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## The Lethal Impact of Defendant and Victim Characteristics on Capital Punishment

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THE LETHAL IMPACT OF DEFENDANT AND VICTIM CHARACTERISTICS ON  
CAPITAL PUNISHMENT

by

Mackenzie Meyer

B.S., Truman State University, 2020

A Research Paper  
Submitted in Partial Fulfillment of the Requirements for the  
Master of Arts

School of Justice and Public Safety  
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**RESEARCH PAPER APPROVAL**

THE LETHAL IMPACT OF DEFENDANT AND VICTIM CHARACTERISTICS ON  
CAPITAL PUNISHMENT

by

Mackenzie Meyer

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Fulfillment of the Requirements

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Master of Arts

in the field of Criminology and Criminal Justice

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## **AN ABSTRACT OF THE RESEARCH PAPER OF**

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**TITLE: THE LETHAL IMPACT OF DEFENDANT AND VICTIM CHARACTERISTICS ON CAPITAL PUNISHMENT**

**MAJOR PROFESSOR: Dr. Matthew P. West**

The current paper reviews the key points of research on the impact of defendant race, victim race, and victim gender on capital sentencing decisions. Each of these factors, as well as a theoretical framework applicable to the factors of defendant race, victim race, and victim gender on capital sentencing decisions, are explored and examined in this effort. All of the sections are intended to complement each other and provide a more comprehensive look into how and why demographic characteristics may shape capital punishment outcomes and where to go from here. It is important to understand disparities in capital punishment because understanding them may help us to limit them which would better enforce constitutional rights.

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## CHAPTER 1

### INTRODUCTION

Capital punishment is a polarizing subject that tends to bring impassioned perspectives and questions on the moral, legal, and empirical aspects of capital sentencing, which is quite understandable given that it is the most consequential criminal justice punishment in the United States (Ulmer et al., 2020) as it is irreversible once carried out in full. Given the nature of this punishment, it is especially alarming to see disparities in sentencing. Historically, literature on sentence severity for capital cases considers the race of the victim, but less so considers race jointly with the gender of the victim. As time has passed, gender disparities have become more relevant in the literature on capital punishment sentencing disparities. More specifically, it is questioned whether the presence of White female victims increases the likelihood of a defendant receiving a capital sentence. The issue of disparities in capital sentencing are joined with concern of infringement of constitutional rights such as those provided by the Eighth Amendment (protection from cruel and unusual punishment) and the Fourteenth Amendment (equal protection).

The current paper reviews and examines how defendant race, victim race, and victim gender affect capital punishment decisions. After an introduction that discusses the key figures, case law, and the processes and procedures of capital punishment, there will be a section on the relevant research on defendant race, victim race, and victim gender on capital punishment decisions. Next, there will be a section on theory that emphasizes a key theoretical framework- focal concerns theory- that is proposed as a potential explanation for the notable effects of gender and race on capital punishment outcomes. Then, there will be a section on the policy implications, informed by both the research and theory sections. The

paper will then be wrapped up with a section on limitations, future research areas, and a brief conclusion to highlight key takeaways. These sections are intended to complement each other and serve to provide a more comprehensive look into how and why demographic characteristics may shape capital punishment outcomes, as well as support potential avenues for where to go from here. It is important and necessary to understand disparities in capital punishment because understanding them may help us to limit them which would better enforce constitutional rights.



## CHAPTER 2

### CAPTIAL PUNISHMENT IN THE UNITED STATES

The United States is part of the approximately 25% of the countries in the world that retain the use of capital punishment as a legal response to crime (Amnesty International, 2023). This is especially unique for Westernized countries as many have already abolished capital punishment as a legal response to crime (West & Miller, 2020). Over 50% of the entire world's countries have abolished capital punishment, regardless of the crime (Amnesty International, 2023). Remaining countries have abolished capital punishment aside from specific circumstances such as war crimes, while others essentially abolish capital punishment in practice as it has gone decades without use even though technically legal (Amnesty International, 2023).

To give an idea of how often the United States uses capital punishment compared to all other countries, it may be helpful to know that the United States made the list of the top five countries in the world for the number of known executions in the year of 2022 (Amnesty International, 2023). Others in this top five include China, Iran, Saudi Arabia, and Egypt (Amnesty International, 2023). Currently, 27 of the 50 U.S. states retain capital punishment as a legal sanction (DIPIC, 2023). However, this has potential to change as state legislatures may and do propose bills to reinstate capital punishment or abolish capital punishment (DPIC, 2023). New Jersey legislators, for example, have proposed several bills over the past couple years with the goal of a reinstatement of capital punishment even though it had been abolished in 2007 (DPIC, 2023). On the flipside, many states (e.g., Arizona, Kansas, Missouri, Ohio, Delaware, Oregon, Nebraska, North Carolina, South Carolina, Louisiana, Texas) have been making efforts at abolishing capital punishment in their state (DPIC, 2023). Aside from states

proposing a removal or reinstatement of capital punishment, states also make efforts to increase or decrease the applicability of capital punishment (DPIC, 2023). More recently, the processes and procedures of capital punishment have been called to attention too, with Alabama legislators proposing a bill requiring jurors to reach a unanimous vote for a capital sentence to be approved (DPIC, 2023).

### **Process and Procedures**

The United States' modern capital trial process has unique aspects and procedures. After the initial arrest of an individual, states may differ in their processes and procedures as indictment for capital crimes is often specified by state law (Whitman & Strickland, 2005). Indictment can take the form of a preliminary hearing, grand jury, or some combination of both (Whitman & Strickland, 2005). After the indictment is determined, an arraignment in which a person is taken into custody and then brought into court to hear their charges and enter a plea occurs. Capital trials are unique from non-capital trials in that the next step is the notice of intent. A notice of intent is a state-required notice of their intent to seek the death penalty in the given case (Whitman & Strickland, 2005). This notice of intent is required to be accompanied by the aggravating factor(s), which are specified in statute (Whitman & Strickland, 2005).

