented criminal histories, will attract the most law. A defendant's currently charged criminal conduct is also an indicator of normative status under Black's theory because any social control is a disadvantage, including a complaint (Black 1976). From a formal legal/jurisprudential model standpoint, the effect of a defendant's prior criminal history and current criminal conduct should have a similar

impact across the various stages of the criminal justice process and across jurisdictions—that is, the application of the law (rules) to the facts of the case should be uniform.

In contrast to the predictions of both formal legal theory and Black's theory of law, a defendant's prior felony conviction and the presence of a contemporary felony attracts *less* law across all models but one. The lone exception is the impact of a contemporaneous felony on the likelihood of receiving a death sentence for those cases advancing to the penalty phase. A prior violent felony conviction, on the other hand, attracts the most law across all models analyzed. The number statutory aggravating circumstances charged in a case, which may be both a "legitimate" legal characteristic and indicator of the social geometry of the case, also had the hypothesized effects on legal decision-making.[493]

Only the effect of two of the four "legal" variables significantly varied across jurisdictions—prior felony conviction and prior violent felony conviction. According to Black's theory, these heterogeneous effects can be partly explained by the vertical, normative, and horizontal status of the jurisdiction in which they occur. With respect to prior criminal conviction, only the interaction with a circuit's horizontal status was in the expected direction: the effect of a prior felony conviction on the likelihood of being noticed for the death penalty was weaker in jurisdictions with higher horizontal status. All of the cross-level interactions between a prior violent felony conviction and the circuit-level social dimensions were in the hypothesized direction: jurisdictional vertical status increased the effect, while jurisdictional normative and horizontal status decreased the effect.

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[493] Defendants with a history of prior drug use (normative status) also attracted the most law.

*Geographic Location*. Another finding that was consistent with Black's theory of law across all models was the fact that there was significant between-circuit variation, after controlling for legal and extra-legal factors at both the case- and circuit-level, in the likelihood that a case: (1) was noticed for the death penalty, (2) resulted in a plea bargain, (3) resulted in a LWOP sentence after a plea bargain, and (4) resulted in a death sentence after advancing to the penalty phase (see Table 11 and Appendix D). The proportion of between-circuit variation ranged from .30 to .58 in the fully specified models. The random-slope models analyzed in the study also revealed substantial between-circuit variation in the effects of those covariates on death noticing, ranging from .18 to .35 (see Table 12). Somewhat surprisingly, the circuit-level variables indexing vertical, normative, and horizontal status only account for a small proportion of that variation; nonetheless, these findings underscore the fact that the social context in which these cases occur is responsible for a significant amount of the variation in legal decision-making across Georgia and must be adequately explored when predicting and explaining legal outcomes.

*Uniformly Unsupportive Results*. Several findings were also uniformly unsupportive of specific hypotheses derived from Black's theory. Recall that Black's theory posits human behavior can be reconceptualized as social behavior, therefore a call to the police, and arrest, a jury verdict, and appeal, *et cetera* are all increases in law and can be predicted and explained by the social geometry of a case. This formulation of human behavior allows the theory to predict the behavior of diverse actors in the criminal justice process without reference to their subjectivity. This implies that the social geometry of a case should have a similar effect on legal decision-making across the

various stages of the capital punishment process—i.e., noticing and sentencing decisions. Contrary to Black's theory, however, most of the variables have quite different effects depending on the stage of the process, and these differences remained after the models included adjustments for non-random selection into the subsequent stages of the death penalty process. This unsupportive finding mirrors the results of other tests of Black's theory that discover various factors of a case which reflect its social geometry have differential impact depending on the stage of the criminal justice process (see, e.g., Dannefer 1984; Myers 1980).

The aggregate normative status of a judicial circuit was almost consistently found to be positively related to the use of law (save Table 11: Model 3). This finding is unsupportive of Black's theory, but consistent with the findings of other studies directly examining Black's theory (see, e.g., Doyle and Luckenbill 1991). It must be noted, however, that his finding pertains to the *direct* effect and not the *conditioning* influence of normative status. As the prior discussion noted, a circuit's normative status had the hypothesized moderating effect in three of the five models examined (see Table 12: Models 1, 2, and 5).

*Mixed Findings and their Implications.* Many of the empirical results neither uniformly support nor uniformly contradict the hypotheses presented in Chapter Six. Table 14 presents a grid indicating how the hypotheses "stacked up" to the data for each of the fully specified models. Each variable (row) listed in the table corresponds with a theoretical prediction, and each column corresponds to a model. There are a total of 97 cells that correspond to a specific predictions derived from the theory—that is, a specific

relationship between the variable and the severity of law.[494] Each cell in the table either contains an "S" (supported), "U" (unsupported), "M" (mixed support), or "N/A" (no specific prediction). Of the 97 cells, 63 cells indicate that the prediction was supported (65 percent), whereas 34 cells indicate the prediction was not supported. The two predictions that received mixed support were with respect to the hypotheses about the effect of the racial organization of the case. The results were mixed because, as hypothesized, b/w and w/w cases were more likely to receive the death sentence at the penalty phase than b/b cases; however, w/w cases were more likely than b/w cases to receive the death sentence—a finding in tension with the hypothesis. It was suggested earlier that the racial dynamics with respect to b/w cases and LWOP plea bargains may be responsible for this particular result.[495]

A description of the specific findings for all of these predictions is presented in Chapter Eight and will not be repeated here; the fact that less than two-thirds of hypotheses receive support in the data is problematic for Black's theory and requires an explanation. A plausible answer, and the most straightforward, is that the models do not adequately capture the social geometry of the cases. There is very little information about the victims in these cases, save their race/ethnicity, age, gender, and relationship with the defendant. By contrast, there is much more information about the defendants in these case. The problem of scant victim information is not idiosyncratic to this project, of course, and has plagued prior scholarship on capital punishment for decades. With the

[494] As explained in Chapter Six, one of the greatest strengths of Black's theory it is ability to generate numerous predictions with few postulates (Jasso 2006, p. 38).
[495] The aforementioned tabulation is actually misleading considering that the "death noticing" models essentially duplicate the same results and only the outcome of one prediction differs between them. Excluding the death noticing model for the murder conviction sample and recalculating the predictions yields the same proportions.

exception of a few well-funded projects (e.g., Baldus's initial study of Georgia and the recent studies in Maryland and North Carolina), most death penalty researchers have been limited in this respect. It is impossible to fully capture the direction, location, and distance (i.e., the social geometry) of a conflict without fairly complete information on the parties involved—particularly with respect to the specific variables under investigation. Since there was information on the race/ethnicity, gender, and age of both the defendant and victim, these general status differences could be explored in the study. It is worth highlighting that results concerning these differences were generally supportive of the hypotheses. This does not imply that Black's theory would have received more empirical support if more information was available about victims, but it does, at least, suggest that it is extremely important to focus on the relative status positions of the defendant and victim. Recall that predictions concerning the impact of defendants' socioeconomic, educational, and employment backgrounds were not corroborated by the evidence. It is highly likely that information about victims' backgrounds with respect to those very same variables was known to prosecutors prior to seeking the death penalty and offering a plea bargains, and known to jurors prior to imposing a death sentence.

The potential problems stemming from inadequate data may also account for the mixed support for the hypothesized direct and indirect effects of the indices of vertical and normative status. As explained in Chapter Eight, level-two equations (i.e., equations predicting random intercepts and slopes) will be misspecified if the level-one equation is misspecified. Many of the case-level extra-legal coefficients do not capture the status differentials between the parties, so the lack of support for the hypotheses predicting the

direct and indirect effects of Black's social dimensions may be an artifact of the data limitations.[496] With respect to vertical status, only four of the nine predictions received empirical support. The empirical results for the effect of normative status are even less favorable: only three of the nine predictions with respect to normative status support Black's theory. Even prior to including case-level covariates in the models, the effects of vertical and normative status in the various models were inconsistent (see Appendix C). This result, however, does not directly contradict Black's theoretical predictions because the theory treats all non-sociological variables and the other dimensions of social space as constants (see Section 6.2.2).[497] Nonetheless, these results are worrisome because many of the effects were in the opposite direction of Black's predictions. It is impractical for empirical analysts to take into account every variable identified in a social theory, and Black's posits that the testability of his theory is one of its strongest virtues. But the relational structure of the case is *the* central proposition of Black's theory, so unsupportive evidence from studies that fail to adequately capture these status differentials should not be viewed as identifying fatal errors in the theory (cf. Lieberson and Lynn 2002).

An equally plausible explanation for the inconsistent empirical results is that structural dynamics influencing legal behavior in the capital charging-and-sentencing process, at both the micro and macro-levels, have changed. If Klüver and Schmidt (1999) are correct, and social systems are able to change their rules of interaction

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[496] The inter-item correlations between the constituent variables in those scales, as well as the overall scale reliability (see Chapter Eight) strongly suggest that those indices were adequately capturing Black's social dimensions, so it also unlikely to be a measurement error problem.

[497] In addition to the omission of several important case-level factors, the omission of a variable indexing corporate status may have negatively impacted the circuit-level models. But the results support seven of the nine predictions with respect to the effect of horizontal status, so it is doubtful that model misspecification would impact two, but not three, of the social dimensions.

according to the particular demands of their environment, it is possible that the relationships between Black's five dimensions and law have been altered. Klüver and Schmidt opine that the relationships between social systems have been fairly static because they "were just not pressed enough to change some of their basic values" (p. 322). Of particular relevance to Black's theory is Klüver and Schmidt's admonition concerning the development of an overly static geometric theory of social systems:

> There are no master equations which may describe the dynamics of social systems...the reason for this is the fact that social actors and therefore social systems can change their rules, their dynamics and even of course their meta rules. In particular, social systems are self-referential systems which can model themselves and anticipate their possible future (p. 322).

To be sure, the dynamism of social systems is not fatal to Black's general explanatory framework. In fact, Black (1989) has acknowledged that certain crude proxies of social status (e.g., race/ethnicity, gender) may become less reliable overtime as membership into these groups becomes associated with higher status locations. The enduring strength of Black's approach is his identification and description of the five social dimensions that influence social behavior. Revision must be directed at the content of the substantive theories derived from the paradigm, and not the paradigm itself (Lenski 1988, p. 169). Black (1984, p. 16) has already commented that other types of social control may not behave according to the same principles of law and should be investigated. If social systems are self-referential systems that must be "pressed enough to change some of their basic values," then is plausible that certain social dynamics of the capital punishment process have changed according to the demands of their environment. Indeed, there was no ideological realignment of the U.S. Supreme Court during the *Atkins*, *Ring*, and *Roper* decisions that fundamentally altered the administration of the death penalty—there was

simply heightened public awareness and debate (nationally and globally) concerning the appropriateness of the death penalty for the mentally disabled (*Atkins*) and juveniles (*Roper*), as well as over capital defendants' Sixth Amendment rights (*Ring*) (see Section 2.3).

## 9.1 Conclusion

The present study revealed that race/ethnicity, gender, and region continue to influence the capital charging-and-sentencing process in Georgia. The enactment of Georgia's life without the possible of parole (LWOP) legislation in 1993 had very little impact on the charging-and-sentencing patterns that existed before the statute—defendants who plead guilty to murdering white victims and female victims received the harshest sentencing during plea bargaining and trial. There also remained significant regional variation in the death penalty process in Georgia and the level of racial/ethnic and gender disparity in a given jurisdiction could be partly explained by the structural characteristics of that jurisdiction. These results are also consistent with nearly every methodologically rigorous study conducted on the death penalty in the United States since 1990.

