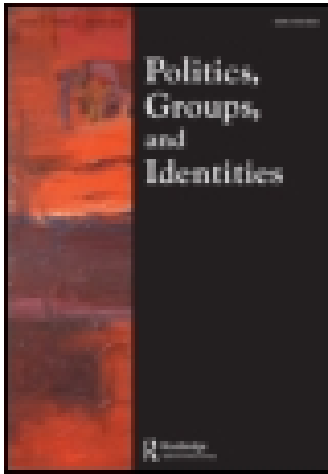


This article was downloaded by: [University North Carolina - Chapel Hill]

On: 13 April 2015, At: 11:59

Publisher: Routledge

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



Politics, Groups, and Identities

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/rpgi20>

#BlackLivesDon'tMatter: race-of-victim effects in US executions, 1976-2013

Frank R. Baumgartner^a, Amanda J. Grigg^a & Alisa Mastro^b

^a Political Science, The University of North Carolina at Chapel Hill, Chapel Hill, NC, USA

^b Georgetown University Law Center, Washington DC, USA

Published online: 08 Apr 2015.



CrossMark

[Click for updates](#)

To cite this article: Frank R. Baumgartner, Amanda J. Grigg & Alisa Mastro (2015): #BlackLivesDon'tMatter: race-of-victim effects in US executions, 1976-2013, *Politics, Groups, and Identities*, DOI: [10.1080/21565503.2015.1024262](https://doi.org/10.1080/21565503.2015.1024262)

To link to this article: <http://dx.doi.org/10.1080/21565503.2015.1024262>

PLEASE SCROLL DOWN FOR ARTICLE

Taylor & Francis makes every effort to ensure the accuracy of all the information (the "Content") contained in the publications on our platform. However, Taylor & Francis, our agents, and our licensors make no representations or warranties whatsoever as to the accuracy, completeness, or suitability for any purpose of the Content. Any opinions and views expressed in this publication are the opinions and views of the authors, and are not the views of or endorsed by Taylor & Francis. The accuracy of the Content should not be relied upon and should be independently verified with primary sources of information. Taylor and Francis shall not be liable for any losses, actions, claims, proceedings, demands, costs, expenses, damages, and other liabilities whatsoever or howsoever caused arising directly or indirectly in connection with, in relation to or arising out of the use of the Content.

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden. Terms &

Conditions of access and use can be found at <http://www.tandfonline.com/page/terms-and-conditions>

#BlackLivesDon'tMatter: race-of-victim effects in US executions, 1976–2013

Frank R. Baumgartner^{a*}, Amanda J. Grigg^a and Alisa Mastro^b

^aPolitical Science, The University of North Carolina at Chapel Hill, Chapel Hill, NC, USA; ^bGeorgetown University Law Center, Washington DC, USA

(Received 4 June 2014; accepted 29 January 2015)

This paper examines the role of racial bias in the implementation of capital punishment. First, our analysis of existing literature confirms higher rates of capital punishment for those who kill Whites, particularly for Blacks who kill Whites. Second, we compare homicide victim data with a newly collected data set including information on the victims of every inmate executed in the USA from 1976 through 2013, some 1369 executions. These data reveal that Black males have been the primary victims of homicides, but their killers are much less likely to be put to death. While previous scholars have emphasized the over-representation of killers of White women, we shed additional light on another aspect of the racial and gender biases of the US death penalty. Capital punishment is very rarely used where the victim is a Black male, despite the fact that this is the category most likely to be the victim of homicide.

Keywords: capital punishment; death penalty; race; gender

The USA routinely experiences over 10,000 homicides in a single year but in the modern period (post-1976) has never executed as many as 100 individuals; death is not and never has been the likely consequence for murder. In spite of the low rates of usage of capital punishment, its symbolic and emotional power are immense. In this article, we focus on one particular element of that power: the great odds against being executed if one's victim is a Black male. Black men, especially among the relatively young, have a statistical risk of homicide victimization many times higher than any other racial or gender group, but their killers rarely face the death penalty. We explore the extent of these discrepancies here first by reviewing the literature and second by presenting the results of a newly collected database of all US executions from 1976 through 2013.

The single most reliable predictor of whether a defendant in the USA will be executed is the race of the victim. Blacks make up about half of the total homicide victims in the USA though they represent only about 12% of the population. Yet, among convicted murderers who have been executed, only 15% of victims have been Black. A substantial body of academic research has confirmed a persistent racial bias in death sentencing in favor of White victims. Further, research suggests that among defendants charged with killing White victims, Blacks are more likely than Whites to receive a death sentence. Just 9.5% of executions for interracial murders

*Corresponding author. Email: frankb@unc.edu

involve White killers with non-White victims (DPIC 2015). One statistic is particularly stark: since the reinstatement of capital punishment in 1976 through the end of 2013, 1359 inmates were executed. Among this group were 534 White inmates executed for killing a single victim. Just 9 of that group of 534 had a Black male victim.¹ Including killers with multiple victims, just 16 Whites executed had a Black male victim (these 16 cases are listed in Appendix B in Supplementary material). It has long been widely known that racial disparities affect criminal justice, of course. Academics and activists have for years argued that the judicial system places more value on the lives of Whites, resulting in disproportionately harsh treatment of Black criminals who have White victims (ACLU 2007; Baldus, Pulaski, and Woodworth 1983; NAACP 2013). Our goal in this paper is to draw attention to the scope of existing disparities in treatment, and in particular to focus on a group which is nearly invisible in this system: Black male victims.