Aggravating factors, also referred to as aggravating circumstances, are legal factors that justify a more punitive sentence (Whitman & Strickland, 2005). Put another way, there must be legally valid reasons for the state to seek a capital punishment opposed to a life sentence. Some examples of aggravating factors would be the killing of a law enforcement officer, the killing of multiple victims, a killing occurring in company with other felony offenses such as rape or robbery, the age of the victim(s), a killing that is considered especially cruel, and the defendants

record prior to the current offense, among a list of other potential aggravators. Depending on the state, mitigating factors may also be considered. Mitigating circumstances or mitigating factors are those that justify a more lenient sentence (e.g., mental or emotional duress at the time of the crime, number of accomplices, mental health).

After the notice of intent, there is discovery. Discovery is the fact-finding process that is administered by the parties involved in representing the state and the defendant. Next, many hearings begin to take place. There may be several hearings that take place before trial (e.g., motions of suppression or continuance, motions for change of venue, motion to compel evidence). There are two significant Supreme Court mandated phases in the trial: the guilt/innocence phase and the penalty phase (Whitman & Strickland, 2005). It is at this point that the jury gets involved. Jurors are responsible for making decisions in both phases (West, Wood, Miller, & Bornstein, 2020). First, they must determine if the defendant is guilty or innocent of the given crime(s). If the defendant is determined to be guilty, then jurors must enter the second phase in which they must reach a conclusion on the penalty to be served by the defendant. If a capital sentence is given then the case is automatically appealed to the Supreme Court, which may begin a lengthy process of post-trial appeals. Notably, a defendant may enter into a plea agreement at one of several points in this overall process, such as after the intent to seek capital punishment is filed, and a trial may never occur.

### **Key Case Law**

There are a few key U.S. Supreme Court cases that addressed important constitutional questions about capital punishment. In *Furman v. Georgia* (1972), the Court ruled that capital punishment, as administered at the time, violated the Eighth Amendment because it resulted in arbitrary outcomes. While some of the Justices considered racial disparities, the point of

consensus revolved around trial procedures. In turn, just a few years later in *Gregg v. Georgia* (1976), the Supreme Court reinstated capital punishment on the grounds that a new trial scheme adopted by states sufficiently addressed the deficits identified in *Furman*. The new trial scheme included aggravating factors and sometimes mitigating factors as well.

*McCleskey v. Kemp* (1987) more directly addressed the question of whether racial disparities in capital punishment were unconstitutional. The Baldus Charging and Sentencing Study (see Baldus, Woodsworth, and Pulaski, 1990) took into consideration more than 2,000 Georgia homicide cases. The evidence from the Baldus Charging and Sentencing Study suggested that Black defendants were more likely than their White defendant counterparts to receive capital punishment, especially when White victims were present in the case. This and subsequent research by Baldus and colleagues effectively gave name to the discriminatory “race-of-the-victim” effect that continues to be studied today (Kennedy, 1988, pp. 1396). Despite evidence of apparent disparities in capital sentencing provided in *McCleskey v. Kemp* (1987), the majority opinion called apparent disparities in sentencing an “inevitable part of our criminal justice system” (p. 481).

In a more recent case of *State v. Gregory* (2018), the Washington Supreme Court again considered statistical evidence of disparities in capital punishment sentencing. For the first time since *McCleskey v. Kemp* (1987), a court in the United States declared capital punishment unconstitutional because of evidence of racial bias in sentencing decisions. Ultimately, the majority of the Court ruled that capital punishment is “unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner” (*State v. Gregory*, 2018, p. 40). This case is significant because it exemplifies not just the presence of disparities in capital punishment, but how their examination and evidence of them can be used

to make meaningful legal changes that better protect constitutional rights (at least at the state level). This leads to questions regarding why one court accepted evidence of racial bias but other courts in previous cases had not.

## CHAPTER 3

### RESEARCH: RACE, GENDER, AND CAPITAL PUNISHMENT

Before diving into the outcomes of research performed on race, gender, and capital punishment, it is important to understand the various methods in which such studies have been conducted. Every method of study has its positive and negative attributes. This is to be expected but must be understood to properly interpret the findings. Most of the evidence on disparities in capital sentencing appears to have come from a variety of correlational studies. Correlational studies can be any type of study that aims to determine if a change in one variable is correlated with a change in another. In this case, it is examined whether a change in race or gender of defendants and victims correlates with a change in the likelihood of receiving capital punishment. Studies use either secondary data or perform primary data collection.

In many instances, case records from a certain time period are retrieved, coded, and compiled into a dataset for analysis. The Baldus studies referenced in *McCleskey v. Kemp* (1987) were continuously used as a source of data in research studies examining disparities in capital sentencing decisions. While it is argued that the Baldus studies may be a bit out of date methodologically speaking, it is undeniable that they inspired a great deal of research on disparities in capital punishment. Contemporary research often uses a similar approach to examine disparities in other states (e.g., Jennings et al., 2014; Richards et al., 2016b). Secondary data is also retrieved from sources such as FBI databases. Specifically, homicide data is used since it is the primary capital-eligible offense. Williams and Holcomb (2004), for example, collected FBI homicide data in their study on the interactive effects of race and gender of the victim on capital punishment likelihood. More recently, experiments- namely,

simulated jury trials- have been used for primary data collection. True experiments are commonly referred to as the gold standard because they allow for a much higher level of confidence in the validity of causal conclusions. However, while not impossible, it can be difficult to create a true experiment that realistically imitates real- world trials. Mock jury experiments attempt to capture the decision-making process, reach causal conclusions, and often aim to sample qualified and jury-eligible participants (e.g., West et al., 2020), but the extent to which they generalize to real-world capital cases is not entirely clear.