While surprising to some, and disappointing to many, the ineffectiveness of the post-*Furman* procedural reforms is completely consistent with Donald Black's theory of law. According to Black (1989, p. 21), "the handling of cases always reflects the social characteristics of those involved it. It applies whenever and wherever law is found. [...] No one has ever observed a legal system without social differentiation. Discrimination is ubiquitous. It is an aspect of the natural behavior of law." Black even suggests that the narrow focus on race/ethnicity, social class, and gender has resulted in analysts actually

ignoring the many other types of discrimination that impacts the handling of cases. The only way to eliminate, or substantially reduce, this discrimination is to limit the amount of social information to which legal decision-makers have access. This may be impractical from a policy standpoint; nonetheless, it is the strongest implication from Black's theory. Moreover, it underscores why the incremental fixes implemented since *Furman* have been unsuccessful—if legal rules are unable to predict the behavior of legal agents in a meaningful way, then reforming legal rules to modify the behavior of legal agents is largely pointless.

In *Furman*, Justice William Douglas believed the absence of sentencing standards permitted jurors to discriminate according to social hierarchies, but was optimistic that death penalty statutes could be revised to conform to the requirements of the constitution. When the U.S. Supreme Court lifted the moratorium on executions four years later in *Gregg*, its decision was based on the belief in the ability of the newly designed post-*Furman* statutes to eliminate discrimination and caprice rather than any scientific evidence demonstrating that the statutes had the desired effect. Not only did the "guided discretion" provisions of the post-*Furman* have a minimal impact on juror discretion because the special circumstances were written so broadly, the provisions were inherently flawed because their influence was basically limited to only one of the many decision stages where discretion is exercised by legal agents.

Subsequent decisions by the Court also underscored its inability to appreciate the undesirable influence of social hierarchies on legal decision-making. Two years after *Gregg*, in *Lockett*, the Court held that statutory restrictions on the types of mitigation evidence that a defendant could present on her or his behalf during sentencing were

unconstitutional, thereby opening the floodgates for social information and discrimination (see Section 2.3). As Zimring (2003) has explained, the penalty phase of capital trials has become a status competition between offender and victim families. Recall from Chapter Four that, after the Civil War, rather than explicitly mentioning race in criminal statutes, Southern states began giving prosecutors and jurors greater discretion in charging and sentencing decisions in order to reinforce the pre-Emancipation racial order. Thirteen years after *Gregg*, in *Stanford*, several Justices believed it was necessary and proper for legal agents to consider numerous factors beyond the actual injury caused by the crime in capital cases when assessing an offender's culpability (see Section 4.1.2).

Perhaps it is axiomatic that discretion is only desirable to those who benefit from it. Both the capital prosecution and defense communities have repeatedly asked courts and legislatures to give their "side" more discretion, while simultaneously requesting that their opponents have less discretion. This tug-of-war has resulted in capital cases remaining just as saturated with social information as they were in the pre-*Furman* era. Twenty years after *Furman*, Justice Harry Blackmun, who dissented in *Furman*, concurred in *Gregg*, and dissented in *McCleskey*, famously wrote, "[D]espite the effort of the States and courts to devise legal formulas and procedural rules to [impose the death penalty fairly and consistently], the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form" (*Callins v. Collins*, 510 U.S. 1144, 1145 [1994]). It is likely the recognition of this

inherent fallibility of death penalty systems—no matter how well crafted—has led many of the world's nations, and nearly all of our closest international allies, to dismantle their own capital punishment systems during the three decades that the United States has unsuccessfully attempted to repair what Justice Blackmun referred to as "the machinery of death."

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**Table 1: Death Notices in Georgia by County (1993–2000)**

| County | Death Notices | % of Total | County | Death Notices | % of Total |
|---|---|---|---|---|---|
| Appling | 5 | 1.32 | Houston | 1 | 0.26 |
| Baldwin | 5 | 1.32 | Irwin | 1 | 0.26 |
| Barrow | 2 | 0.53 | Jackson | 2 | 0.52 |
| Bartow | 9 | 2.37 | Jasper | 1 | 0.26 |
| Ben Hill | 1 | 0.26 | Jeff Davis | 3 | 0.52 |
| Bibb | 7 | 1.85 | Jefferson | 1 | 0.26 |
| Bryan | 1 | 0.26 | Jenkins | 1 | 0.26 |
| Bulloch | 4 | 1.03 | Jones | 2 | 0.52 |
| Burke | 5 | 1.29 | Laurens | 1 | 0.26 |
| Butts | 2 | 0.52 | Lee | 1 | 0.26 |
| Camden | 1 | 0.26 | Liberty | 4 | 1.03 |
| Candler | 1 | 0.26 | Long | 5 | 1.29 |
| Carroll | 3 | 0.77 | Lowndes | 6 | 1.55 |
| Catoosa | 1 | 0.26 | Macon | 2 | 0.52 |
| Charlton | 1 | 0.26 | Marion | 1 | 0.26 |
| Chatham | 10 | 2.84 | McIntosh | 1 | 0.26 |
| Cherokee | 2 | 0.52 | Meriwether | 1 | 0.26 |
| Clarke | 10 | 2.58 | Monroe | 2 | 0.52 |
| Clayton | 19 | 4.9 | Morgan | 8 | 2.06 |
| Cobb | 11 | 2.84 | Muscogee | 14 | 3.61 |
| Coffee | 3 | 0.52 | Newton | 3 | 0.77 |
| Colquitt | 1 | 0.26 | Oconee | 7 | 1.8 |
| Columbia | 4 | 1.03 | Oglethorpe | 1 | 0.26 |
| Cook | 3 | 0.77 | Paulding | 2 | 0.52 |
| Crawford | 1 | 0.26 | Pike | 3 | 0.77 |
| Crisp | 2 | 0.52 | Polk | 3 | 1.03 |
| DeKalb | 25 | 6.7 | Putnam | 8 | 2.06 |
| Dougherty | 7 | 1.8 | Rabun | 1 | 0.26 |
| Douglas | 3 | 0.77 | Richmond | 19 | 5.15 |
| Early | 3 | 0.77 | Rockdale | 4 | 1.03 |
| Effingham | 2 | 0.52 | Screven | 2 | 0.52 |
| Elbert | 2 | 0.52 | Spalding | 8 | 2.06 |
| Emanuel | 1 | 0.26 | Stephens | 1 | 0.26 |
| Fayette | 4 | 1.03 | Sumter | 1 | 0.52 |
| Floyd | 5 | 1.29 | Terrell | 1 | 0.26 |
| Forsyth | 1 | 0.26 | Thomas | 2 | 0.52 |
| Fulton | 19 | 5.15 | Tift | 6 | 1.8 |
| Gilmer | 1 | 0.52 | Toombs | 3 | 0.77 |
| Glynn | 6 | 1.55 | Troup | 1 | 0.26 |
| Greene | 1 | 0.26 | Upson | 2 | 0.52 |
| Gwinnett | 13 | 3.35 | Walker | 2 | 0.52 |
| Hall | 11 | 3.09 | Walton | 2 | 0.52 |
| Hancock | 1 | 0.26 | Ware | 7 | 1.8 |
| Harris | 1 | 0.26 | Washington | 1 | 0.26 |
| Hart | 6 | 1.55 | Wayne | 1 | 0.26 |
| Henry | 5 | 1.29 | Whitfield | 1 | 0.26 |

Total Death Notices: 381

Percent of all counties filing a death notice: 58%

**Table 2: Death Notices in Georgia by Judicial Circuit (1993–2000)**

| Judicial Circuit | Death Notices | % of Total |
|---|---|---|
| Alapaha | 3 | 0.77 |
| Alcovy | 5 | 1.29 |
| Appalachian | 1 | 0.52 |
| Atlanta | 19 | 5.15 |
| Atlantic | 11 | 2.84 |
| Augusta | 28 | 7.47 |
| Blue Ridge | 3 | 0.77 |
| Brunswick | 15 | 3.61 |
| Chattahoochee | 16 | 4.12 |
| Cherokee | 9 | 2.32 |
| Clayton | 19 | 4.9 |
| Cobb | 11 | 2.84 |
| Conasauga | 1 | 0.26 |
| Cordele | 3 | 0.77 |
| Coweta | 5 | 1.29 |
| Dougherty | 7 | 1.8 |
| Douglas | 3 | 0.77 |
| Dublin | 1 | 0.26 |
| Eastern | 10 | 2.84 |
| Flint | 9 | 2.32 |
| Griffin | 17 | 4.38 |
| Gwinnett | 13 | 3.35 |
| Houston | 1 | 0.26 |
| Lookout Mountain | 3 | 0.77 |
| Macon | 8 | 2.06 |
| Middle | 7 | 1.8 |
| Mountain | 2 | 0.52 |
| Northeastern | 11 | 3.09 |
| Northern | 9 | 2.32 |
| Ocmulgee | 26 | 6.7 |
| Ogeechee | 9 | 2.32 |
| Pataula | 2 | 0.52 |
| Piedmont | 4 | 1.03 |
| Rockdale | 4 | 1.03 |
| Rome | 5 | 1.29 |
| South Georgia | 2 | 0.52 |
| Southern | 9 | 2.32 |
| Southwestern | 4 | 1.29 |
| Stone Mountain | 25 | 6.7 |
| Tallapoosa | 5 | 1.55 |
| Tifton | 7 | 2.06 |
| Waycross | 12 | 2.84 |
| Western | 17 | 4.38 |

Total Death Notices: 381

Percent of all judicial circuits filing a death notice: 93%

**Table 3: Summary Statistics for Case-Level Variables**

| Variable Name | N | Mean | Std. Dev. | Min | Max |
|---|---|---|---|---|---|
| DP Notice | 3318 | 0.114 | 0.318 | 0 | 1 |
| Verdict/Plea (Verdict) | 3315 | 0.418 | 0.493 | 0 | 1 |
| Murder Conviction | 3316 | 0.601 | 0.490 | 0 | 1 |
| Death Sentence (Yes) | 3318 | 0.017 | 0.128 | 0 | 1 |
| Sentence (LS; LWOP;DS) | 1991 | 1.144 | 0.423 | 1 | 3 |
| LWOP Plea | 3318 | 0.032 | 0.176 | 0 | 1 |
| # of Defendants | 3315 | 1.524 | 1.011 | 1 | 11 |
| Defendant Black | 3318 | 0.726 | 0.446 | 0 | 1 |
| Defendant White | 3318 | 0.238 | 0.426 | 0 | 1 |
| Defendant Native Amer. | 3318 | 0.001 | 0.025 | 0 | 1 |
| Defendant Asian | 3318 | 0.007 | 0.085 | 0 | 1 |
| Defendant "Other" | 3318 | 0.002 | 0.043 | 0 | 1 |
| Defendant Hispanic | 3318 | 0.027 | 0.161 | 0 | 1 |
| Defendant Sex (Male) | 3318 | 0.901 | 0.299 | 0 | 1 |
| Defendant Age (Yrs) | 3315 | 27.631 | 10.533 | 17 | 76 |
| Defendant HS Grad | 3316 | 0.157 | 0.363 | 0 | 1 |
| Defendant Employed | 3315 | 0.560 | 0.496 | 0 | 1 |
| Defendant SES (Middle) | 3315 | 0.427 | 0.495 | 0 | 1 |
| Defendant Married | 3318 | 0.288 | 0.453 | 0 | 1 |
| Defendant has Children | 3316 | 0.628 | 0.484 | 0 | 1 |
| Defendant Drug Use | 3315 | 0.440 | 0.496 | 0 | 1 |
| Contemp. Felony | 3316 | 0.547 | 0.498 | 0 | 1 |
| Prior Felony | 3316 | 0.176 | 0.381 | 0 | 1 |
| Felony-related (Yes) | 3315 | 0.389 | 0.488 | 0 | 1 |
| Prior Violent Crime | 3318 | 0.390 | 0.488 | 0 | 1 |
| # of Stat Aggs | 378 | 2.069 | 0.850 | 1 | 6 |
| # of Victims | 3315 | 1.218 | 0.762 | 1 | 14 |
| Victim Black | 3315 | 0.632 | 0.482 | 0 | 1 |
| Victim White | 3315 | 0.348 | 0.476 | 0 | 1 |
| Victim Native Amer. | 3315 | 0.003 | 0.055 | 0 | 1 |
| Victim Asian | 3315 | 0.018 | 0.132 | 0 | 1 |
| Victim Female | 3315 | 0.275 | 0.447 | 0 | 1 |
| Victim Age | 3315 | 32.324 | 15.854 | 0 | 93 |
| Victim Stranger | 3315 | 0.244 | 0.430 | 0 | 1 |