Our work offers new evidence in efforts to document racial bias in the implementation of capital punishment, providing both a systematic review of existing literature and a new, comprehensive review of all 1359 executions in the modern era. We would certainly expect to uncover patterns in the direction of what we observe, given the robust literature documenting bias in capital punishment. However, the scope of the disparity identified is greater than even the existing body of scholarship would lead one to expect. In addition, our findings are not based on a sample or an estimate; they come from a complete list of every execution in the modern area and detailed information about each victim. The thorough nature of our evidence allows us to make substantial conclusions about the state of capital punishment in the USA; it is clearly a racial project, and a highly gendered one as well.

The influence of victim race in capital sentencing

Of course, suggesting that the race of the victim has an impact on the likelihood of a death sentence is hardly new. It is one of the most consistent findings in all empirical legal scholarship relating to capital punishment. The landmark work on the influence of victim race in death penalty sentencing was conducted by Baldus, Pulaski, and Woodworth (1983). Their work examined over 2000 murders in Georgia, controlling for over 230 variables. They found that those accused of killing White victims were four times as likely to be sentenced to death as those accused of killing Black victims (Baldus, Pulaski, and Woodworth 1983).² Research has continued on this topic apace, and by 1990 the federal Government Accounting Office (GAO) had issued a report reviewing the substantial body of scholarship on racial bias in capital punishment. According to the GAO, 82% of studies found that those who murdered Whites were more likely to be sentenced to death than those who murdered Blacks (GAO 1990).

In the years following the GAO report, academic research has continued to demonstrate that victim race is a strong determinant of whether defendants are sentenced to death, and done so with increasingly sophisticated methods (Baldus and Woodworth 2003; Bowers, Pierce, and McDevitt 1984; Donohue 2014; Paternoster and Brame 2003; Pierce and Radelet 2005; Radelet 1989). These more recent works have found that even after controlling for aggravating factors, defendants with White victims are as much as four times as likely to be sentenced to death than those with Black victims (Baldus and Woodworth 2001; Paternoster et al. 2004). Donohue (2014) was particularly complete in assessing the degree of heinousness of the crimes for all death-eligible homicides in Connecticut. His conclusion was that death sentences were not reserved for the “worst of the worst” – many not sentenced to death had committed more heinous or aggravated murders than those sentenced; rather, victim race and geography were major predictors. Similar disparities have been found across the death penalty states.³

Though victim race is the key determinant, certain combinations of victim race and defendant race can result in even greater bias. Donohue's study of over 4600 murders in Connecticut found that African-American defendants received the death penalty at three times the rate of White defendants in cases where the victims are White (Donohue 2014). The race of a defendant and victim can play a role even after the death sentence has been imposed. Among those already on death row, minority inmates convicted of killing Whites are more likely to be executed than any other perpetrators (Jacobs et al. 2007).

Several US states, even among those that are substantial users of capital punishment, have never seen a White inmate executed for killing a Black man. In his 1981 study of the death penalty in Florida, Zeisel found that not only were there no Whites on death row for killing only a Black person, but also that there had "never been such a person on Florida's death row in living memory" (Zeisel 1981). In Texas and Alabama, the execution of a White man for the murder of a Black man has occurred only once in living memory, in both cases within the last decade. The men executed in those two cases, Lee Taylor and Henry Francis Hays, were both White supremacists convicted of particularly gruesome and racially motivated murders.⁴

Meta-analysis of race-of-victim bias

As the preceding review of the literature suggests, race-of-victim bias has been a topic of great interest to scholars. To better understand the scope of race-of-victim effects in capital prosecution and sentencing, we conducted a meta-analysis of existing research. In so doing we expand on the work of Baldus and Woodworth whose 2005 article provides an excellent overview of empirical research on racial bias in the death penalty, with an emphasis on post-1990 research.

To begin, we produced a comprehensive inventory of the body of research, identifying 236 sources, of which 72 listed empirical estimates. The articles included are empirical analyses and discussions of race- and gender-based differences in death penalty prosecution and sentencing. This review is limited to works from academic journals, governmental studies, and state-commissioned reports.⁵ The review is also limited to works published after 1972, which was the year the Supreme Court of the United States decided in *Furman v. Georgia* that states had to reevaluate their death penalty statutes to eliminate arbitrariness. Michael Radelet (1989) has argued that much of the research conducted before the *Furman* decision failed to consider important controls, including the effect of prior criminal records, and employed methodologies that have since become outmoded due to their simplicity. The periods under study range from 1972 to 2008 and jurisdictions include the U.S. Armed Forces, Federal Courts, and 33 current and prior death penalty states from all regions of the USA. Notably, the controls used in the studies under review varied widely.

In every study of racial bias in capital prosecution, prosecutors were more likely to charge killers of Whites with capital crimes than those who were killers of Blacks.⁶ Studies of bias in death sentencing (in the penalty phase of a capital trial) covered an even greater range than those of capital prosecution.⁷ The vast majority of these studies found that killers of Whites were more likely than killers of Blacks to receive a death sentence.⁸ Though existing scholarship would certainly lead us to expect to find frequent documentation of racial bias, the enormous range of methods, time frames, geographic foci, and control variables used make finding consistent evidence of anything far more difficult. In light of this, the persistent presence of bias is both striking and extremely robust.