### **The Effect of Race on Capital Punishment**

Since *Gregg v. Georgia* (1976), the number of individuals who have been executed has reached 1,577 executions (DPIC, 2023). Of this current count, 878 executed individuals were White, 537 were Black, 133 were Latinx, and the remaining 29 are undefined (DPIC, 2023). In more than 75% of these executions, the homicide victims in the case were White even though national statistics suggest that White victims only make up about 50% of the homicide victim population (DPIC, 2023). This comparison suggests racial disparities based on the race of the victim in capital cases to be especially pronounced.

Early research suggests that there is a statistically significant relationship between the race of the defendant and the race of the victim on capital sentencing, with the greatest proportion of cases with a capital punishment decision featuring the racial dyad of Black defendants and White victims (Kiel & Vito, 1990). However, there are notable deviations from this finding that point to other potential explanations for this observation. Jennings and colleagues (2013) find that claims of a White victim effect lose support after including several additional factors into the analysis. Basic statistical comparison using population data from the U.S. Census Bureau (2022) and death row and execution data from the Legal

defense Fund's quarterly report on death row (Fins, 2022) gives us a look into contemporary trends in data on race and capital punishment (see Table 1 and Table 2).

**Table 1. Death Row Populations and Proportions by Race**

	Percentage on Death Row	Percentage of Death Row Executions	Percentage of U.S. Population
White	42.07%	55.81%	75.5%
Black	41.05%	34.26%	13.6%
Other	16.88%	9.93%	10.9%



**Table 2. Death Row Executions by Defendant-Victim Racial Combinations (1976-Present)**

	<b>White Victim</b>	<b>Black Victim</b>	<b>Latin x Victim</b>	<b>Asian Victim</b>	<b>Native American Victim</b>
<b>White Defendant</b>	51.68%	1.35%	1.16%	0.39%	0.00%
<b>Black Defendant</b>	19.23%	11.81%	1.16%	1.03%	0.00%
<b>Latin x Defendant</b>	3.55%	0.19%	4.00%	0.13%	0.00%
<b>Asian Defendant</b>	0.19%	0.00%	0.00%	0.32%	0.00%
<b>Native American Defendant</b>	0.97%	0.00%	0.00%	0.00%	0.19%

As evident in Table 1, the percentage of Black individuals on death row is not proportionate to their share of the United States Population (Fins, 2022; U.S. Census Bureau, 2022). This disproportionality, though slightly less, carries over to the completion of a capital punishment sentence (execution) (Fins, 2022). A potential explanation for the lowered percentages going from death row to execution rates is the number of cases in which there were court reversals or residency in moratorium states. To exemplify this, the total number of death row inmates as of October 1, 2022, is used. Out of the 2,363 total number of death row inmates, only 1,367 were technically enforceable sentences (Fins, 2022). Of the grand total of

2,363, there were 141 cases that were not enforceable due to a court reversal while 855 were based in moratorium states, meaning the cases were based in states where execution is currently prohibited but was not at the time of sentencing (Fins, 2022). As seen in Table 2, the most prominent categories appear to consist of White victims with any race defendant or defendants and victims of the same race. The least prominent categories are those with any defendant and any non-White victims.

### ***Race of the Defendant***

Research on the effect of defendant race on capital sentence decisions has taken several distinct perspectives over the years. Some studies suggest there are special circumstances in which there are racial disparities that disadvantage Black defendants (see Kleck, 1981; Gasperetti, 2021), others have found persistent racial disparities that disadvantage Black defendants (see Sweeney & Haney, 1992), and some have begun to suggest a reverse racial disparity effect in which White defendants are disadvantaged (see Medwed, 2021).

A meta-analysis of fourteen experimental studies that focus on defendant race and sentencing decisions provides significant support for the hypothesis that racial bias impacts sentencing decisions (see Sweeney & Haney, 1992). Sweeney and Haney (1992) conclude that the race of the defendant impacts a mock juror's decision to impose a capital sentence in a way that disadvantages Black defendants. Black defendants are considered disadvantaged because they tend to receive harsher sentencing recommendations or a greater number of sentencing recommendations than did their White counterparts (Sweeney & Haney, 1992). The analysis included seven predictor variables that were determined to be important based on past research (Sweeney & Haney, 1992). Three predictors, for example, were included to consider the arguments of previous research that it is only Southern studies, older studies, and

studies involving rape that would see racial bias (Sweeney & Haney, 1992). These predictors were incredibly significant to the findings because they considered the caveats and contrary findings by accounting for such studies' variables, and still found significant results that racial bias impacts sentencing decisions (Sweeney & Haney, 1992).

Kleck (1981) does not find evidence of a race of defendant effect in any region of the United States apart from the South. The Southern region of the United States was the only region in which Kleck (1981) concludes there to be a disproportionate number of Black offenders who received death sentences compared to their White counterparts. In every region other than the South, White defendants were more likely to receive a capital sentence and more likely to be executed (Kleck, 1981). However, these findings did not remain solid when incorporating victim race. Black victims were placed at a lesser value than that of White victims, as is displayed by the findings that offenses with Black victims were less likely to result in capital sentences than offenses with White victims (Kleck, 1981). When Black defendants are given more lenient sentences than their White counterparts, it may be because of the victim's race rather than the defendant's. Thus, Black defendants may be given a more lenient sentence than their White counterparts (Kleck, 1981). This does not necessarily reflect unbiased sentencing, but rather sentencing that may be biased according to victim characteristics such as victim race opposed to some overt racial discrimination against the defendant. This relationship will be examined later.

A more recent study on racial bias in capital sentencing decisions suggests there is no race of defendant effect, with some stipulations (Gasperetti, 2021). Using a mock jury, Gasperetti (2021) finds no race of defendant effect as long as the jury selection process (*voir dire*) thoroughly screens for racial bias in potential jurors and removes such jurors from the

selection pool. Interestingly, just over 10% of the study participants were open to admitting racial bias (Gasperetti, 2021). This suggests that if jury selection for capital cases is not done in a way that eliminates such obvious biases, it could result in outcomes that disadvantage Black defendants.