**Table 4: Summary Statistics for Judicial Circuit-Level Variables**

| Variable Name | N | Mean | Std. Dev. | Min | Max |
|---|---|---|---|---|---|
| Per Capita Income | 46 | 14900.500 | 3200.693 | 11157.900 | 24227.500 |
| % Below Poverty Level | 46 | 16.050 | 6.052 | 4.850 | 28.279 |
| % Fam. Below Pov. Level | 46 | 12.623 | 5.113 | 3.350 | 22.964 |
| Median Home Value | 46 | 91961.260 | 29081.300 | 55371.430 | 180700.000 |
| Violent Crime Rate (Reps) | 46 | 443.780 | 353.064 | 108.488 | 2459.853 |
| Murder Rate | 46 | 8.127 | 3.491 | 2.700 | 21.640 |
| % of GA murders | 46 | 0.022 | 0.036 | 0.004 | 0.226 |
| % Living in Diff. Home | 46 | 45.777 | 6.439 | 33.866 | 59.200 |
| % Never Been Married | 46 | 23.952 | 4.576 | 16.241 | 36.738 |
| % HS Grad | 46 | 65.845 | 3.698 | 60.382 | 73.654 |
| % College Grad | 46 | 15.135 | 7.980 | 7.618 | 36.493 |
| % Foreign Born | 46 | 1.170 | 0.853 | 0.234 | 3.985 |
| % English Only | 46 | 94.924 | 2.859 | 85.463 | 98.045 |
| % Born in Georgia | 46 | 70.827 | 11.979 | 41.563 | 88.681 |
| Vertical Status ($\alpha$ = 0.87) | 46 | 0.000 | 0.862 | -1.840 | 1.646 |
| Normative Status ($\alpha$ = 0.97) | 46 | 0.000 | 0.974 | -1.046 | 1.861 |
| Horizontal Status ($\alpha$ = 0.83) | 46 | 0.000 | 0.910 | -1.383 | 1.343 |
| Cultural Status ($\alpha$ = 0.93) | 46 | 0.000 | 0.968 | -1.722 | 1.542 |

**Table 5: Summary Statistics for Murder Conviction Subsample**

| Variable Name | N | Mean | Std. Dev. | Min | Max |
|---|---|---|---|---|---|
| DP Notice | 2138 | 0.177 | 0.382 | 0 | 1 |
| Verdict/Plea (Verdict) | 2136 | 0.559 | 0.497 | 0 | 1 |
| Murder Conviction* | 2138 | 0.932 | 0.251 | 0 | 1 |
| Death Sentence (Yes) | 2138 | 0.026 | 0.158 | 0 | 1 |
| Sentence (LS; LWOP;DS) | 1984 | 1.145 | 0.423 | 1 | 3 |
| LWOP Plea | 2138 | 0.050 | 0.217 | 0 | 1 |
| # of Defendants | 2136 | 1.609 | 1.065 | 1 | 8 |
| Defendant Black | 2138 | 0.712 | 0.453 | 0 | 1 |
| Defendant White | 2138 | 0.258 | 0.437 | 0 | 1 |
| Defendant Native Amer. | 2138 | 0.000 | 0.022 | 0 | 1 |
| Defendant Asian | 2138 | 0.006 | 0.078 | 0 | 1 |
| Defendant "Other" | 2138 | 0.002 | 0.048 | 0 | 1 |
| Defendant Hispanic | 2138 | 0.021 | 0.144 | 0 | 1 |
| Defendant Sex (Male) | 2138 | 0.933 | 0.250 | 0 | 1 |
| Defendant Age (Yrs) | 2136 | 27.397 | 10.175 | 17 | 73 |
| Defendant HS Grad | 2136 | 0.163 | 0.369 | 0 | 1 |
| Defendant Employed | 2136 | 0.565 | 0.496 | 0 | 1 |
| Defendant SES (Middle) | 2136 | 0.438 | 0.496 | 0 | 1 |
| Defendant Married | 2138 | 0.283 | 0.451 | 0 | 1 |
| Defendant has Children | 2136 | 0.632 | 0.482 | 0 | 1 |
| Defendant Drug Use | 2136 | 0.465 | 0.499 | 0 | 1 |
| Contemp. Felony | 2138 | 0.668 | 0.471 | 0 | 1 |
| Prior Felony | 2138 | 0.207 | 0.405 | 0 | 1 |
| Felony-related (Yes) | 2136 | 0.481 | 0.500 | 0 | 1 |
| Prior Violent Crime | 2138 | 0.498 | 0.500 | 0 | 1 |
| # of Stat Aggs | 378 | 2.069 | 0.850 | 1 | 6 |
| # of Victims | 2136 | 1.273 | 0.861 | 1 | 14 |
| Victim Black | 2136 | 0.575 | 0.495 | 0 | 1 |
| Victim White | 2136 | 0.402 | 0.490 | 0 | 1 |
| Victim Native Amer. | 2136 | 0.002 | 0.044 | 0 | 1 |
| Victim Asian | 2136 | 0.015 | 0.122 | 0 | 1 |
| Victim Female | 2136 | 0.330 | 0.470 | 0 | 1 |
| Victim Age | 2136 | 33.430 | 16.340 | 0 | 93 |
| Victim Stranger | 2136 | 0.291 | 0.454 | 0 | 1 |

*Note: The murder conviction subsample also includes an additional 145 cases that were death eligible under B1 or B2 of Georgia's capital statute or where the prosecutor sought the death penalty but the defendant was not ultimately convicted of murder.

**Table 6: Summary Statistics for Death Eligible Subsample**

| Variable Name | N | Mean | Std. Dev. | Min | Max |
|---|---|---|---|---|---|
| DP Notice | 1096 | 0.346 | 0.476 | 0 | 1 |
| Verdict/Plea (Verdict) | 1094 | 0.476 | 0.500 | 0 | 1 |
| Murder Conviction | 1096 | 0.868 | 0.339 | 0 | 1 |
| Death Sentence (Yes) | 1096 | 0.050 | 0.218 | 0 | 1 |
| Sentence (LS; LWOP;DS) | 951 | 1.287 | 0.566 | 1 | 3 |
| LWOP Plea | 1096 | 0.090 | 0.287 | 0 | 1 |
| # of Defendants | 1094 | 1.678 | 1.072 | 1 | 8 |
| Defendant Black | 1096 | 0.662 | 0.473 | 0 | 1 |
| Defendant White | 1096 | 0.315 | 0.465 | 0 | 1 |
| Defendant Native Amer. | 1096 | 0.001 | 0.030 | 0 | 1 |
| Defendant Asian | 1096 | 0.005 | 0.067 | 0 | 1 |
| Defendant "Other" | 1096 | 0.000 | 0.000 | 0 | 1 |
| Defendant Hispanic | 1096 | 0.017 | 0.131 | 0 | 1 |
| Defendant Sex (Male) | 1096 | 0.939 | 0.240 | 0 | 1 |
| Defendant Age (Yrs) | 1094 | 27.983 | 9.946 | 17 | 65 |
| Defendant HS Grad | 1094 | 0.213 | 0.410 | 0 | 1 |
| Defendant Employed | 1094 | 0.583 | 0.493 | 0 | 1 |
| Defendant SES (Middle) | 1094 | 0.463 | 0.499 | 0 | 1 |
| Defendant Married | 1096 | 0.296 | 0.457 | 0 | 1 |
| Defendant has Children | 1094 | 0.644 | 0.479 | 0 | 1 |
| Defendant Drug Use | 1094 | 0.501 | 0.500 | 0 | 1 |
| Contemp. Felony | 1096 | 0.834 | 0.372 | 0 | 1 |
| Prior Felony | 1096 | 0.281 | 0.450 | 0 | 1 |
| Felony-related (Yes) | 1094 | 0.633 | 0.482 | 0 | 1 |
| Prior Violent Crime | 1096 | 0.695 | 0.461 | 0 | 1 |
| # of Stat Aggs | 378 | 2.069 | 0.850 | 1 | 6 |
| # of Victims | 1094 | 1.534 | 1.145 | 1 | 14 |
| Victim Black | 1094 | 0.453 | 0.498 | 0 | 1 |
| Victim White | 1094 | 0.503 | 0.500 | 0 | 1 |
| Victim Native Amer. | 1094 | 0.002 | 0.049 | 0 | 1 |
| Victim Asian | 1094 | 0.019 | 0.137 | 0 | 1 |
| Victim Female | 1094 | 0.366 | 0.482 | 0 | 1 |
| Victim Age | 1094 | 35.204 | 17.499 | 0 | 93 |
| Victim Stranger | 1094 | 0.334 | 0.472 | 0 | 1 |

**Table 7: Summary Statistics for Death Noticed Subsample**

| Variable Name | N | Mean | Std. Dev. | Min | Max |
|---|---|---|---|---|---|
| DP Notice | 379 | 1.000 | 0.000 | 1 | 1 |
| Verdict/Plea (Verdict) | 379 | 0.434 | 0.496 | 0 | 1 |
| Murder Conviction | 379 | 0.926 | 0.262 | 0 | 1 |
| Death Sentence (Yes) | 379 | 0.145 | 0.353 | 0 | 1 |
| Sentence (LS; LWOP;DS) | 352 | 1.705 | 0.723 | 1 | 3 |
| | | | | | |
| LWOP Plea | 214 | 0.387 | 0.488 | 0 | 1 |
| # of Defendants | 379 | 1.892 | 1.141 | 1 | 8 |
| Defendant Black | 379 | 0.588 | 0.493 | 0 | 1 |
| Defendant White | 379 | 0.372 | 0.484 | 0 | 1 |
| Defendant Native Amer. | 379 | 0.000 | 0.000 | 0 | 1 |
| | 379 | | | | |
| Defendant Asian | 379 | 0.005 | 0.073 | 0 | 1 |
| Defendant "Other" | 379 | 0.000 | 0.000 | 0 | 1 |
| Defendant Hispanic | 379 | 0.034 | 0.182 | 0 | 1 |
| Defendant Sex (Male) | 379 | 0.942 | 0.234 | 0 | 1 |
| Defendant Age (Yrs) | 379 | 26.886 | 9.149 | 17 | 65 |
| | 379 | | | | |
| Defendant HS Grad | 379 | 0.251 | 0.434 | 0 | 1 |
| Defendant Employed | 379 | 0.624 | 0.485 | 0 | 1 |
| Defendant SES (Middle) | 379 | 0.511 | 0.501 | 0 | 1 |
| Defendant Married | 379 | 0.285 | 0.452 | 0 | 1 |
| Defendant has Children | 379 | 0.682 | 0.466 | 0 | 1 |
| | 379 | | | | |
| Defendant Drug Use | 379 | 0.534 | 0.499 | 0 | 1 |
| Contemp. Felony | 379 | 0.797 | 0.403 | 0 | 1 |
| Prior Felony | 379 | 0.201 | 0.401 | 0 | 1 |
| Felony-related (Yes) | 379 | 0.950 | 0.219 | 0 | 1 |
| Prior Violent Crime | 379 | 0.734 | 0.443 | 0 | 1 |
| | 379 | | | | |
| # of Stat Aggs | 379 | 2.069 | 0.850 | 1 | 6 |
| # of Victims | 379 | 1.632 | 1.347 | 1 | 14 |
| Victim Black | 379 | 0.300 | 0.459 | 0 | 1 |
| Victim White | 379 | 0.667 | 0.472 | 0 | 1 |
| Victim Native Amer. | 379 | 0.005 | 0.073 | 0 | 1 |
| | 379 | | | | |
| Victim Asian | 379 | 0.030 | 0.170 | 0 | 1 |
| Victim Female | 379 | 0.492 | 0.501 | 0 | 1 |
| Victim Age | 379 | 36.008 | 19.885 | 0 | 90 |
| Victim Stranger | 379 | 0.402 | 0.491 | 0 | 1 |