Figure 1 illustrates the collective findings of all the studies we reviewed. Part A summarizes the race-of-victim findings for published studies on the prosecutor's decision to charge a defendant capitally, and Part B does so for studies looking at sentences of death after a trial. The bars indicate the number of studies that found each level of bias. A value of 1.00 would indicate that

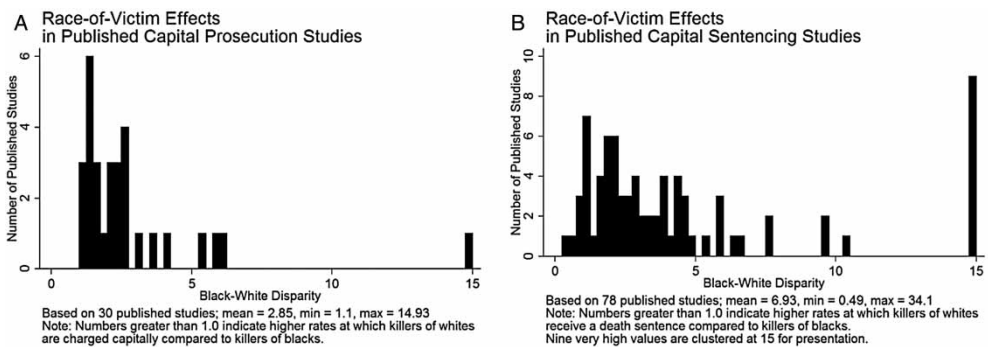


Figure 1. Race-of-victim effects found in published studies (A) capital prosecutions and (B) death sentences. Note: For a list of sources and more details on the findings, see Appendix A in Supplementary material.

Black and White victims are equally likely to see the crime proceed capitally (Part A), or lead to a sentence of death (Part B). As Figure 1 makes clear, almost all published studies find some degree of racial bias, and, for the decision to prosecute, this was unanimous.

In the studies summarized in Figure 1(A), none found a value below 1.00. That is, each of the 30 studies identified found that killers of Whites were more likely than killers of Blacks to face a capital prosecution. These studies cover a wide range of geographic areas and time periods, and include different sets of statistical controls. In Figure 1(B), we see almost the same pattern, with some slight differences. Though the vast majority of studies found that killers of Whites are sentenced to death at higher rates than killers of Blacks, there were cases in which this was not found.⁹ Nine studies found a negative effect or no significant effect (ratios below 1.09), and 69 studies found significant and substantial race-of-victim effects. As the captions to the figures show, the average bias in the charging studies (Part A) was 2.85, and in the sentencing studies (Part B), 6.93. These are very high racial disparities, and as Appendix A in Supplementary material makes clear they have been found in many time periods, geographical areas, and with different statistical models controlling for legally relevant factors. Note that Part B includes nine studies where ratios could not be calculated because no Whites had been sentenced to death for killing Black victims. Overall, then, our comprehensive review of past studies shows ample evidence of racial biases in the vast majority of cases. The unique contribution of the current study is to examine all US executions since 1976. We turn to those findings in the next section.

Methodology

The USA has executed 1359 inmates from 1977 through 31 December 2013.¹⁰ Each of these executions is the object of considerable public record, and several web sites make available information about each of them. Most prominent is that of the Death Penalty Information Center (DPIC), a Washington-based clearinghouse of information related to the modern death penalty. Another prominent and near-comprehensive source is the website of the Clark County (IN) Office of the Prosecuting Attorney. This site, in fact, links to newspaper coverage, legal documents, and other sources relating especially to the underlying crimes that lead to the death penalty in each case. Beginning with these two sources, the senior author of this article, working with a team of research assistants, compiled a database listing the race and gender of each of the victims of these executions. For cases from 2000 through 2013, the Clark County

Prosecutor's Office site contains full information; for earlier cases, extensive web and legal database searches were conducted to ascertain information about the victims, dates of crimes, dates of sentencing, and county of crime and conviction; this article makes use only of the victim information. With information about the inmate easily available, and information about the victims now compiled, our analysis is relatively straightforward; we simply want to know the number of cases with various combinations of offender–victim race and gender. These can then be compared with US Department of Justice (Bureau of Justice Statistics – BJS) statistics about homicides overall.¹¹ BJS statistics come from “Homicide Trends in the United States” and are available only through 2005. The time coverage of our execution database is therefore slightly longer than that of homicides, but we report the full series available. Limiting our execution database to 2005 would show similar results; executions typically follow homicides by more than 10 years in any case.

It is important to recognize some limitations to our comparisons of execution cases with all US homicides; the key point is that we do not know which homicides are capital-eligible and which are not. Here, we follow the examples of Blume, Eisenberg, and Wells (2004) and Fagan, Zimring, and Geller (2006), who looked at particular states (eight states where offender and victim race and gender data were available for Blume, and Texas in the case of Fagan) and compared death-sentence cases with homicides more generally. For example, Blume et al. calculated the number of death sentences per homicide (using the same BJS statistics that we use) and showed these rates per 1000 homicides: Black Offender–Black Victim, 8.4; White Offender–Black Victim, 19.3; White Offender–White Victim, 30.1; Black Offender–White Victim, 65.4 (calculated from Blume, Eisenberg, and Wells 2004, 197; note that for Arizona, the comparisons are Minority–Majority rather than Black–White). Our results are highly consistent and use a similar methodology to those, with these differences: Blume et al. looked at death sentences where we look at executions; they looked at just eight states where we look at all US jurisdictions; and they reviewed statistics from 1977 through 2000 and we go through 2013.