Another recent argument that contrasts much research on the race of the defendant comes from Medwed (2021) and proposes that White offenders are more likely to receive the death penalty than Black offenders. This “reverse racial disparity” is predicted to advantage Black defendants because of an overcorrection to racial bias or racial disparities against Black defendants (Medwed, 2021, p. 970).

### ***Race of the Victim***

The seminal work by Baldus, Woodworth, and Pulaski Jr. (1990) inspired most of the literature that exists on the effects of victim characteristics on capital sentences (Royer et al., 2014). One of their most referenced works examined more than 2,400 capital cases in Georgia between 1973-1980 (Baldus et al., 1990). The Georgia study results are well-known for being used as evidence of racial discrimination in the landmark case, *McCleskey v. Kemp* (1987). The results of the study conclude that a Georgia defendant was more likely to be given a capital sentence when the victim was White compared to similar cases in which the victim was Black (Baldus et al., 1990). This may be referred to as the White victim effect or race of victim effect.

Research has documented a clear race of victim effect, whereby cases in which there is the presence of one or more White victims are punished more harshly (Paternoster & Brame, 2008). Results from Dodge (1990) present a clear race of victim effect in capital sentencing. A capital sentence was more likely to be sought and imposed in cases in which

the victim was White (Dodge, 1990). Dodge (1990) obtained these results from a final sample of 28 studies that included a range of time periods and covered different geographic regions in the United States. The White victim effect has been documented in Illinois (see Pierce & Radelet, 2002), Nebraska (see Baldus, Woodworth, & Grosso, 2002), Maryland (see Paternoster, Brame, Bacon, & Ditchfield, 2004), Colorado (see Hindson, Potter, & Radelet, 2006), Louisiana (see Pierce & Radelet, 2010; Radelet & Pierce, 2011a), and North Carolina (see Radelet & Pierce, 2011b, Unah, 2011).

While Jennings and colleagues (2014) do initially find capital punishment to be especially likely for the racial dyad of Black defendants and White victims, further examination discovered this was only observable until additional factors were included (Jennings et al., 2014). When a variety of both legal and extralegal case characteristics (e.g., number of accomplices, whether defendant had a private attorney, victim involvement in illegal activity, etc.) were included in the estimates, there was no significant effect between the race of defendants and the race of victims on capital punishment (Jennings et al., 2014). This may be because these additional factors explained away disparities in sentencing. Put another way, the findings suggest that there is a “case effect” rather than a “race of victim effect” or “White victim effect” that explains why Black defendants with White victims tend to be especially likely to receive a capital punishment (Jennings et al., 2014, pp. 395). There may be other specific factors aside from race that account for differential outcomes.

### **The Effect of Victim Gender on Capital Punishment**

Scholars that maintain a neutral perspective on gender and sentencing outcomes have suggested differential sentencing based on gender is something of the past and that gender is no longer applicable to sentencing decisions (Spohn & Beichner, 2000). Other researchers

suggest that differential sentencing based on gender is still ever present. Female defendants are both given capital sentences and executed at significantly lower rates than their male counterparts (Shatz & Shatz, 2012). This can be exemplified by North Carolina's death row which, as of 2005, was made up of four women and 187 men (Reza, 2005). This is thought to be the result of differential rates in committing homicide by gender, with women committing significantly fewer homicides than men. More recently, gender-based research in this area has brought into focus the victim. While at first somewhat of a rarity, inclusion of victim gender as a variable has become increasingly common.

As with defendant gender, victim gender influences the likelihood of a defendant being given a capital sentence and executed (Royer et al., 2013). Research tends to find that defendants with female victims have greater odds of receiving a capital sentence compared to similarly situated cases with male victims (Lee, 2007; Royer et al., 2013). Lee (2007) suggests the odds of receiving a capital sentence to be forty-three times higher when victims are female compared to male. An Ohio study found that the odds of a defendant being sentenced to death were 2.617 times greater for cases in which there were female victims compared to cases in which there were male victims (Holcomb et al., 2004). This finding remained consistent after controlling for fifteen different predictor variables (Holcomb et al., 2004). This is quite a variation of odds.

Royer and colleagues (2014) conclude that differential rates in capital punishment outcomes for defendants with male and female victims may be the result of the greater presence of sexual victimization in cases in which there were female victims. Not only are cases with female victims more likely to include sexual victimization, but cases with higher scores on the sex crime scale in cases are associated with a greater likelihood of receiving a

capital sentence (Royer et al., 2014).

Utilizing data on jury decisions in the final phase of decision making- the penalty phase- Richards and colleagues (2016b) noted quite different situations for male and female defendants. Capital cases with female victims were predicted by two specific variables, one being the number of mitigators present and the other being a designation of the case as heinous and cruel (Richards et al., 2016b). On the other hand, capital cases with male victims had a much lengthier number of significant predictors for the decision to impose capital punishment (Richards et al., 2016b). Capital sentencing decisions for male victims are suggested to be predicted by the age of the victim, the age of the defendant, urban areas, the number of victims killed, the number of aggravators accepted, the number of mitigators accepted, and the designation of the case as heinous and cruel (Richards et al., 2016b). This suggests that many more factors may contribute to jury decisions to impose capital punishment for men compared to their female counterparts.

### **Intersectionality of Race and Gender on Capital Punishment**

The *White female victim effect* is a general term used in the body of literature to express the prediction that disparities in defendant's sentencing decisions occur because of the victim's status as White and female. The White female victim effect predicts that punishment severity will be highest when the victim is a White woman. The White female victim effect is predicted to be at its strongest when the defendant is Black because of the racial disparities that exist for defendants. In this explanation, it is predicted that the dyad of Black defendant and White female victim is most likely to receive a capital sentence because of a Black defendant being associated with harming a White woman, which gives into stereotypes of both Black dangerousness and White female fragility.