**Table 8: Random Intercept Logistic Regression Models ($H_1$–$H_3$)**

| | (1) **DPN-MC** | (2) **DPN-DE** | (3) **BP** | (4) **DS** |
|---|---|---|---|---|
| # of Defs. | 0.352*** | 0.320*** | -0.357* | -0.136 |
| | (0.060) | (0.074) | (0.165) | (0.234) |
| Def. Age | 0.017 | 0.004 | 0.008 | 0.079 |
| | (0.010) | (0.011) | (0.025) | (0.042) |
| Def. Age (Squared) | -0.002** | -0.001 | 0.001 | -0.006* |
| | (0.001) | (0.001) | (0.001) | (0.003) |
| # of Vics. | 0.479*** | 0.135* | -0.006 | 0.448* |
| | (0.072) | (0.068) | (0.114) | (0.190) |
| Vic. Age | -0.005 | -0.011* | 0.012 | -0.014 |
| | (0.004) | (0.005) | (0.010) | (0.015) |
| Vic. Age (Squared) | 0.001*** | 0.001*** | -.0003 | -0.000 |
| | (0.000) | (0.000) | (.0003) | (0.000) |
| Def. X Vic. Age | -0.001** | -0.001 | 0.001 | -0.001 |
| | (0.000) | (0.000) | (0.001) | (0.002) |
| Def. B/Vic. W. | 1.282*** | 0.895*** | 0.612 | -0.003 |
| | (0.187) | (0.212) | (0.437) | (0.606) |
| Def. W/Vic. W | 0.834*** | 0.676*** | -0.178 | 1.087* |
| | (0.169) | (0.189) | (0.389) | (0.543) |
| Def. H./Vic. W. | 0.929* | 2.419** | -0.387 | 1.780 |
| | (0.410) | (0.737) | (1.187) | (1.122) |
| Def. M./Vic. F. | 1.006*** | 0.960*** | 0.526 | 0.151 |
| | (0.141) | (0.158) | (0.331) | (0.442) |
| Def. F./Vic. M. | -0.352 | -0.075 | -0.137 | -2.560 |
| | (0.357) | (0.390) | (0.925) | (1.541) |
| Constant | -2.457*** | -1.470*** | -1.392** | -1.926* |
| | (0.233) | (0.262) | (0.527) | (0.813) |
| Year Dummies | Y | Y | Y | Y |
| S.D. of random effect | 0.682*** | 0.641*** | 0.373 | 1.234*** |
| Rho ($\rho$) | 0.626 | 0.556 | 0.119 | 0.465 |
| N | 2136 | 1094 | 214 | 164 |
| # of Judicial Circuits | 46 | 46 | 40 | 39 |
| AIC | 1643.107 | 1229.208 | 287.487 | 214.591 |
| BIC | 1762.107 | 1334.158 | 354.619 | 279.688 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

**Table 9: Random Intercept Logistic Regression Models ($H_4$)**

| | (1) DPN-MC | (2) DPN-DE | (3) BP | (4) DS |
|---|---|---|---|---|
| # of Defs. | 0.328*** | 0.312*** | -0.435* | -0.175 |
| | (0.062) | (0.076) | (0.178) | (0.262) |
| Def. Age | 0.009 | -0.007 | 0.035 | 0.083 |
| | (0.012) | (0.013) | (0.029) | (0.047) |
| Def. Age (Squared) | -0.001* | -0.000 | -0.000 | -0.006 |
| | (0.001) | (0.001) | (0.001) | (0.003) |
| # of Vics. | 0.485*** | 0.142* | -0.005 | 0.475* |
| | (0.073) | (0.070) | (0.118) | (0.199) |
| Vic. Age | -0.008 | -0.012* | 0.004 | -0.017 |
| | (0.005) | (0.005) | (0.011) | (0.017) |
| Vic. Age (Squared) | 0.001*** | 0.001*** | -0.000 | -0.000 |
| | (0.000) | (0.000) | (0.000) | (0.001) |
| Def. X Vic. Age | -0.001** | -0.001 | 0.001 | -0.001 |
| | (0.000) | (0.000) | (0.001) | (0.002) |
| Def. B/Vic. W. | 1.084*** | 0.725** | 0.444 | -0.257 |
| | (0.198) | (0.224) | (0.482) | (0.672) |
| Def. W/Vic. W | 0.865*** | 0.697*** | 0.164 | 1.727** |
| | (0.178) | (0.199) | (0.431) | (0.635) |
| Def. H./Vic. W. | 1.061* | 2.647*** | 0.200 | 2.328* |
| | (0.437) | (0.769) | (1.244) | (1.179) |
| Def. M./Vic. F. | 1.107*** | 1.076*** | 0.687* | 0.143 |
| | (0.148) | (0.167) | (0.347) | (0.497) |
| Def. F./Vic. M. | -0.253 | 0.043 | 0.093 | -2.711 |
| | (0.377) | (0.408) | (0.948) | (1.824) |
| Def. HS Grad | 0.740*** | 0.348 | -0.573 | -0.676 |
| | (0.173) | (0.197) | (0.433) | (0.581) |
| Def. Employed | 0.412** | 0.385* | -0.229 | -0.181 |
| | (0.149) | (0.168) | (0.362) | (0.538) |
| Def. SES | 0.051 | 0.160 | -0.537 | 0.819 |
| | (0.143) | (0.162) | (0.364) | (0.509) |
| Def. Married | -0.122 | -0.097 | 0.309 | -1.057 |
| | (0.168) | (0.189) | (0.451) | (0.633) |
| Def. has Children | 0.310* | 0.413* | -0.157 | 2.312** |
| | (0.158) | (0.182) | (0.381) | (0.830) |
| Def. Drug Use | 0.477*** | 0.412** | 0.482 | -0.057 |
| | (0.139) | (0.158) | (0.339) | (0.527) |
| Vic. Stranger | 0.686*** | 0.606** | 0.840 | 0.759 |
| | (0.172) | (0.188) | (0.458) | (0.599) |
| Constant | -3.465*** | -2.498*** | -1.583* | -4.044** |
| | (0.302) | (0.338) | (0.688) | (1.316) |

**Table 9 (cont.)**

| | | | | |
|---|---|---|---|---|
| Year Dummies | Y | Y | Y | Y |
| S.D. of random effect | 0.699*** | 0.674*** | 0.498 | 1.09 |
| Rho ($\rho$) | 0.629 | 0.569 | 0.178 | 0.361 |
| N | 2138 | 1096 | 214 | 164 |
| # of Judicial Circuits | 46 | 46 | 40 | 39 |
| AIC | 1594.866 | 1208.059 | 289.623 | 298.769 |
| BIC | 1753.507 | 1347.940 | 380.251 | 408.798 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

**Table 10: Random Intercept Logistic Regression Models ($H_5$)**

| | (1) DPN-MC | (2) DPN-DE | (3) BP | (4) DS |
|---|---|---|---|---|
| # of Defs. | 0.325*** | 0.314*** | -0.442* | -0.230 |
| | (0.062) | (0.076) | (0.178) | (0.250) |
| Def. Age | 0.009 | -0.006 | 0.031 | 0.071 |
| | (0.012) | (0.013) | (0.030) | (0.042) |
| Def. Age (Squared) | -0.001* | -0.000 | 0.000 | -0.004 |
| | (0.001) | (0.001) | (0.001) | (0.003) |
| # of Vics. | 0.483*** | 0.143* | -0.002 | 0.652** |
| | (0.072) | (0.069) | (0.118) | (0.200) |
| Vic. Age | -0.008 | -0.012* | 0.005 | -0.021 |
| | (0.005) | (0.005) | (0.011) | (0.015) |
| Vic. Age (Squared) | 0.001*** | 0.001*** | -0.000 | -0.000 |
| | (0.000) | (0.000) | (0.000) | (0.000) |
| Def. X Vic. Age | -0.001** | -0.001 | 0.001 | -0.001 |
| | (0.000) | (0.000) | (0.001) | (0.002) |
| Def. B/Vic. W. | 1.092*** | 0.724** | 0.478 | -0.163 |
| | (0.198) | (0.223) | (0.514) | (0.641) |
| Def. W/Vic. W | 0.844*** | 0.651** | 0.244 | 1.724** |
| | (0.181) | (0.202) | (0.478) | (0.629) |
| Def. H./Vic. W. | 1.038* | 2.641*** | 0.371 | 2.202* |
| | (0.436) | (0.778) | (1.252) | (1.085) |
| Def. M./Vic. F. | 1.106*** | 1.074*** | 0.720* | 0.148 |
| | (0.148) | (0.167) | (0.358) | (0.491) |
| Def. F./Vic. M. | -0.277 | 0.017 | 0.036 | -3.013 |
| | (0.377) | (0.407) | (0.989) | (1.756) |
| Def. HS Grad | 0.726*** | 0.337 | -0.667 | -0.830 |
| | (0.173) | (0.196) | (0.447) | (0.568) |
| Def. Employed | 0.404** | 0.373* | -0.156 | 0.058 |
| | (0.149) | (0.168) | (0.366) | (0.527) |
| Def. SES | 0.034 | 0.138 | -0.574 | 0.895 |
| | (0.143) | (0.163) | (0.372) | (0.498) |
| Def. Married | -0.133 | -0.108 | 0.362 | -0.966 |
| | (0.167) | (0.188) | (0.457) | (0.591) |
| Def. has Children | 0.321* | 0.422* | -0.137 | 2.414** |
| | (0.158) | (0.182) | (0.386) | (0.846) |
| Def. Drug Use | 0.473*** | 0.412** | 0.497 | 0.169 |
| | (0.139) | (0.158) | (0.342) | (0.497) |
| Vic. Stranger | 0.673*** | 0.593** | 0.867 | 0.908 |
| | (0.172) | (0.187) | (0.469) | (0.560) |
| Vertical | -0.062 | -0.045 | 0.350 | 0.133 |
| | (0.207) | (0.207) | (0.364) | (0.530) |
| Normative | -0.538 | -0.498 | 0.608 | -1.375 |
| | (0.295) | (0.283) | (0.391) | (0.799) |
| Horizontal | 0.190 | 0.103 | -0.329 | -0.140 |
| | (0.278) | (0.276) | (0.427) | (0.629) |

**Table 10 (cont.)**

| | | | | |
|---|---|---|---|---|
| Horizontal (Squared) | -0.600** | -0.540* | -0.278 | -0.779 |
| | (0.229) | (0.228) | (0.336) | (0.535) |
| Constant | -3.641*** | -2.670*** | -1.446* | -4.589** |
| | (0.317) | (0.346) | (0.710) | (1.500) |
| Year Dummies | Y | Y | Y | Y |
| S.D. of random effect | 0.616*** | 0.624*** | 0.655 | 0.998 |
| Rho (r) | 0.574 | 0.538 | 0.225 | 0.314 |
| N | 2138 | 1096 | 214 | 164 |
| # of Judicial Circuits | 46 | 46 | 40 | 39 |
| AIC | 1595.320 | 1209.424 | 293.207 | 206.818 |
| BIC | 1770.958 | 1364.293 | 393.904 | 305.621 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