Fagan, Zimring, and Geller (2006, 1825, Figure 2) compare homicide trends with capital homicide trends and show that capital homicides represent roughly 15–25% of all homicides

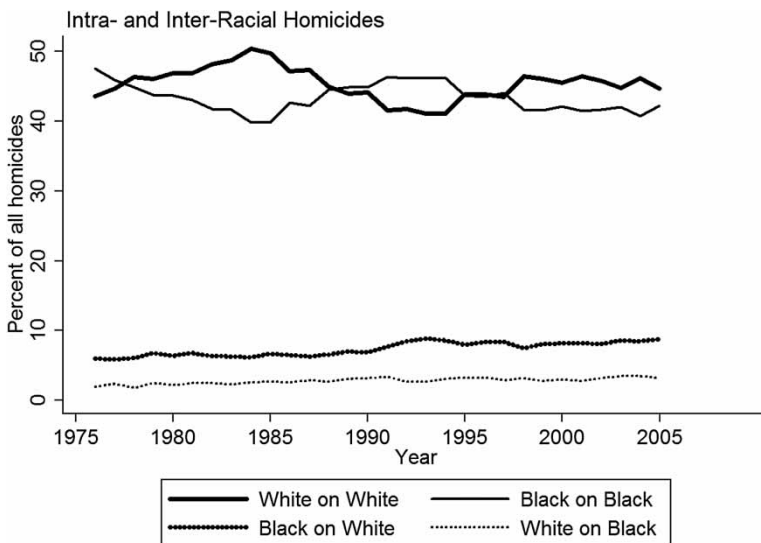


Figure 2. Percent of homicides by offender–victim race.
Source: Bureau of Justice Statistics 2008, 2011.

in death penalty states from 1976 through 2005, or 22–28% of homicides nationally. The percentage of homicides eligible for capital prosecution increases slightly over time nationally as well as in death penalty states. As our interest is in proportions and trends over time, these numbers suggest that a national analysis based on all homicides will show similar trends as one limited to death-eligible homicides (since these represent a relatively constant percentage of all homicides), and to look at national data rather than to limit our assessment to death penalty states only (since the trends are highly similar in both).

Systematic data on capital-eligible homicides are not available, but the number of capital-eligible homicides is generally related to the number of homicides more broadly, as Fagan, Zimring, and Geller (2006) demonstrate. Further, a number of carefully controlled studies reviewed above have looked at individual-level factors including victim and defendant socio-economic status, number of victims, egregiousness of crime, and aggravating and mitigating factors statutorily considered in death penalty sentencing and reached findings broadly similar to our own (Baldus and Woodworth 2003; Donohue 2014; Paternoster and Brame 2003; Pierce and Radelet 2005).¹² And, finally, a review of the White-on-Black killings that did lead to an execution in Appendix B in Supplementary material makes clear, even to a reader accustomed to the violent nature of capital homicides, that these cases are indeed particularly heinous.

Results

To begin, we examine overall homicide rates in order to determine how many executions of each racial combination we would expect in the absence of bias. Using data from the Department of Justice on all US homicides, available from 1975 through 2005, we find that the vast majority of homicides are intra-racial (between two people of the same race). As shown in Figure 2, White-on-White homicide and Black-on-Black homicide each consistently make up over 40% of all homicides. Interracial crimes, White-on-Black and Black-on-White homicides, each make up less than 10%.

In the absence of legally permissible factors that are relevant to death sentencing, we would expect that most executions would be the result of White-on-White or Black-on-Black crime, and that executions for White-on-Black and Black-on-White crime would be infrequent, and roughly equal to their proportion of all homicides (10%). However, literature on race-of-victim bias suggests that executions for Black-on-White crime will be relatively common while executions for White-on-Black crime will be rare (see our meta-analysis above). Our analysis confirms that this is the case, but extends the evidence to a larger historical period, with greater geographic coverage than has been done before, and shows that the bias is larger than had been previously estimated. Figure 3 provides a visual representation. The dark bars show the number of victims of White killers who were later executed; grey bars show the number of victims of Black killers who were later executed.

While 17 Whites have been executed for killing a Black, 230 Blacks have been executed for killing a White. In fact, twice as many Blacks have been executed for killing Whites (230) as have been executed for killing Blacks (108). This is in spite of the fact that the vast majority of all homicides committed by Blacks have a Black victim.¹³

Figure 4 compares execution rates for intra-racial (White-on-White and Black-on-Black) and interracial homicides. Figure 2 showed that the vast majority of homicides occur between individuals of the same race, and this is reflected in the right-most columns of Figure 4, which show that 94% and 85%, respectively, of Whites and Blacks have victims of the same race. The left-most columns in Figure 4 show that patterns of intra-racial homicide are not reflected in executions. As in the case of homicides, the vast majority of Whites have victims of the same race. There is no such correspondence in the case of Black defendants. While 85% of all Blacks found guilty of

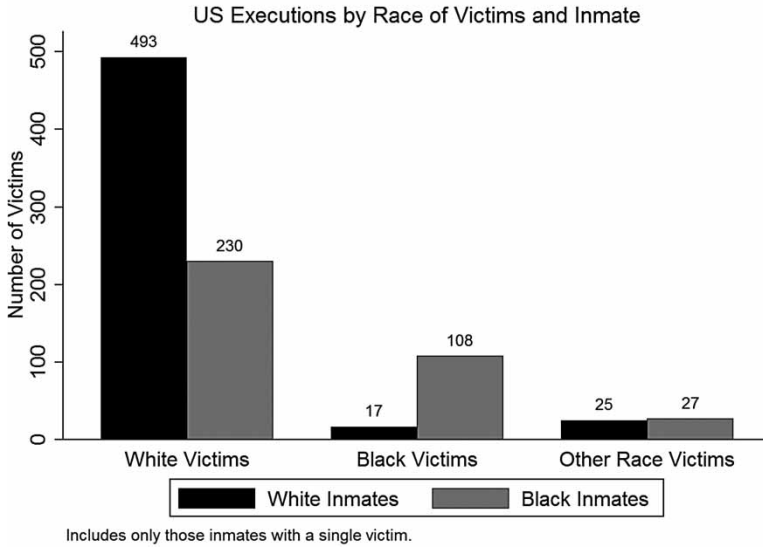


Figure 3. Race of victim for Blacks and Whites executed.

homicide have Black victims, fewer than 40% of Blacks executed for homicide have Black victims.