Williams and Holcomb (2004) examine the interactive effects of victim race and victim gender on the likelihood of a defendant being given a capital sentence for a homicide using the FBI's Supplementary Homicide Reports data for homicides in Ohio. Their findings suggest that there may be a race and gender effect on capital sentence outcomes in which it is more likely for those defendants with White female victims (Williams & Holcomb, 2004). However, Williams and Holcomb warn this to be more of a preliminary study of the "methodologically complex relationship" (pp. 352) and stress that the results are not to be taken as being conclusive. A couple of years later, Holcomb, Williams, and Demuth (2006) extended their look into the relationship between race, gender, and capital punishment via the study of homicide data and test the hypothesis that defendants with White female victims are most likely to be given a capital sentence. Their results suggest that defendants with White female victims were, indeed, the most likely race-gender dyad to receive a capital sentence for their offense (Holcomb et al., 2006).

A year later, Williams, Demuth, and Holcomb (2007) again found that the race of the victim and the gender of the victim were associated with the likelihood of a capital punishment decision, this time using data from the Baldus Charging and Sentencing Study. The key difference from this study and the previous was that the more recent study determined the effect of White female victims to be especially unique for capital punishment outcomes. The odds of a defendant with White female victims being given a capital sentence was 14.5 times greater than in cases where defendants had Black male victims; defendants with White female, White male, or Black female victims all tended to have a greater likelihood of the imposition of a capital punishment compared to Black male victims (Williams et al., 2007).



## Limitations of Prior Research

Prior research on race and gender disparities in capital sentencing do have their notable limitations. There are several components of methodological rigor that appear to be lacking and may contribute to inconsistent findings. Prior research may be limited by their population size and composition, case selection, and data collection. Population sizes may be small, cases may be from single urban areas, and data may be more than thirty years old. These are not always problems but are important to consider. Small population size presents limitations for studies since it provides only a small amount of data for statistical relationships to be analyzed.

Compared to other offenses, capital punishment cases represent a small portion of cases. So naturally, population sizes may be small.

Some studies on disparities and capital sentencing outcomes include cases from only a single, urban area. Jennings and colleagues (2014) point to the 1998 work of Baldus, Woodworth, Zuckerman, Weiner, & Broffitt as an example of this limitation. While Baldus and colleagues' (2001) later research looks at geographic disparities, the geographic disparities examined are that of major urban areas. This can be an issue, especially for studies like the Baldus studies, because their data may be used in later works and thus pass on the same limitations. Some studies do, however, include rural areas (see Gross & Mauro, 1984; Garrett et al., 2017; Garrett, Jakubow, & Desai, 2017). As a result, we get little information about how capital punishment and potential disparities operate in rural areas or suburban areas.

Older data may be an issue because of how much can change over time, both in terms of how race and gender is viewed by society and how research is performed. Much of the

research on defendant and victim characteristics in capital punishment cases comes from the Baldus studies (see Baldus et al., 1990). The commonly cited Charging and Sentencing Study utilizes data from over thirty years ago (see Baldus, Woodsworth, and Pulaski, 1990). As a result, much research on defendant and victim characteristics in capital punishment cases utilizes data that is more than thirty years old. For example, Williams, Demuth, and Holcomb (2007) utilize data from Baldus, Woodsworth, and Pulaski (1990) in their study on victim gender and capital cases. Kleck (1981) uses and analyzes execution rate data from 1930 to 1967 and data on capital sentence rates from 1967 to 1978 to answer their research questions. In this case and others, the problem is not the quality of the data. The problem is that the data is from thirty to forty years ago and society and the criminal justice system is notably different now.

Prior research may also be limited by the problems of sample selection bias and omitted variables. Studies that only consider the disparities in terms of capital sentencing decisions do not consider nor measure potential disparities that may have occurred prior to the point of capital sentencing. For example, there may be race or gender disparities present at earlier stages in the criminal justice system that account for disparities in capital sentencing stages. The issue of omitted variables is evidenced by Jennings and colleagues (2014) work which displayed different results after including a greater number of variables. The effect of race may be overestimated in cases where significant variables are omitted. This was the exact case for Jennings and colleagues (2014) as they discovered the prevalent “case effect” issue opposed to a “race effect” or “White victim effect” after including a range of both legal and extralegal case characteristics into their estimates. Research must be cautious when claiming a causal relationship between demographic characteristics and any outcome, as it assumes the

characteristics themselves to be the direct cause of the outcome opposed to one or many other omitted variables.

Prior research tends to focus much more on disparities between White and Black victims than any other race. This is surprising considering how racial heterogeneity has only grown in the United States. Hispanic individuals, for example, make up the largest racial minority in the United States (Lee, 2007). However, much fewer studies analyze how racial bias may affect Hispanic individuals. This relationship is even less known for other groups such as Asian and Native American individuals. One notable effort made towards expanding such variables is made by Lee (2007). Lee (2007) extends literature by including ethnicity in their research. Lee (2007) extends the usual Black and White racial dichotomy to include Asian and Hispanic individuals. Lee (2007) questions and tests whether Hispanic individuals in the United States are treated more like Black individuals or more like White individuals in terms of the defendant/victim racial dyad of capital sentencing. To this end, the findings suggest that defendants with White or Asian victims are five times more likely to receive a capital sentence than defendants with Black victims (Lee, 2007). Defendants with Hispanic victims were even less likely to receive a capital sentence than those with Black victims, suggesting that Hispanic individuals are treated more like Black individuals than White (Lee, 2007).

When it comes to gender, there is an apparent lack of female defendants included in samples. This may simply be due to the trend that women rarely commit death-eligible crimes in the first place, but it is still relevant to consider. Richards and colleagues (2016b), for example, include only male defendants in their sample because this is what prior research has done. There is variation in the gender of victims in samples, but no variation in the gender of

defendants. It would be expected that more information could come from a study that includes an entire population of female defendants to better understand how defendant gender impacts capital sentence decisions.

Furthermore, it is important to point out that gender and sex are not properly specified in most prior research, nor are they made into exhaustive categories. Gender and sex are often used interchangeably, even though they are different. Since this is the way prior research has conducted their studies, it tends to be the way current research conducts their studies. It is also quite possible that some of the variation in findings may be the result of changes that have occurred over time in respect to the acceptability of racial discrimination. The temporal difference could explain differences in findings between earlier studies and more recent studies regarding their severity or subtly in the presence of racial disparities in capital sentencing.