**Table 11: Random Intercept Logistic Regression Models ($H_6$–$H_7$)**

| | (1) DPN-MC | (2) DPN-DE | (3) BP | (4) DS |
|---|---|---|---|---|
| # of Defs. | 0.360*** | 0.322*** | -0.246 | -0.239 |
| | (0.065) | (0.077) | (0.329) | (0.252) |
| Def. Age | 0.015 | 0.010 | 0.018 | 0.071 |
| | (0.013) | (0.014) | (0.033) | (0.046) |
| Def. Age (Squared) | -0.001 | -0.001 | 0.000 | -0.004 |
| | (0.001) | (0.001) | (0.002) | (0.003) |
| # of Vics. | 0.479*** | 0.144* | 0.131 | 0.621** |
| | (0.076) | (0.071) | (0.188) | (0.206) |
| Vic. Age | -0.008 | -0.011* | -0.003 | -0.023 |
| | (0.005) | (0.005) | (0.016) | (0.016) |
| Vic. Age (Squared) | 0.001*** | 0.001*** | 0.000 | -0.000 |
| | (0.000) | (0.000) | (0.001) | (0.001) |
| Def. X Vic. Age | -0.001* | -0.001 | 0.000 | -0.001 |
| | (0.000) | (0.000) | (0.001) | (0.002) |
| Def. B/Vic. W. | 1.068*** | 0.698** | 1.374 | 0.115 |
| | (0.206) | (0.228) | (0.728) | (0.976) |
| Def. W/Vic. W | 0.921*** | 0.576** | 0.916 | 2.031* |
| | (0.190) | (0.208) | (0.631) | (0.847) |
| Def. H./Vic. W. | 1.168* | 2.434** | 3.257 | 3.003 |
| | (0.456) | (0.770) | (1.715) | (2.153) |
| Def. M./Vic. F. | 1.087*** | 1.128*** | 1.291 | 0.219 |
| | (0.152) | (0.170) | (1.062) | (0.521) |
| Def. F./Vic. M. | -0.283 | -0.293 | -0.242 | -2.817 |
| | (0.395) | (0.413) | (0.985) | (1.795) |
| Def. HS Grad | 0.745*** | 0.402* | -0.326 | -0.754 |
| | (0.179) | (0.203) | (0.611) | (0.612) |
| Def. Employed | 0.446** | 0.391* | 0.132 | -0.017 |
| | (0.155) | (0.171) | (0.516) | (0.545) |
| Def. SES | 0.050 | 0.158 | -0.613 | 0.750 |
| | (0.148) | (0.166) | (0.413) | (0.521) |
| Def. Married | -0.225 | -0.108 | 0.334 | -1.161 |
| | (0.174) | (0.192) | (0.490) | (0.613) |
| Def. has Children | 0.276 | 0.336 | 0.138 | 2.543** |
| | (0.164) | (0.186) | (0.531) | (0.892) |
| Def. Drug Use | 0.487*** | 0.390* | 0.771 | 0.219 |
| | (0.144) | (0.161) | (0.469) | (0.527) |
| Vic. Stranger | 0.434* | 0.552** | 0.912 | 0.920 |
| | (0.178) | (0.193) | (0.757) | (0.605) |
| Contemp. Fel. | -0.046 | -0.955*** | 0.990 | 1.653 |
| | (0.209) | (0.246) | ( 0.694) | (0.924) |
| Prior Fel. | -0.222 | -0.657** | -0.944 | -0.399 |
| | (0.188) | (0.200) | (0.723) | (0.617) |
| Vio. Prior | 1.437*** | 0.943*** | 0.646 | -0.677 |
| | (0.194) | (0.210) | (0.942) | (0.772) |

**Table 11 (cont.)**

| | | | | |
|---|---|---|---|---|
| # Stat. Aggs. | | | 0.594* | -0.098 |
| | | | (0.251) | (0.386) |
| Vertical | -0.102 | 0.019 | 0.230 | 0.072 |
| | (0.215) | (0.213) | (0.502) | (0.546) |
| Normative | -0.594 | -0.472 | 0.467 | -1.498 |
| | (0.307) | (0.291) | (0.463) | (0.841) |
| Horizontal | 0.261 | 0.019 | -0.337 | 0.055 |
| | (0.290) | (0.284) | (0.440) | (0.676) |
| Horizontal (Squared) | -0.678** | -0.569* | -0.682 | -0.681 |
| | (0.239) | (0.234) | (0.572) | (0.564) |
| Constant | -4.360*** | -2.309*** | -3.531** | -5.299** |
| | (0.362) | (0.404) | (1.217) | (1.703) |
| Year Dummies | Y | Y | Y | Y |
| Sel. Bias Corrected | N/A | N/A | Y | Y |
| S.D. of random effect | 0.645*** | 0.545*** | 0.824* | 1.223 |
| Rho ($\rho$) | 0.578 | 0.473 | 0.324 | 0.383 |
| N | 2138 | 1096 | 214 | 164 |
| # of Judicial Circuits | 46 | 46 | 40 | 39 |
| AIC | 1509.646 | 1183.684 | 297.040 | 211.101 |
| BIC | 1702.282 | 1353.540 | 417.877 | 322.254 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

**Table 12: Cross-Level Interactions ($H_8$)**

| | (1) DPN | (2) DPN | (3) DPN | (4) DPN | (5) DPN |
|---|---|---|---|---|---|
| Def. B/Vic. W. | 0.704** | | | | |
| | (0.238) | | | | |
| B/W X Vert. | 0.025 | | | | |
| | (0.376) | | | | |
| B/W X Norm. | 0.416 | | | | |
| | (0.357) | | | | |
| B/W X Horiz. | -0.445 | | | | |
| | (0.444) | | | | |
| Def. W/Vic. W | | 0.686** | | | |
| | | (0.249) | | | |
| W/W X Vert. | | -0.036 | | | |
| | | (0.345) | | | |
| W/W X Norm. | | 0.240 | | | |
| | | (0.389) | | | |
| W/W X Horiz. | | 0.009 | | | |
| | | (0.410) | | | |
| Def. M./Vic. F. | | | 1.082*** | | |
| | | | (0.183) | | |
| M/F X Vert. | | | -0.209 | | |
| | | | (0.299) | | |
| M/F X Norm. | | | -0.284 | | |
| | | | (0.306) | | |
| M/F X Horiz. | | | 0.285 | | |
| | | | (0.374) | | |
| Prior Fel. | | | | -0.684** | |
| | | | | (0.212) | |
| Prior Fel. X Vert. | | | | -0.123 | |
| | | | | (0.348) | |
| Prior Fel. X Norm. | | | | -0.208 | |
| | | | | (0.334) | |
| Prior Fel. X Horiz. | | | | 0.241 | |
| | | | | (0.424) | |
| Vio. Prior | | | | | 0.939*** |
| | | | | | (0.237) |
| Prior Vio. X Vert. | | | | | 0.501 |
| | | | | | (0.329) |
| Prior Vio. X Norm. | | | | | 0.399 |
| | | | | | (0.368) |
| Prior Vio. X Horiz. | | | | | -0.893* |
| | | | | | (0.405) |
| Constant | -2.343*** | -2.324*** | -2.303*** | -2.288*** | -2.340*** |
| | (0.408) | (0.404) | (0.406) | (0.406) | (0.423) |

**Table 12 (cont.)**

| | | | | | |
|---|---|---|---|---|---|
| Year Dummies | Y | Y | Y | Y | Y |
| S.D. of Random Intercept | 0.628*** | 0.761*** | 0.817*** | 0.761*** | 0.551*** |
| S.D. of Random Slope | 0.818* | 0.543 | 0.750* | 0.932* | 0.787* |
| Rho (Random Intercept) | 0.509 | 0.539 | 0.545 | 0.549 | 0.343 |
| Rho (Random Slope) | 0.316 | 0.179 | 0.301 | 0.332 | 0.355 |
| Rho ($\rho_{21}$) | -0.222 | -0.687 | -0.666 | -0.382 | -0.441 |
| N | 1092 | 1092 | 1092 | 1092 | 1092 |
| # of Judicial Circuits | 46 | 46 | 46 | 46 | 46 |
| AIC | 1187.285 | 1189.073 | 1188.699 | 1189.251 | 1184.332 |
| BIC | 1372.128 | 1373.916 | 1373.542 | 1374.094 | 1369.176 |

*p<.05; **p<.01; ***p<001

Standard errors in parentheses

The above models include controls for all case-level covariates.

**Table 13: Multivariate Logit Selection Models**

| | (1)<br>**BP** | (2)<br>**DS** |
|---|---|---|
| # of Defs. | -0.010 | -0.078 |
| | (0.125) | (0.091) |
| Def. Age | 0.027 | 0.021 |
| | (0.016) | (0.029) |
| Def. Age (Squared) | 0.000 | -0.002 |
| | (0.002) | (0.002) |
| # of Vics. | 0.011 | 0.225*** |
| | (0.082) | (0.066) |
| Vic. Age | 0.001 | -0.019** |
| | (0.006) | (0.008) |
| Vic. Age (Squared) | 0.000 | 0.000 |
| | (0.000) | (0.000) |
| Def. X Vic. Age | 0.000 | 0.000 |
| | (0.000) | (0.000) |
| Def. B/Vic. W. | 0.514* | 0.162 |
| | (0.250) | (0.336) |
| Def. W/Vic. W | 0.360 | 0.929* |
| | (0.240) | (0.386) |
| Def. H./Vic. W. | 0.280 | 1.803** |
| | (0.850) | (0.699) |
| Def. M./Vic. F. | 0.942*** | 0.497*** |
| | (0.198) | (0.286) |
| Def. F./Vic. M. | -0.398 | -0.680 |
| | (0.512) | (0.606) |
| Def. HS Grad | 0.155 | -0.309 |
| | (0.206) | (0.352) |
| Def. Employed | -0.058 | 0.195 |
| | (0.213) | (0.243) |
| Def. SES | -0.222 | 0.484* |
| | (0.219) | (0.237) |
| Def. Married | -0.083 | -0.622* |
| | (0.166) | (0.286) |
| Def. has Children | -0.259 | 1.721*** |
| | (0.195) | (0.475) |
| Def. Drug Use | 0.496* | 0.192 |
| | (0.214) | (0.189) |
| Vic. Stranger | 0.531** | 0.629* |
| | (0.178) | (0.322) |
| Contemp. Fel. | -0.086 | 0.614 |
| | (0.270) | (0.501) |
| Prior Fel. | -0.280 | -0.301 |
| | (0.211) | (0.293) |
| Vio. Prior | 0.627* | 0.171 |
| | (0.302) | (0.349) |

**Table 13 (cont.)**

| | | |
|---|---|---|
| Vertical | -0.051 | 0.018 |
| | (0.131) | (0.227) |
| Normative | -0.091 | -0.758*** |
| | (0.100) | (0.224) |
| Horizontal | -0.008 | 0.150 |
| | (0.159) | (0.302) |
| Horizontal (Squared) | -0.174 | -0.470 |
| | (0.132) | (0.256) |
| Constant | -2.233*** | -5.7328*** |
| | (0.296) | (0.648) |
| Year Dummies | Y | Y |
| N | 1037 | 1096 |
| $r_{21}$ | 0.664*** | 0.629*** |
| $r_{31}$ | 0.734*** | 0.732*** |
| $r_{23}$ | 0.193** | -0.007 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