We see the same phenomenon in Figure 5 which compares the race of all homicide victims (on the right) with the victims of individuals later executed (on the left).

Figure 5 shows that Blacks make up 47% of all homicide victims, but just 17% of the victims of those executed. This suggests that Blacks are not only over-represented among the executed (as scholars have long argued) but are also vastly under-represented among victims of those executed. Analysis of the 2128 victims of all individuals executed between 1977 and 2013, and all 401,650

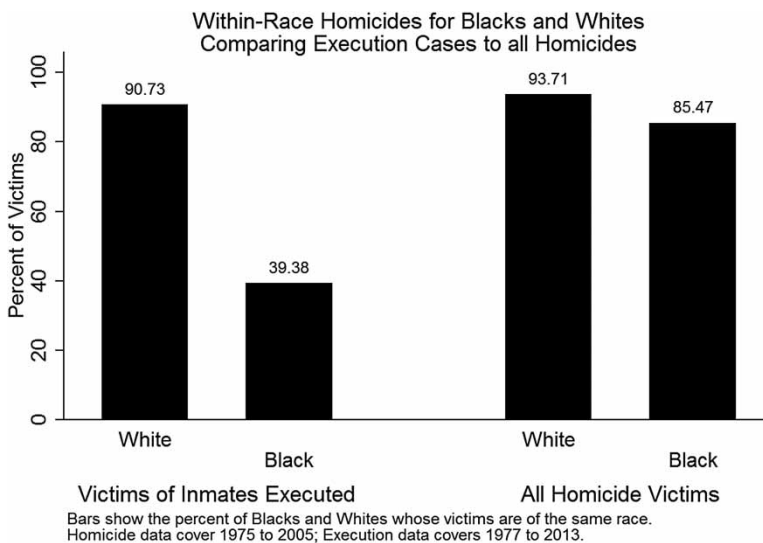
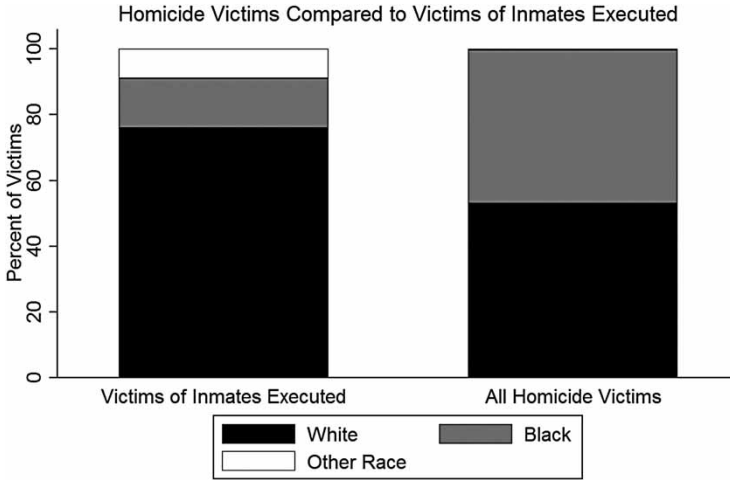


Figure 4. Inter- and intra-racial homicides and executions.

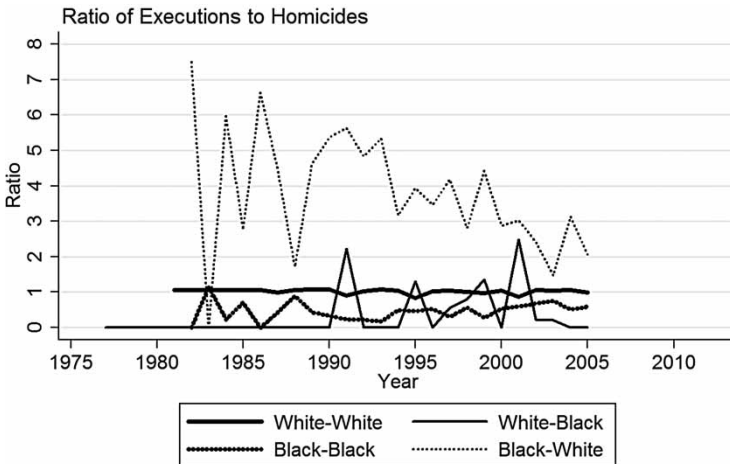


Based on 2128 victims of those executed 1977-2013 and 401,650 homicide victims 1975-2005. Blacks are 47 Percent of all homicide victims but only 17 percent of those leading to an execution.

Figure 5. Race of homicide victims compared to race of victims of those executed.

homicide victims between 1975 and 2005 reveals that although Blacks make up almost half (47%) of all homicide victims, they represent just a small proportion (17%) of the victims of crime where the perpetrator is later executed by the state. Conversely, Whites are over-represented among victims of those executed as compared to homicides in general. These findings suggest that race-of-victim bias can work not only to increase the perceived seriousness of crimes against White victims, but also to decrease the perceived seriousness of crimes against Black victims.

Figure 6 shows the ratio of executions to homicides, by year, for the different combinations of inmate and victim race. It calculates the ratio of percent of all homicides in a given offender-victim race category to the percentage of execution-related homicides for that same category. If an equal percentage of homicides led to execution, the ratio would be 1.00. Numbers below



Lines show the ratio of percent of all executions compared to all homicides. Numbers above 1,0 indicate a higher percentage of executions than homicides. Overall Ratios: W-W, 1.02; W-B, 0.34; B-B, 0.46; B-W 3.83.