## CHAPTER 4

### FOCAL CONCERNS THEORY

The focal concerns theory was originally presented by Steffensmeier and colleagues in 1998 as a theory to explain judicial decision making and how it is affected by race, gender, age, and the combination of such social statuses. Research suggesting a White victim effect, White female victim effect, and a race-gender dyad of a Black defendant/White female victim effect cite focal concerns theory as a potential explanation for such outcomes. The basic idea is that stereotypes associated with demographic characteristics influence the weight of punishment rationales, and in turn, punishment decisions. Originally, this theory was interpreted in a context of assuming Black individuals were inherently more dangerous, more blameworthy, and less salvageable because of differential rates of offending in which Black individuals offended at the highest rate. Currently, it is well-understood by most that race does not have a direct relationship with offending. Current focal concern attributions are understood in the context that Black individuals are attributed greater levels of dangerousness, blameworthiness, salvageability, and so on because of stereotyping.

#### **Key Concepts**

The central elements of the focal concerns perspective are blameworthiness, dangerousness, constraints, and salvageability (Galvin & Ulmer, 2022; Ulmer et al., 2022). These elements are argued to be the center of decisions on punishment (Ulmer et al., 2022). Other theoretical ideas, such as chivalry, may also be understood through the lens of focal concerns. Blameworthiness refers to the amount of fault, or blame, and culpability attributed to the defendant (Hartley, 2014). Dangerousness revolves around concern and desire for community protection (Hartley, 2014). Constraints include practical and other constraints that

may be related to punishment decisions. An example of constraints may be the lack of time or limited information available to judges tasked with sentencing defendants (Hartley, 2014).

Salvageability refers to the anticipated redeemability of an offender (Galvin & Ulmer, 2022).

Together, these constructs make up the core of the focal concerns perspective.

Chivalry is another related concept that closely ties into many of focal concern theory's key elements. Chivalry, or paternalism, has long been a part of the criminal justice system. The chivalry effect or the chivalry hypothesis was first proposed in 1950 as an explanation for the relationship between apparent defendant and victim characteristics and criminal justice outcomes (Pollak, 1950). Chivalry is rooted in patriarchy and rests on the notion that women are weaker than men and need protection from men. Such notions are based on the stereotypical gender roles in which women are viewed as less capable compared to men.

In application to the criminal justice system, the concept of chivalry and the chivalry hypothesis suggests that when women are the offenders of crime, they are given less severe sentences than their male counterparts. When women are the victims of crime, it is predicted that it initiates chivalrous protection by the criminal justice system. More specifically, the chivalry hypothesis predicts that the severity of punishment will be greatest when the victim is a woman because of women being viewed as a vulnerable population in need of protection. Furthermore, women are viewed as less responsible for their victimization than men since they are viewed as helpless to offenders.

### **Attributions and Disparities**

A central idea of focal concerns theory is that people make attributions based on stereotypes about demographics. Disparities in capital sentencing are oftentimes argued to be

influenced by a reliance on stereotypes about defendant and victim race and gender. In this explanation, focal concerns are shaped by factors such as race because crime and violence are stereotyped as “normative” for Black individuals while also being “atypical” for White individuals (Jennings et al., 2014, pp. 385; Galvin & Ulmer, 2022). Research that examines the impact of gender on capital sentencing also regularly suggests that defendants are given harsher sentences in capital cases with female victims compared to similar cases with male victims (Royer, Hritz, Hans, & Eisenberg, 2013). Just as racialized expectations might shape focal concerns, so too might gender expectations and their combination. Indeed, research on focal concerns theory has linked key concepts such as blameworthiness to racialized gender expectations (Kruttschnitt, 2013). For example, research finds that Black and Hispanic men are deemed the most blameworthy offenders (Kruttschnitt, 2013). Conversely, female offenders of any race are suggested to be attributed less blameworthiness for crimes than their male counterparts (Kruttschnitt, 2013).

While research finds support for focal concerns theory, it has been argued by some (see Hartley, 2014) that the theory requires further conceptualization and operationalization of its underlying concepts for the utility of the theory to be fully realized and tested. This appears to have always been the case as the original authors themselves point to the issue of the role of race and gender in judicial decision-making being oversimplified in both theory and research in the past (Steffensmeier et al., 1998). This is discussed as an issue for theory.

### **Theoretical Limitations**

Some of the variation in findings suggested by research may very well be the result of changes that have occurred over time in the acceptability of prejudice or reliance on stereotypes. Stereotypes are a heuristic, meaning they are mental shortcuts people take in place of gathering

information. They can be subtle and hard to identify but deserve examination, nonetheless. Indeed, recent findings suggest more subtle disparities than earlier studies because of changes in the acceptability of prejudice (West & Miller, 2020). Stereotyping in the criminal justice system is not only detrimental to individuals who find themselves unfairly disadvantaged by them, but also detrimental to the validity of the criminal justice system. Even if stereotyping does not necessarily occur at the capital punishment decision phase of the system or only plays a subtle role, *any* presence of stereotyping causing disparities is inherently impactful and should be lessened.

It is reasonable to advocate for awareness of the potential for oversimplification in the present and future of theory and research on these characteristics and capital sentencing decisions. Oversimplification occurs through poor conceptualization of gender and race, as well as the reliance on stereotypes in decision making- even if not done intentionally. Gender is often not properly specified nor is it made into exhaustive categories. There tends to be definitional issues with the use of gender, namely confusing it with sex. When studies refer to gender, they often really referring to sex. This may be due to more inclusive definitions being proposed for these terms in recent years which have not yet been applied to theoretical frameworks outside of feminist criminology. Race also suffers from oversimplification as some may simply see it as a term for one's complexion. Additionally, race can be misconstrued with ethnicity. Both race and ethnicity can be much more detailed than a couple of simple categories, and individuals may very well see themselves fit in multiple categories.