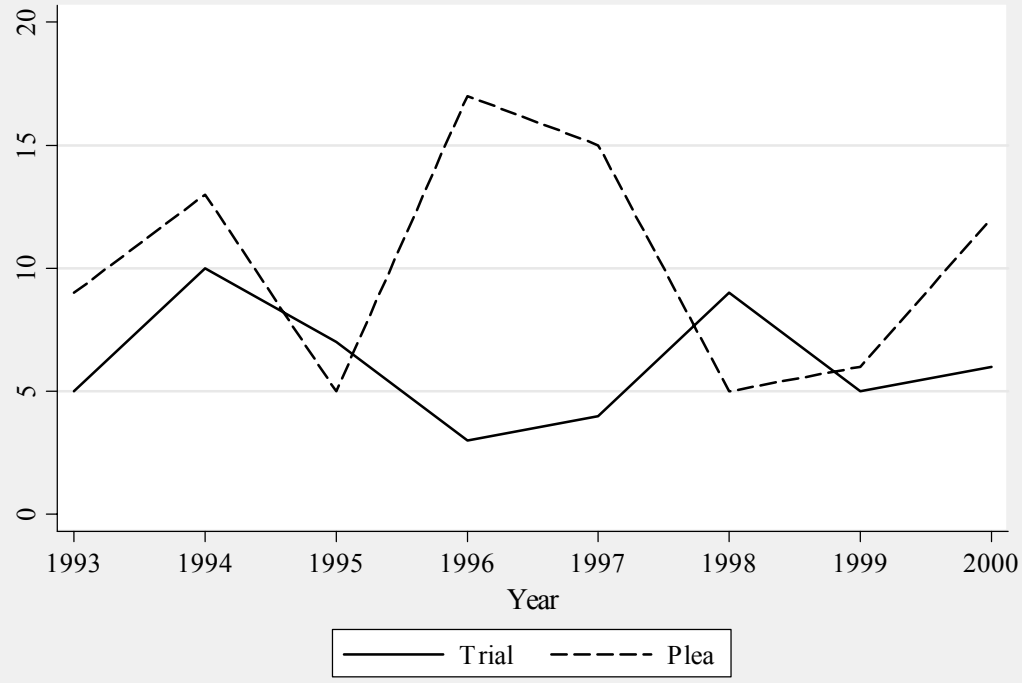
**Table 14: Summary of Results for Hypotheses**

| | DPN-MC | | DPN-DE | | BP | | DS |
|---|---|---|---|---|---|---|---|
| # of Defs. | N/A | | N/A | | N/A | | N/A |
| Def. Age | S | | S | | U | | S |
| # of Vics. | N/A | | N/A | | N/A | | N/A |
| Vic. Age | S | | S | | U | | S |
| Def/Vic Age Difference | S | | S | | U | | S |
| Def. B/Vic. W. | S | | S | | S | | M |
| Def. W/Vic. W | S | | S | | S | | M |
| Def. H./Vic. W. | S | | S | | S | | S |
| Def. M./Vic. F. | S | | S | | S | | S |
| Def. F./Vic. M. | S | | S | | S | | S |
| Def. HS Grad | U | | U | | U | | S |
| Def. Employed | U | | U | | S | | U |
| Def. SES | U | | U | | S | | U |
| Def. Married | S | | S | | S | | S |
| Def. has Children | U | | U | | S | | U |
| Def. Drug Use | S | | S | | S | | S |
| Vic. Stranger | S | | S | | S | | S |
| Contemp. Fel. | U | | U | | U | | S |
| Prior Fel. | U | | U | | U | | U |
| Vio. Prior | S | | S | | S | | S |
| # Stat. Aggs. | N/A | | N/A | | S | | S |
| Vertical | U | | S | | U | | S |
| Normative | U | | U | | U | | U |
| Horizontal | S | | S | | S | | S |

| Cross-Level Hypotheses | |
|---|---|
| B/W X Vert. | S |
| B/W X Norm. | S |
| B/W X Horiz. | S |
| W/W X Vert. | U |
| W/W X Norm. | S |
| W/W X Horiz. | U |
| M/F X Vert. | U |
| M/F X Norm. | U |
| M/F X Horiz. | U |
| Prior Fel. X Vert. | U |
| Prior Fel. X Norm. | U |
| Prior Fel. X Horiz. | U |
| Prior Vio. X Vert. | S |
| Prior Vio. X Norm. | S |
| Prior Vio. X Horiz. | S |

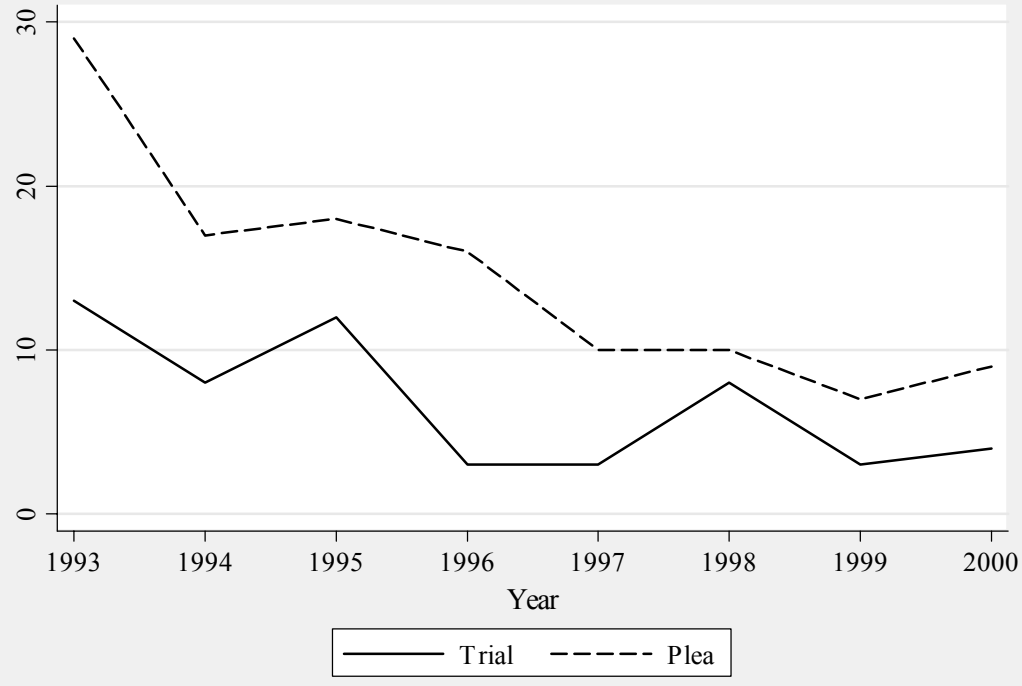
KEY: S = Supportive; U = Unsupportive; M = Mixed Support