Figure 6. Ratio of executions to homicides by race of offender and victim.

1.00 indicate that such homicides are relatively unlikely to lead to an execution, and numbers above 1.00 show where the executions are statistically more likely.

The thick Black line in Figure 6 shows that White-on-White crime is consistently treated in a proportionate manner, with an overall ratio 1.02. Roughly the same percentage of these homicides leads to execution as not. This is what we would expect in the absence of any kind of bias for or against victims or perpetrators. In both of the victim/perpetrator combinations with Black victims, however, overall ratios are well below 1, meaning that killers of Black victims are substantially less likely than killers of Whites to be executed. Of course, the low odds of execution are particularly stark in the case of White-on-Black crime, for which the overall ratio is 0.34. In fact, as the thin solid line makes clear, there are many years where this ratio is 0.00: no Whites were executed killing Blacks in many of the years shown. (A quick perusal of Appendix B in Supplementary material gives a feel, in fact, of just how horrific these crimes need to be in order to lead to execution.) The dotted line at the top of the graph shows the opposite for Black-on-White crime. In this case, Black-on-White murders make up a far larger proportion of all executions than they do of all homicides. While Whites who killed Blacks are vastly under-represented in the list of those executed, Blacks with White victims are dramatically over-represented. These trends are stark, consistent over time, and overwhelming in their magnitude.

Conclusion

Strong race-of-victim effects have consistently been found in post-*Furman* studies indicating that individuals with White victims are treated more harshly than those with Black victims. Our own data consisting of all reported homicides and executions in the modern era (from 1976 onwards) confirm that there are very few cases in which Whites are executed for killing Blacks, and a disproportionately high number of cases in which Blacks are executed for killing Whites. Researchers have tended to focus on the latter cases, specifically as evidence of a troubling bias in favor of White victims. In fact, our data suggest that an exploration of both kinds of cases presents even more compelling evidence of the power of race-of-victim bias.

A long line of scholarship documents persistent racial bias in the implementation of capital punishment. In *McCleskey v. Kemp*, the United States Supreme Court ruled that even the most convincing evidence of racial bias is not enough to demonstrate a violation of constitutional rights unless it presents proof of intentional, conscious discrimination. Such evidence is nearly impossible to come by barring an outright admission. Further, as the magnitude and scope of racial bias documented in our findings suggests, a focus on intentional discrimination by individuals ignores the ways in which bias might be built into the system or operate unconsciously across multiple individuals and processes. Recent litigation regarding the retention of the death penalty in Connecticut included the compilation of extensive statistics in a massive data collection effort by Donohue (2014) covering every death-eligible homicide in recent years in that state, and confirming important racial and geographic biases in the application of the penalty. (From 1973 through 2007, Donohue's analysis showed that Connecticut had 4979 homicides, 205 death-eligible homicides, 12 death sentences, 9 death sentences sustained after appeals, and 1 execution.) The court, as in *McCleskey*, threw out the argument that such evidence was persuasive. Scheidegger (2011, 2012) argued that if crimes occur in urban areas, and urban juries have Blacks, and Blacks are unwilling to impose the death sentence, then "racial disparities would shrink to insignificance if legitimate factors, including jurisdiction, could properly be taken into account" (2011, 22).¹⁴ In another article (2012, 164) he asks: "To the extent that a race-of-the-victim disparity exists, is it due to racial animus of the decision makers?" If this cannot be demonstrated, then his logic suggests that there can be no finding of disparity, and that was the finding in *McCleskey* as well as in the Connecticut litigation.

The idea that racial disparities require the demonstration of racial animus and intent is what Eduardo Bonilla-Silva (1997) refers to as the “prejudice problematic” – the expectation that we should identify a single racist villain to explain an outcome that could well be due to more structural causes. To a large extent, the courts have remained true to this “prejudice problematic,” unwilling to confront implicit bias and structural differences. Further, as Scheidegger (2011) suggests, they take geographic disparities – which of course can be related to racial outcomes – as signs of appropriate “local control” properly to be left to the discretion of locally elected prosecutors, judges, and juries and in fact a sign of healthy variation rather than a challenge to the equal protection clause of the Constitution.

Despite the rejection of powerful evidence by the courts, scholarship continues to document the presence of racial bias in capital punishment. Numerous studies, such as those by Bonilla-Silva (1996, 1997) and Bonilla-Silva, Lewis, and Embrick (2004) and Eberhardt with various colleagues (Eberhardt et al. 2004, 2005/2006; Hetey and Eberhardt 2014; Rattan et al. 2012; Williams and Eberhardt 2008), convincingly show the subconscious bias that underlies many decisions in the criminal justice system from traffic stops to eyewitness ID procedures to prosecutors’ decisions about capital punishment to whether an offender should be tried as a child or an adult, to the imposition of the ultimate penalty. Our work builds on these important theoretical works, providing both a systematic review of existing empirical literature and a new, comprehensive review of all 1359 executions in the modern era. In both cases the results are stunning. The trend is certainly expected given the large body of scholarship documenting bias. However, the scope of the disparity is greater than even the existing literature would lead one to expect. Further, our findings are not based on a survey or an estimate; we have assembled a complete list of every execution in the modern era, and looked up information on each of the victims. The comprehensive nature of our evidence allows some strong conclusions about the state of capital punishment in the USA now almost 40 years since its re-establishment in 1976.