As the world becomes more accepting and inclusive of those who have been historically oppressed, we learn more about the many differences that exist. Gender and race are not simple, nor do they need to be. There may be trends in disparities that are completely



missed because of oversimplification or confusion with other factors such as sex or ethnicity. We may even be better off including all four factors- gender, sex, race, and ethnicity- with their proper conceptualizations. It is also beneficial to note that chivalry is not distributed equally to all women, and that other victim characteristics such as race and class also impact sentencing outcomes. It is quite possible that other characteristics such as attractiveness, gender identity, sexual identity, and others may play a role too. For theory, and research as well, to expand, so must our consideration of such key factors.

## CHAPTER 5

### POLICY IMPLICATIONS

In principle, demographic characteristics of defendants and victims should not influence sentencing decisions in capital trials. Unfortunately, as evidence suggests, race and gender are related to capital sentencing outcomes. Sentencing disparities are something that ought to be addressed through both further research and by taking action to make changes. The debate comes into play as to how exactly this ought to be done. In policy implications of the research findings on gender, race, and capital punishment, various angles may be taken. There are broad, macro-level social changes that could be made with the hopes of lessening instances of race and gender bias in the country and in criminal justice decisions such as the decision of whether to impose capital punishment. It would be a disservice to ignore the possibility that the disparities we see at the final steps of capital punishment, the most severe punishment, are cumulative effects of disparities at any and/or all other stages of the criminal justice process. By targeting race and gender bias at the macro-level, we may be able to address these issues affecting more than just the capital punishment process. There are also more specific changes that target actors directly involved in the decision to impose capital punishment that could be imposed in the hopes of achieving the same ends. I argue that utilizing both broad and specific changes, together, to be the best chance at reducing disparities in capital sentencing.

#### **Specific Changes: Addressing Procedure**

##### ***Attorney Policy & Training***

It is well known that defendants are often poor, and that a greater proportion of poor defendants are Black men. So not only are Black men disadvantaged by unjust disparities in sentencing, but they are impacted by poverty as well. This remains true for

capital case defendants as well (Balske, 1979). As a result, many capital defendants start at a place of disadvantage or with additional hardships before the court process even begins. This can manifest into difficulties acquiring high quality legal presentation that wealthier individuals have access to. *Wiggins v. Smith* (2003) serves as an example of just how important quality representation can be. *Wiggins v. Smith* (2003) introduced questions regarding whether a capital defendant's defense attorney's failure to present available mitigative evidence in trial constitutes ineffective assistance of counsel. The Court determined that an attorney's failure to investigate and present mitigating evidence at a capital trial is a violation of the Sixth Amendment right to effective assistance of counsel. Attorneys should make good faith efforts to investigate the background of defendants thoroughly to retrieve any potential mitigating circumstances that could be presented in Court. Attorney training should be sure to include policies that make aware the importance of quality performance in the investigation and presentation of mitigating evidence. The presence of mitigating evidence and how it is presented could be incorporated into basic training.

### ***Court Camera Footage***

Kaufman (2020) argues that there is an outstanding lack of systematic information about capital trials and everything they entail, and that this is no accident. Instead, capital trials (like any trial) are argued to be staged, theatrical performances orchestrated by criminal justice actors such as attorneys and their witnesses (Kaufman, 2020). For example, Kaufman (2020) notes that attorneys strategically choose which facts to reveal and not reveal, and exactly how facts are displayed for viewing. It is not a straightforward process in which attorneys provide facts and witness statements for an objective conclusion to be reached by

the judge or jury. It may be helpful to have court processes recorded by video camera to capture facial expressions, gestures, and other physical aspects. This would capture moments that do not ever make it to text-based documentation. This would allow for a greater variety of information to be collected from court procedures and provide evidence to look back on. Court transcripts combined with body cam footage, or some other footage, would allow for a more comprehensive examination of capital court procedures compared to typical text-based documents. Performative aspects of trials that might contribute to gender and race disparities are currently omitted from consideration in most studies as well as appeals.

### ***The Jury: Instructions and Diversification***

Jury procedures, such as the jury's makeup and their instructions, present an area that could be addressed. Evidence suggests that changes such as jury diversification in combination with more simplified penalty phase instructions for jurors will result in higher levels of instruction comprehension and less racial bias in sentencing. While this has been challenged, there remains evidence of potential benefits. Benefits of simplified jury instructions are evidenced by experimental studies such as that of Lynch and Haney (2000) and Shaked-Schroer and colleagues (2008).

Lynch and Haney (2000) performed an experiment in which jury-eligible participants were randomly assigned to one of four mock capital trials that were manipulated according to race of the defendant (Black or White) and race of the victim (Black or White). The conclusion of the mock capital trial was that participants had poor comprehension of penalty phase instructions and that this impacted how punitive they were in their decision of whether to recommend a capital sentence or life sentence (Lynch & Haney, 2000). Black defendants were only slightly more likely to receive capital sentences over life sentences compared to

their White counterparts, indicating that racial disparities in the decision to recommend a capital sentence may be more related to and/or exacerbated by poor comprehension of penalty phase instructions (Lynch & Haney, 2000).

In a similar study by Shaked-Schroer and colleagues (2008), jury-eligible participants were provided a mock capital trial in which participants were randomly provided one of six conditions in which they were to assume the position of actual jurors in a capital trial. The six scenarios had been manipulated by defendant race (Black or White), participant race (non-White or White), and by penalty phase instruction type (standard or simplified). The findings of the mock capital trial show a significant relationship between defendant race, participant race, instruction type, and the outcome of sentence recommendation (Shaked-Schroer et al., 2008).