**Figure 1: Capital Cases Resulting in LWOP**




Data Source: Department of Corrections

**Figure 2: Capital Cases Resulting in Straight Life Sentences**




Data Source: Department of Corrections

**Figure 3: Nonlinear Effect of Victim's Age**

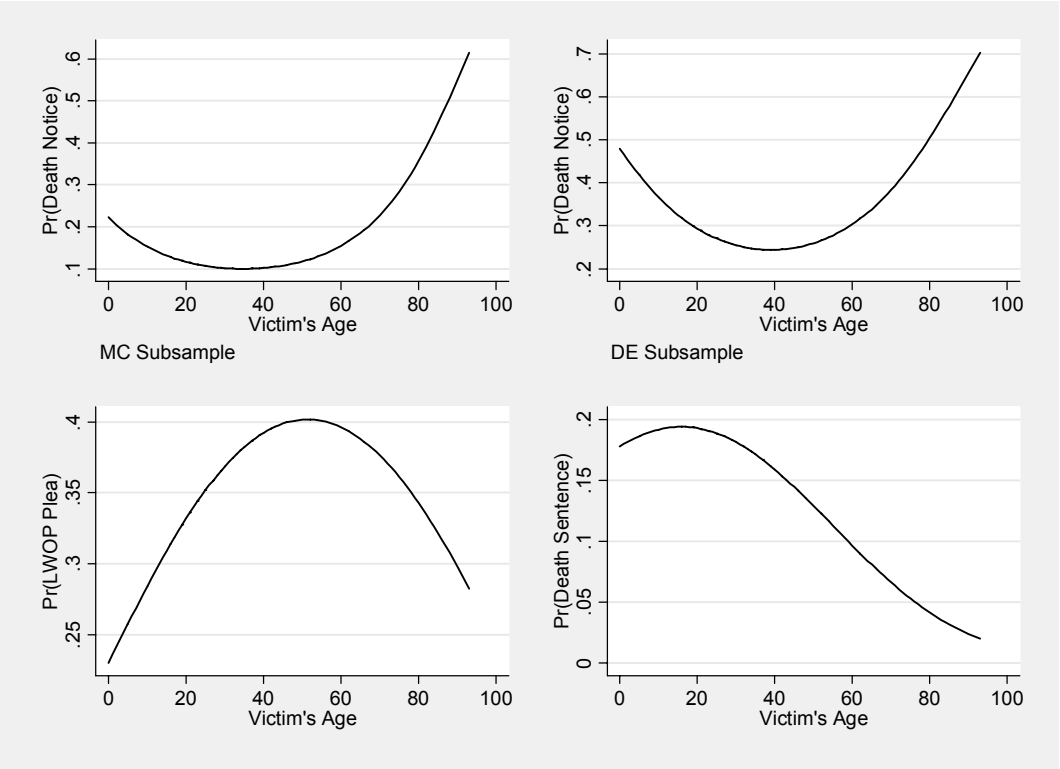



**Figure 4: Nonlinear Effect of Defendant's Age**

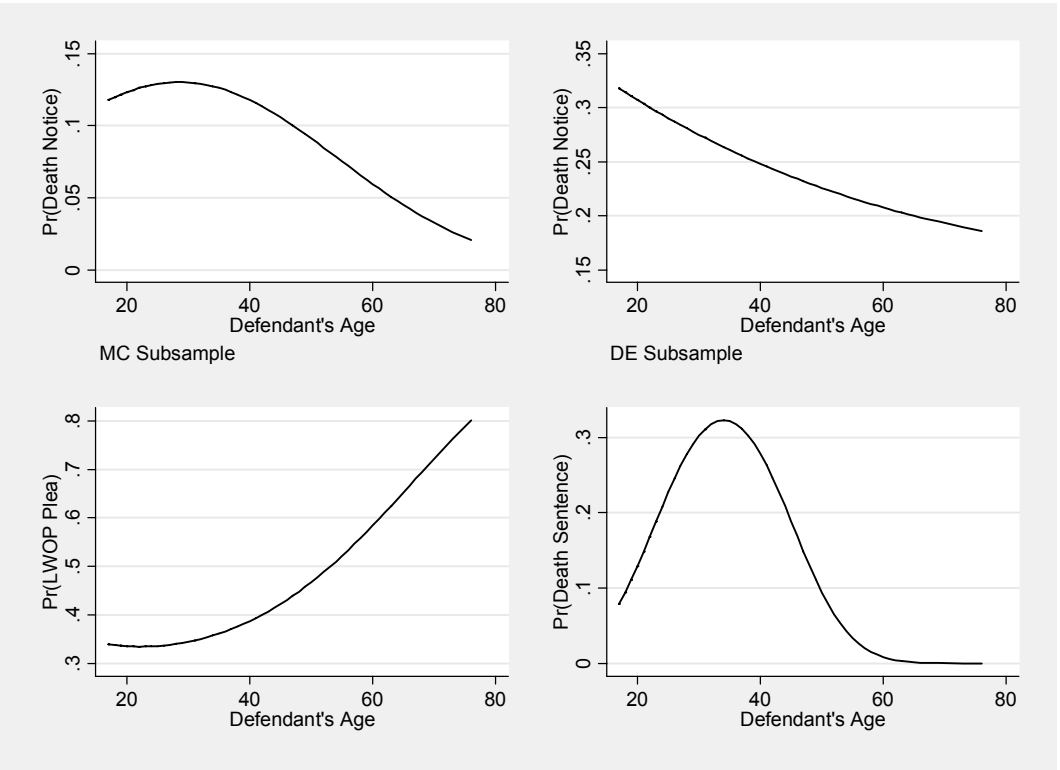


**Figure 5: Nonlinear Effect of Defendant/Victim Age Difference**

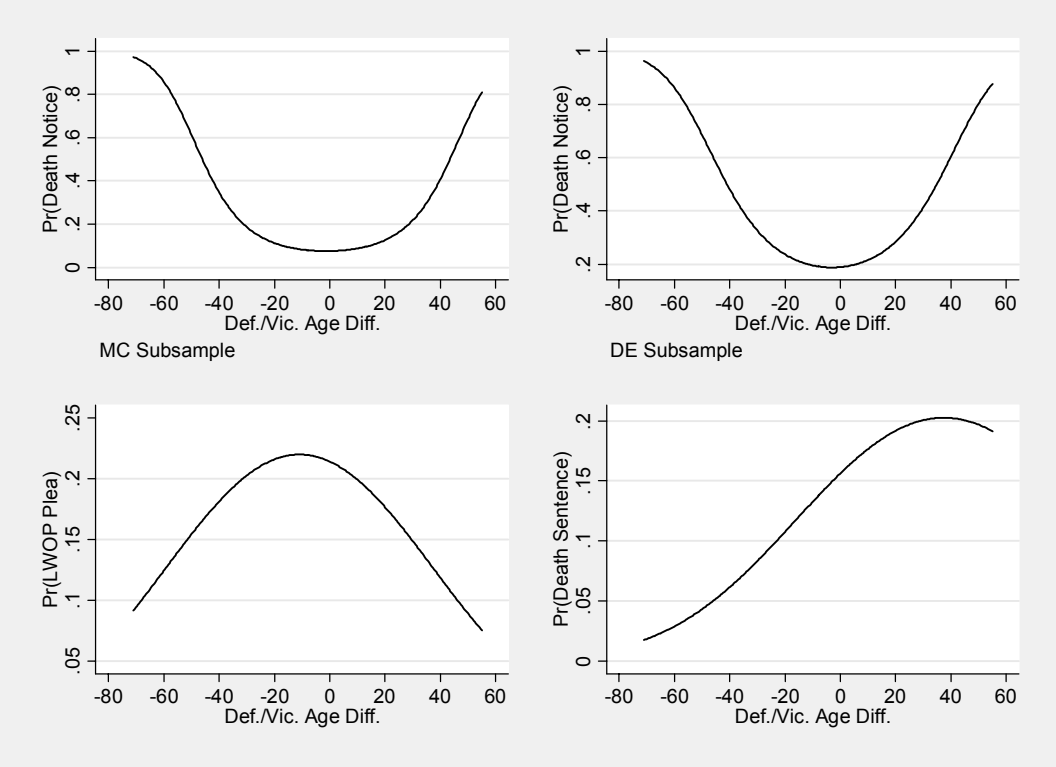
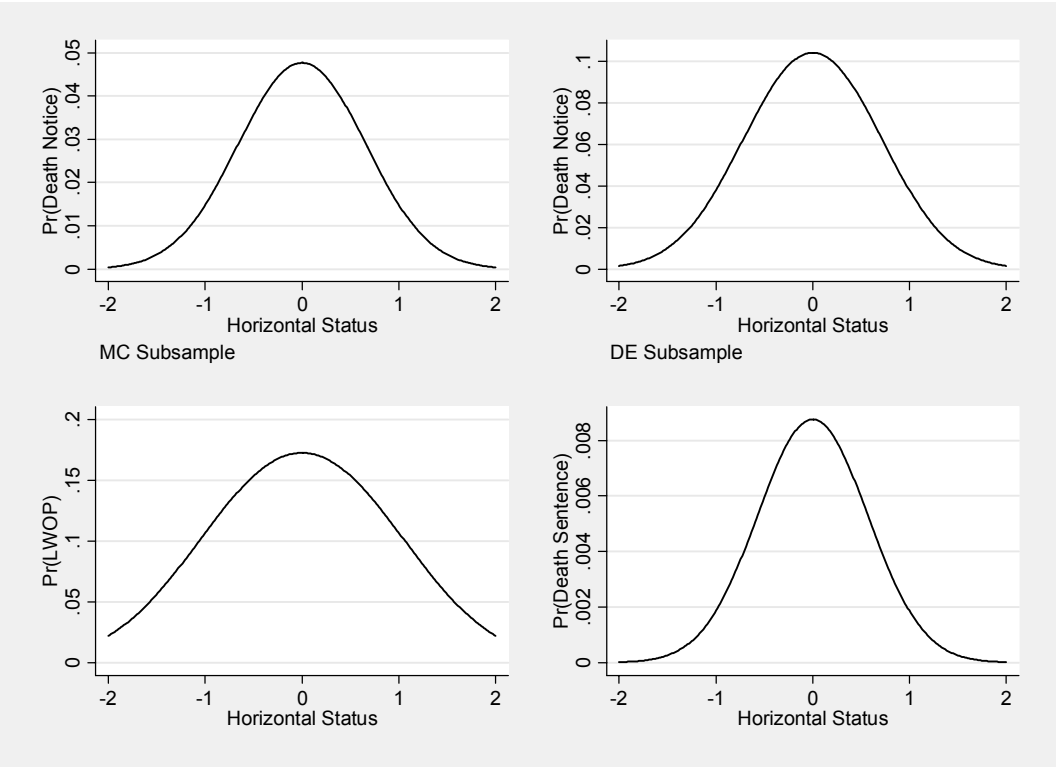



**Figure 6: Nonlinear Effect of Circuit-Level Horizontal Status**



## Appendix A: Progression of Georgia Death Penalty Case (Abridged)

| | |
|---|---|
| *Arrest, First Appearance, and Commitment Hearing* | Accused presented before a magistrate judge within 48 (warrant) or 72 (w/o warrant) hours (Unif. Super. Ct. R. 26.1 [2007]). |
| *Grand Jury Indictment* | Grand jury returns an indictment charging capital offense. Once indicted, accused possibly eligible for the appointment of counsel. |
| *Appointment of Counsel* | Accused eligible for appointed counsel if indigent. Pursuant to the Georgia Indigent Defense Act of 2003 (GIDA). If the accused is eligible, he must be appointed two attorneys before he is called upon to plea to the charges, which generally occurs at the arraignment. |
| *Pretrial Conference: Notice of Intent to Seek the Death Penalty and Qualifications of Defense Counsel* | Pretrial conference must be held as soon as possible after indictment and before arraignment, and the conference must be recorded and transcribed. Prosecuting attorney must announce intention to seek the death penalty and then file a notice of intent with the clerk of the superior court. The superior court must then transmit the notice to the clerk of the Supreme Court of Georgia (Unif. App. R. IIC(1) [2007]) |
| *Arraignment, Pleas, Special Plea of Mental Incompetency to Stand Trial and Notice of the Defense's Intention to Raise the Issue of Insanity or Mental Illness* | During the arraignment, the court must read the indictment and ask the defendant to plead to the capital felony and any lesser-included offenses charged. The defendant is allowed to plead guilty, not guilty, or mentally incompetent to stand trial; *nolo contendere* pleas are disallowed (Ga. Code Ann. § 17-7-95(a)). |
| *Selection of a Capital Jury* | Capital defendant(s) have a right to a trial by jury. The court must empanel forty-two prospective jurors from which the state and defense must select a total of twelve jurors and one or more alternative jurors, if deemed necessary by the judge (Ga. Code Ann. §§ 15-12-160, 168). |
| *Capital Trial* | Capital cases are heard before the superior court (Ga. Const. Art. 6, § 4, ¶ I) and conducted in two phases: the guilt/innocence phase and, if the defendant is found guilty of a capital felony, the penalty phase. Immediately prior to the conviction phase, the court must conduct a conference with the state, defense counsel, and the defendant to resolve several matters, including, *inter alia*, any last minute motions, stipulations, and objections to defense counsel. If the defendant is convicted of capital murder at the conclusion of the guilt/innocence phase, the case proceeds to the penalty phase where both the prosecutor and defense counsel may present witnesses and evidence regarding the statutory aggravating circumstances, as well as non-statutory aggravating and mitigating circumstances. The jury *may* sentence the defendant to death if, and only if, they find one or more statutory aggravating circumstance beyond a reasonable doubt (Ga. Code Ann. § 17-10-31.1(c)). Following a conviction for a capital felony and a sentence of death, the defendant may challenge her conviction or death sentence by: (1) filing a motion for a new trial with the superior court, or (2) filing a direct appeal with the Georgia Supreme Court (Ga. Code Ann. § 17-10-35). If the defendant does not initiate any sort of review, the case will automatically be appealed to the Georgia Supreme Court within ten days of the filing of the trial transcript by the court reporter of the superior court. This automatic review will occur even if the defendant does not wish to appeal her conviction or sentence. |

## Appendix B: Variable Definitions

| VARIABLE NAME | VARIABLE DESCRIPTION | DATA SOURCE(S) |
|---|---|---|
| | | |
| | Case-Level Variables | |
| IncidentYear | Year of Incident | GDC; CO; GCD |
| DP Notice | Death Penalty Notice Filed (Yes=1) | CO; GCD |
| Sentence | Disposition of Case (Life Sentence; Life Sentence w/o Parole; Death Sentence) | GDC; CO; GCD |
| Plea/Verdict | Case Disposed by Trial or Plea Bargain (Trial=1) | GDC; CO; GCD |
| # of Defendants | Total Number of Co-defendants | CO; GCD |
| Defendant's Race | Defendant's Race (Asian, Black, Hispanic, Other, White) | GDC; CO; GCD |
| Defendant's Sex | Defendant's sex/gender (Male=1) | GDC; CO; GCD |
| Defendant's Age | Defendant's Age at Time of Incident (in Years) | GDC; CO; GCD |
| Defendant HS Grad | Defendant Graduated from High School (Yes=1) | GDC; CO; GCD |
| Defendant Employed | Defendant was Employed at time of incident (Yes=1) | GDC; GCD |
| Defendant Married | Defendant was Married at the time of the incident (Yes=1) | GDC; GCD |
| Defendant has Children | Defendant has Children (Yes=1) | GDC; GCD |
| Defendant's Drug Use | Defendant has history of drug use (Yes=1) | GDC; GCD |
| Contemp. Felony | Defendant was convicted of committing a contemporaneous felony (Yes=1) | CO; GCD |
| Prior Felony | Defendant had prior felony conviction (Yes=1) | CO; GCD |
| Felony Circumstances | Murder was committed during the course of a another felony (Yes=1) | CO; GCD; SHR |
| Murder Conviction | Defendant Convicted of Murder (Yes=1) | GDC; CO |
| Prior Violent Crime | Defendant had prior conviction for a violent crime | GDC; GCD |
| # of Stat Aggs | Number of Statutory Aggravating Circumstances Alleged | GDC; GCD |

| **Appendix B (cont.)** | | |
|---|---|---|
| VARIABLE NAME | VARIABLE DESCRIPTION | DATA SOURCE(S) |
| # of Victims | Number of deceased victims in the case | CO; GCD; SHR |
| Victim Race | Victim's race (Asian, Black, Hispanic, Other, White) | CO; GCD; SHR |
| Victim Sex | Victim's sex/gender (0=No; 1=Yes) | CO; GCD; SHR |
| Victim Age | Victim's age at time of incident (in Years) | CO; GCD; SHR |
| Victim Stranger | Victim's and defendant were strangers (Yes=1) | CO; GCD; SHR |
| | | |
| | Circuit-Level Variables | |
| County | County in which the trial took place | GDC; CO; GCD |
| Circuit | Circuit in which the trial took place | GDC; CO; GCD |
| Tpop | Total Population | CENSUS |
| PopSM | Population per square mile | CENSUS |
| Pwhite | Percent White | CENSUS |
| Pblack | Percent Black | CENSUS |
| Pother | Percent "Other" | CENSUS |
| Medage | Median Age | CENSUS |
| PU18 | Percent of Population Under 18 years of age | CENSUS |
| PCapInc | Per Capital Income | CENSUS |
| PIBPL | Percent of Population with Income below Poverty Level | CENSUS |
| PFBPL | Percent Families with Income Below Poverty Level | CENSUS |
| ValHome | Median Value of Homes | CENSUS |
| MPFem | Males per 100 Females | CENSUS |
| PHSGrad | Percent HS graduate or higher (25 and older) | CENSUS |
| PCGrad | Percent College graduate or higher (25 and older) | CENSUS |
| PNBM | Percent Never been married (15 and older) | CENSUS |
| PLDH | Percent living in different home from 1995 | CENSUS |
| PUrban | Percent living in urban area | CENSUS |

| **Appendix B (cont.)** | | |
|---|---|---|
| VARIABLE NAME | VARIABLE DESCRIPTION | DATA SOURCE(S) |
| PSEO | Percent who only speak English (18 and over) | CENSUS |
| PBSOR | Percent Born in Georgia | CENSUS |
| PFB | Percent Foreign Born | CENSUS |
| PLabor | Percent in labor force (16 and older) | CENSUS |
| VRUCR | County Violent Crime Rate (Reports) | GBI |
| VAUCR | County Violent Crime Rate (Arrests) | GBI |
| MRUCR | County Homicide Rate | GBI |
| LEGEND: U.S. Bureau of the Census (CENSUS); Ga. Department of Corrections (GDC); Ga. Sup. Ct. Clerk's Office (CO); Ga. Bureau of Investigation (GBI); Office of the Georgia Capital Defender (GCD); Supplementary Homicide Reports (SHR). | | |