The enormous scope of racial bias identified here, in both the review of existing literature and analysis of all modern-era executions, suggests that we question the standard for evidence presented in *McCleskey v. Kemp*. It is clear that significant, troubling, racial disparities exist without proof of intentional discrimination by state actors. These disparities are not, as Justice Powell suggested, “an inevitable part of our criminal justice system” (*McCleskey v. Kemp* 1987). More pressingly, these findings suggest that we reevaluate the death penalty itself. At a minimum, we must recognize its strongly racialized character.

The justices have recognized these facts. In fact, in an internal memorandum from Justice Scalia to the conference during consideration of Justice Powell’s draft decision quoted above, he wrote:

Since it is my view that unconscious operation of 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. (quoted in Gross 2012, 1921)

In other words, no evidence could change his mind: he already believes that “irrational sympathies,” and even their “unconscious operation” (i.e., with no explicit intent), are powerful factors in the criminal justice system. And, furthermore, he thinks this is a fact we simply have to become accustomed to, as it cannot be avoided.

Whether or not Justice Scalia’s opinion that racial factors in the criminal justice system are both real and “ineradicable” remains the operating assumption on the US Supreme Court, the degree of racial disparity demonstrated here is powerful enough to cause many others to find it unacceptable. In a time when support for capital punishment among legislators and the public

has reached record lows, our study adds another reason to oppose the practice. In its modern history as in its use in previous eras, racial bias in its application is consistently high. In addition to the threat to the equal protection of the law that these numbers suggest, such overwhelming evidence of differential treatment erodes public support for the judicial system. Further, the strength of these biases makes clear that complaints of unequal treatment are real, not imagined. If the ultimate and highly symbolic punishment is meted out in such a disparate manner with regard to race, and with these patterns of racial bias so similar in the modern period to the overtly racist practices of previous generations, the statistical patterns laid bare in this study can only lead to a decline in support and efficacy of the judicial system overall.

Supplemental data

Supplemental data for this article can be accessed at <http://dx.doi.org/10.1080/21565503.2015.1024262>

Notes

1. Eight had Black female victims.
2. It was notably the central evidence presented in the 1987 Supreme Court decision *McCleskey v. Kemp*, which alleged widespread racial bias in the implementation of the death penalty in Georgia. In the end, the Supreme Court ruled that even strong statistical evidence of racial bias in sentencing did not render the death penalty unconstitutional.
3. Examinations of capital punishment in Texas have found the death penalty more likely in cases with White victims after controlling for a large number of potential explanatory values (Bowers, Pierce, and McDevitt 1984; Ekland-Olson 1988). Similar results were found in studies of death penalty sentencing in North Carolina and Florida (Unah 2011; Zeisel 1981). In North Carolina, the rate of death penalty sentencing for White victim cases was almost twice as high of that of non-White victim cases between 1993 and 1997. A study of California executions found that those convicted of killing White victims were 3.7 times as likely to receive a death sentence as those with Black victims (Pierce and Radelet 2005).
4. See Appendix B for a list and short description of the cases where a White has been executed for the crime of killing a Black man.
5. We make one exception to this rule, including a piece from the *Los Angeles Times*, which details the results of a study commissioned by the newspaper.
6. Thirty studies examined race-of-victim bias in prosecutor's decisions to charge defendants capitally. In addition, the literature covered 16 current and past death penalty states including states in the geographic West, South, and Northeast as well as cases prosecuted within the judicial branch of the US Armed Forces. Studies covered a period of over 30 years with periods studied ranging from 1976 to 2007.
7. Researchers collectively examined cases over a period of 35 years, from 1972 to 2008, and from 33 states as well as cases conducted within the US Armed Forces.
8. Appendix A lists each of the studies reviewed, indicates the geographic scope and time coverage of the study, and lists the findings.
9. One study, in Delaware, found a value of 0.49; a second, from South Carolina, found 0.54; 7 studies found values in the range of 0.93–1.09; 60 studies found race-of-victim disparities ranging from 1.19 to 34.1; and 9 studies found an infinite ratio, as there were no death sentences handed down for any killers of Blacks (these are clustered at a value of 15 in the graph).
10. The modern period starts with the reinstatement of the death penalty by the US Supreme Court in *Gregg v. Georgia* in 1976; the first execution occurred in 1977. The most recent before that had been in 1965.
11. The usual caveats apply to the use of homicide data reported by the BJS, as it comes from local jurisdictions and may not always be a full census. However, for homicides, the data are more fully reported than for lesser crimes. And, most importantly, we are concerned with percentages of victims and offenders of different race and genders. These percentages may vary somewhat in the real world from those reported by BJS, but as the reader will see, the differences we report are so large that we are confident they cannot be due to measurement error in the BJS reports. Further, to

the extent that crimes are not closed and therefore offender data are missing, this may be expected disproportionately to affect Black-on-Black crimes, rather than others. If this were the case, it would make our findings stronger rather than weaker.

12. As noted earlier, we expand on these works here both in our use of a new, more comprehensive national data set of modern-era executions as well as in our focus on bias against Black victims (and in favor of White defendants with Black victims).
13. Note that our analysis here focuses on those cases where there was only a single victim. Including all 1359 cases shows a similar pattern but the results are clouded because many with multiple victims included victims of different races. Blume, Eisenberg, and Wells (2004) note that race-of-offender effects often are not found because Black offenders typically have Black victims, and crimes with Black victims are unlikely to lead to a death sentence. Blacks who kill Whites, however, are greatly over-represented on death row.
14. He obviously ignores Houston, Dallas, and Fort Worth as top 10 counties nationally by executions, and Philadelphia and Los Angeles, top counties by death sentences imposed. The “death qualification”, limiting jury participation only to those with abstract support of the death penalty, mitigates his concerns at the same time as it eliminates many Blacks from capital juries.

References

- American Civil Liberties Union Capital Punishment Project. 2007. “The Persistent Problem of Racial Disparities in the Federal Death Penalty.” June 25, 2007. Web. March 19, 2014.
- Baldus, David C., Charles Pulaski, and George Woodworth. 1983. “Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience.” *Journal of Criminal Law and Criminology* 74: 661–753.
- Baldus, David C., and George Woodworth. 2001. “Race of Victim and Race of Defendant Disparities in the Administration of Maryland’s Capital Charging and Sentencing System (1979–1996). Preliminary Finding.”
- Baldus, David C., and George Woodworth. 2003. “Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research.” *Criminal Law Bulletin* 39 (2): 194–226.
- Blume, John, Theodore Eisenberg, and Martin T. Wells. 2004. “Explaining Death Row’s Population and Racial Composition.” *Journal of Empirical Legal Studies* 1 (1): 165–207.
- Bonilla-Silva, Eduardo. 1996. “Rethinking Racism: Toward a Structural Interpretation.” *American Sociological Review* 62 (June): 465–480.
- Bonilla-Silva, Eduardo. 1997. “Rethinking Racism: Toward a Structural Interpretation.” *American Sociological Review* 62 (3): 465–480.
- Bonilla-Silva, Eduardo, Amanda Lewis, and David G. Embrick. 2004. “I Did Not Get That Job Because of a Black Man ... : The Story Lines and Testimonies of Color-blind Racism.” *Sociological Forum* 19 (4): 555–581.
- Bowers, W. J., G. L. Pierce, and J. F. McDevitt. 1984. *Legal Homicide: Death as Punishment in America, 1864–1982*. Boston, MA: Northeastern University Press.
- Death Penalty Information Center. 2015. “Facts About the Death Penalty.” Accessed March 3, 2015. <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.
- Donohue III, John J. 2014. “An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?” *Journal of Empirical Legal Studies* 11 (4): 637–696.
- Eberhardt, Jennifer L., Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson. 2005/2006. “Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-sentencing Outcomes.” *Psychological Science* 17 (5): 383–386.
- Eberhardt, Jennifer L., Phillip Atiba Goff, Valerie J. Purdie, and Paul G. Davies. 2004. “Seeing Black: Race, Crime, and Visual Processing.” *Journal of Personality and Social Psychology* 87 (6): 876–893.
- Eklund-Olson, Sheldon. 1988. “Structured Discretion, Racial Bias, and the Death Penalty: The First Decade after ‘Furman’ in Texas.” *Social Science Quarterly* 69 (4): 853–873.
- Fagan, Jeffrey, Franklin E. Zimring, and Amanda Geller. 2006. “Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty.” Accessed August 4, 2014. <http://ssrn.com/abstract=928649>.
- Government Accountability Office. 1990. *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (GAO Publication No. 90-57). Washington, DC: US Government Printing Office.

- Gross, Samuel R. 2012. "David Baldus and the Legacy of McCleskey v. Kemp." *Iowa Law Review* 97 (6): 1906–1924.
- Hetey, Rebecca C., and Jennifer L. Eberhardt. 2014. "Racial Disparities in Incarceration Increase Acceptance of Punitive Policies." *Psychological Science* 25 (10): 1949–1954.
- Jacobs, David, Zhenchao Qian, Jason T. Carmichael, and Stephanie L. Kent. 2007. "Who Survives on Death Row? An Individual and Contextual Analysis." *American Sociological Review* 72 (4): 610–632.
- McCleskey v. Kemp. 1987. 481 US 279.
- NAACP Criminal Justice Project. 2013. "Death Row U.S.A." Accessed March 3, 2015. http://www.naacpldf.org/files/publications/DRUSA_Fall_2013.pdf.
- Paternoster, Raymond, and Robert Brame. 2003. *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*. College Park: University of Maryland.
- Paternoster, Raymond, Robert Brame, Sarah Bacon, and Andrew Ditchfield. 2004. "Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999." *University of Maryland Law Journal of Race, Religion, Gender and Class* 4 (1): 1–97.
- Pierce, Glenn L., and Michael L. Radelet. 2005. "The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999." *Santa Clara Law Review* 49: 1–31.
- Radelet, Michael L. 1989. "Executions of Whites for Crimes against Blacks: Exceptions to the Rule?" *The Sociological Quarterly* 30 (4): 529–544.
- Rattan, A., C. S. Levine, C. S. Dweck, and J. L. Eberhardt. 2012. "Race and the Fragility of the Legal Distinction between Juveniles and Adults." *PLoS ONE* 7 (5): 1–5.
- Scheidegger, Kent S. 2011. "Mend It Don't End it: A Report to the Connecticut General Assembly on Capital Punishment." Accessed August 4, 2014. <http://www.cjlf.org/deathpenalty/deathpenalty.htm>.
- Scheidegger, Kent S. 2012. "Rebutting the Myths about Race and the Death Penalty." *Ohio State Journal of Criminal Law* 10 (1). Accessed August 4, 2014. <http://www.cjlf.org/deathpenalty/deathpenalty.htm>.
- Unah, Isaac. 2011. "Empirical Analysis of Race and the Process of Capital Punishment in North Carolina." *Michigan State Law Review* 609: 610–658.
- Williams, Melissa J., and Jennifer L. Eberhardt. 2008. "Biological Conceptions of Race and the Motivation to Cross Racial Boundaries." *Journal of Personality and Social Psychology* 94 (6): 1033–1047.
- Zeisel, Hans. 1981. "Race Bias in the Administration of the Death Penalty: The Florida Experience." *Harvard Law Review* 95 (2): 456–468.