## Appendix C: Random Intercept Logistic Regression Models (Null & Partial)

| | (1) **DPN-MC** | (2) **DPN-DE** | (3) **BP** | (4) **DS** |
|---|---|---|---|---|
| Null Model (No Predictors) | | | | |
| Constant | -1.331*** | -0.332 | -1.128** | -.898*** |
| | (0.185) | (0.208) | (0.396) | (0.456) |
| Year Dummies | Y | Y | Y | Y |
| S.D. of random effect | 0.717*** | 0.722*** | 0.474 | 0.553 |
| Rho ($\rho$) | 0.679 | 0.629 | 0.185 | 0.192 |
| N | 2138 | 1096 | 214 | 164 |
| # of Judicial Circuits | 46 | 46 | 40 | 39 |
| AIC | 1882.424 | 1330.979 | 284.737 | 209.772 |
| BIC | 1893.759 | 1340.978 | 291.451 | 215.972 |
| | (5) **DPN-MC** | (6) **DPN-DE** | (7) **BP** | (8) **DS** |
| Contextual Variables Only | | | | |
| Vertical | 0.061 | -0.042 | 0.238 | 0.275 |
| | (0.205) | (0.216) | (0.364) | (0.337) |
| Normative | -0.675* | -0.590 | 0.649 | -0.501 |
| | (0.3090) | (0.319) | (0.436) | (0.529) |
| Horizontal | 0.076 | 0.034 | -0.494 | -0.199 |
| | (0.284) | (0.298) | (0.442) | (0.501) |
| Horizontal (Squared) | -0.355 | -0.401 | -0.293 | -0.442 |
| | (0.228) | (0.241) | (0.367) | (0.465) |
| Constant | -1.286*** | -0.303 | -1.314** | -0.948 |
| | (0.178) | (0.203) | (0.414) | (0.473) |
| Year Dummies | Y | Y | Y | Y |
| S.D. of random effect | 0.617*** | 0.578*** | 0.549 | 0.495 |
| Rho ($\rho$) | 0.622 | 0.571 | 0.224 | 0.157 |
| N | 2138 | 1094 | 214 | 164 |
| # of Judicial Circuits | 46 | 46 | 40 | 39 |
| AIC | 1880.275 | 1330.987 | 288.695 | 212.152 |
| BIC | 1908.613 | 1355.984 | 305.478 | 230.752 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

## Appendix D: Supplemental Analyses (Partial & Plea Bargaining Models)

| | (1)<br>**DS-RI** | (2)<br>**PB-DE** | (3)<br>**PB-DN** |
|---|---|---|---|
| # of Defs. | -0.217 | 0.153* | 0.207 |
| | (0.263) | (0.068) | (0.123) |
| Def. Age | 0.077 | 0.016 | 0.024 |
| | (0.051) | (0.012) | (0.022) |
| Def. Age (Squared) | -0.006 | -0.000 | 0.001 |
| | (0.003) | (0.001) | (0.001) |
| # of Vics. | 0.429* | -0.091 | -0.067 |
| | (0.199) | (0.063) | (0.090) |
| Vic. Age | -0.018 | 0.012* | 0.005 |
| | (0.017) | (0.005) | (0.008) |
| Vic. Age (Squared) | -0.000 | -0.000 | 0.000 |
| | (0.001) | (0.000) | (0.000) |
| Def. X Vic. Age | -0.001 | -0.001 | -0.000 |
| | (0.002) | (0.000) | (0.001) |
| Def. B/Vic. W. | -0.094 | 0.055 | 0.184 |
| | (0.681) | (0.200) | (0.349) |
| Def. W/Vic. W | 1.958** | 0.044 | 0.301 |
| | (0.690) | (0.180) | (0.327) |
| Def. H./Vic. W. | 2.242 | -0.150 | -0.573 |
| | (1.277) | (0.569) | (0.685) |
| Def. M./Vic. F. | 0.145 | 0.328* | 0.213 |
| | (0.515) | (0.145) | (0.251) |
| Def. F./Vic. M. | -2.354 | -0.485 | 0.418 |
| | (1.825) | (0.364) | (0.726) |
| Def. HS Grad | -0.636 | 0.190 | 0.101 |
| | (0.630) | (0.175) | (0.297) |
| Def. Employed | -0.222 | -0.087 | -0.323 |
| | (0.549) | (0.144) | (0.263) |
| Def. SES | 0.628 | 0.238 | -0.034 |
| | (0.522) | (0.143) | (0.258) |
| Def. Married | -1.235 | -0.301 | -0.269 |
| | (0.658) | (0.164) | (0.292) |
| Def. has Children | 2.668** | -0.700*** | -1.283*** |
| | (0.876) | (0.158) | (0.300) |
| Def. Drug Use | -0.112 | 0.187 | 0.059 |
| | (0.539) | (0.136) | (0.246) |
| Vic. Stranger | 0.858 | -0.001 | -0.123 |
| | (0.697) | (0.163) | (0.312) |
| Contemp. Fel. | 2.026* | -0.891*** | -0.441 |
| | (0.945) | (0.208) | (0.418) |
| Prior Fel. | -0.291 | -0.090 | -0.318 |
| | (0.646) | (0.167) | (0.329) |
| Vio. Prior | -1.190 | 0.459** | 0.439 |
| | (0.832) | (0.166) | (0.386) |

**Appendix D (cont.)**

| | | | |
|---|---|---|---|
| # Stat. Aggs. | -0.102 | | 0.045 |
| | (0.344) | | (0.160) |
| IMR | -0.757** | | |
| | (0.271) | | |
| Vertical | | -0.205 | 0.123 |
| | | (0.160) | (0.272) |
| Normative | | -0.164 | 0.193 |
| | | (0.185) | (0.334) |
| Horizontal | | 0.076 | 0.026 |
| | | (0.206) | (0.335) |
| Horizontal (Squared) | | 0.066 | -0.355 |
| | | (0.165) | (0.295) |
| Constant | -4.089** | 0.942* | 1.301** |
| | (1.519) | (0.347) | (0.631) |
| Year Dummies | Y | Y | Y |
| S.D. of random effect | 1.185 | 0.407** | 0.608* |
| Rho ($\rho$) | 0.384 | 0.391 | 0.351 |
| N | 164 | 1096 | 379 |
| # of Judicial Circuits | 39 | 46 | 46 |
| AIC | 212.136 | 1469.536 | 529.486 |
| BIC | 310.939 | 1644.387 | 670.951 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses

## Appendix E: Supplemental Analyses (Pooled Estimates)

| | (1) DPN-MC | (2) DPN-DE | (3) BP | (4) DS |
|---|---|---|---|---|
| # of Defs. | 0.347*** | 0.296** | -0.447 | -0.183 |
| | (0.086) | (0.103) | (0.248) | (0.172) |
| Def. Age | 0.009 | 0.004 | 0.019 | 0.066 |
| | (0.014) | (0.014) | (0.033) | (0.049) |
| Def. Age (Squared) | -0.001 | -0.001 | 0.000 | -0.005 |
| | (0.001) | (0.001) | (0.001) | (0.003) |
| # of Vics. | 0.457*** | 0.133* | 0.024 | 0.413** |
| | (0.085) | (0.062) | (0.106) | (0.155) |
| Vic. Age | -0.008 | -0.010 | 0.004 | -0.013 |
| | (0.006) | (0.006) | (0.011) | (0.013) |
| Vic. Age (Squared) | 0.001*** | 0.001*** | -0.000 | -0.000 |
| | (0.000) | (0.000) | (0.000) | (0.001) |
| Def. X Vic. Age | -0.001 | -0.001 | 0.001 | -0.001 |
| | (0.001) | (0.001) | (0.001) | (0.003) |
| Def. B/Vic. W. | 1.186*** | 0.871*** | 0.889 | -0.068 |
| | (0.232) | (0.256) | (0.572) | (0.705) |
| Def. W/Vic. W | 1.112*** | 0.807** | 0.547 | 1.461** |
| | (0.259) | (0.256) | (0.440) | (0.689) |
| Def. H./Vic. W. | 1.292*** | 2.259*** | 1.580 | 1.859 |
| | (0.372) | (0.544) | (1.217) | (1.074) |
| Def. M./Vic. F. | 1.064*** | 1.116*** | 1.496 | 0.156 |
| | (0.185) | (0.180) | (0.384) | (0.424) |
| Def. F./Vic. M. | -0.189 | 0.119 | -0.353 | -2.383 |
| | (0.331) | (0.295) | (0.893) | (1.779) |
| Def. HS Grad | 0.696*** | 0.279 | -0.500 | -0.597 |
| | (0.167) | (0.179) | (0.349) | (0.578) |
| Def. Employed | 0.458*** | 0.450*** | -0.242 | -0.171 |
| | (0.114) | (0.125) | (0.402) | (0.479) |
| Def. SES | 0.091 | 0.232 | -0.620 | 0.614 |
| | (0.202) | (0.238) | (0.328) | (0.404) |
| Def. Married | -0.236 | -0.115 | 0.429 | -1.122 |
| | (0.141) | (0.190) | (0.406) | (0.635) |
| Def. has Children | 0.283 | 0.348 | -0.140 | 2.695* |
| | (0.193) | (0.232) | (0.343) | (1.141) |
| Def. Drug Use | 0.475*** | 0.380** | 0.506 | -0.063 |
| | (0.119) | (0.138) | (0.369) | (0.445) |
| Vic. Stranger | 0.380** | 0.508*** | 0.513 | 0.630 |
| | (0.130) | (0.144) | (0.630) | (0.643) |
| Contemp. Fel. | -0.076 | -0.933*** | 0.088 | 1.968* |
| | (0.174) | (0.197) | (0.795) | (0.994) |
| Prior Fel. | -0.239 | -0.663** | -0.139 | -0.388 |
| | (0.205) | (0.236) | (0.546) | (0.534) |
| Vio. Prior | 1.344*** | 0.801** | 0.226 | -1.058 |
| | (0.232) | (0.283) | (0.694) | (0.937) |

**Appendix E (cont.)**

| | | | | |
|---|---|---|---|---|
| # Stat. Aggs. | | | 0.407 | -0.077 |
| | | | (0.235) | (0.261) |
| Constant | -4.156*** | -2.197*** | -1.959* | -4.592** |
| | (0.370) | (0.381) | (0.980) | (1.540) |
| Year Dummies | Y | Y | Y | Y |
| Sel. Bias Corrected | N/A | N/A | N | N |
| N | 2134 | 1092 | 212 | 164 |
| Pseudo-$R^2$ | 0.325 | 0.271 | 0.305 | 0.411 |
| AIC | 1579.303 | 1227.310 | 291.019 | 210.430 |
| BIC | 1749.276 | 1377.183 | 395.073 | 306.146 |

*p<.05; **p<.01; ***p<001
Standard errors in parentheses