When mock capital jurors were given standard instructions and a scenario with a White defendant, there was no difference in whether they gave a capital punishment or life sentence recommendation (Shaked-Schroer et al., 2008). When mock capital jurors were given standard instructions and a scenario with a Black defendant, White participants gave more capital punishment recommendations and non-White participants gave more life sentence recommendations (Shaked-Schroer et al., 2008). When penalty phase instructions were simplified instead of remaining standard, there was no significant difference in sentencing recommendations (Shaked-Schroer et al., 2008). Simply put, the results of the study suggest that the use of simplified penalty phase instructions and having a diverse jury will reduce racial bias in sentencing for capital trials (Shaked-Schroer et al., 2008).

Establishing simplified penalty phase instructions is quite doable, but some would suggest jury diversification to not be totally feasible. Jury instructions would be edited to

provide the same key details but written in more basic language to make it as easy as possible to clearly comprehend. It is important all jurors have a great understanding of the guidelines they are to follow to uphold constitutional rights to a fair trial. A jury could be made more diverse by requiring the presence of both men, women, White, and non-White participants. Given that evidence suggests White jurors to decide more punitive punishments for Black capital defendants (Shaked-Schroer et al., 2008), one could infer that having non-White jurors (especially in cases with Black defendants) may help combat such disparities.

Mock jury studies were soon expanded to examine the extent and ways in which jury deliberation may impact racial disparities in the decision of juries to recommend a capital sentence. In 2009, Lynch and Haney performed such a study in which it was determined that jury deliberation only exacerbated the likelihood of White mock jurors to recommend a death sentence for Black defendants more often than their White defendant counterparts. Interestingly, and quite in line with other findings on penalty phase instruction comprehension, jury deliberation did not do anything to aid in comprehending jury instructions (Lynch & Haney, 2009). This further solidifies the recommendation that comprehension of penalty phase instructions is necessary and may reduce the likelihood of racial disparities in the decision to recommend capital sentences. Like with the recommendation for jury diversification, simplified instructions may extend from race to gender by encouraging less disparities among gender since proper adherence to jury instructions would mean not putting value in such characteristics.

### ***Collaboration with Judicial and Legal Actors***

As seen in *McCleskey v. Kemp* (1987) with the utilization of the Baldus Charging and Sentencing Study, greater attention was drawn to the influence of defendant and victim

characteristics in capital sentencing. With the *State v. Gregory* (2018) case, we saw change at the state level after using research to bolster argument. This gives reason to believe that research can continue to be used in court cases with the possibility of creating legal change, at least at the state level. Such collaboration could be taken a step further. Closer relationships could be fostered between researchers and judicial and legal actors in states, such as legislators and judges. To take some of the effort off all sides, an additional party could be established across states to lead collaboration amongst these actors. Doing so could have many benefits such as ensuring research and policy work together, increased job satisfaction from seeing more meaning in work, focus efforts to enact change as needed, and potentially many others. The key takeaway here is that research not only informs and inspires, but it can go as far as to contribute to legal change.

## CHAPTER 6

### FUTURE RESEARCH

Importantly, there are numerous areas in research and policy that could be expanded even further. Future research is necessary to better understand the relationship between defendant characteristics, victim characteristics, and capital punishment outcomes- specifically those characteristics which relate to demographics and static features. Gender and race could be better conceptualized and operationalized. Additional variables could be incorporated to capture bias and disparities in sentencing decisions. In line with Gasperetti's (2021) research, it is also suggested to consider implicit bias in decision making and explicit bias. Lastly, the utility of research for Court decisions should not be overlooked.

How gender and race are captured in studies could be expanded and conceptualized in other ways to be more inclusive of actual population differences and, thus, more applicable. More inclusive studies would include both biological sex (male, female, and intersex), as well as gender identity (male, female, and nonbinary), to get a better grasp on how different characteristics influence capital sentencing. Similarly, more comprehensive, and inclusive measures for race would include ethnicity and may even expand further to add other potential indicators of such biases. Race and ethnicity should be regularly made into exhaustive categories in which individuals can mark more than one option. It is possible that differences we see in findings on race and capital punishment outcomes may be the result of skin tone opposed to typical definitions of race. A study that incorporates a variable for skin tone or complexion, for example, may be a fruitful addition to race and ethnicity variables. Burch (2015), for example, examines skin color and disparities in sentencing by breaking down color into the following categories: Whites, lighter-skinned Blacks, medium-skinned Blacks,



and dark-skinned Blacks. Future research should also consider courts as a policy change avenue. As seen in several court cases throughout the years, research can be used to bolster arguments. *McCleskey v. Kemp (1987)* and the research's utilization and general findings inspired further research to analyze and build from the Baldus Charging and Sentencing Study. This drew greater attention to the influence of defendant and victim characteristics in capital sentencing. With the *State v. Gregory (2018)* case, we saw successful change at the state level. This gives reason to believe that research can continue to be used in court cases with the possibility of creating legal change. The key takeaway here is that research not only informs and inspires, but it can go as far as to contribute to legal change.

## CHAPTER 7

### CONCLUSION

Taken as a whole, there appears to be some identifiable and consistent patterns of disparities in literature on gender, and more inconsistent findings on race and the intersectional effects of race and gender on capital sentences. Research suggests there to be more leniency afforded to White offenders and women than Black offenders. Similarly, offenders with White victims tend to be more likely to receive a capital sentence than those with non-White victims. Others combine these effects and predict capital sentences to be the most likely when the victim is a White female, and the defendant is Black male. Medwed (2021) considers these patterns to be just another presentation of the criminal justice system's tendency to place a higher value on White victims than Black victims. This pattern is especially strong in older research and appears to be less clear as it approaches the present day.

Findings on disparities are quite significant because they exemplify repeated scenarios in which demographic characteristics affect judicial outcomes which is a violation of Constitutional rights. Focal concerns theory is an applicable and useful framework for considering how such disparities may come about and what changes to policy and future research may be impactful in further identifying and reducing noted disparities. Here, changes to attorney training, further information gathering during trials such as the use of body cameras or other footage methods, jury diversification, the use of simplified jury instructions, and collaboration between researchers and legal or judicial actors, are suggested as achievable changes to consider. However, areas for future research may present better alternatives to such recommendations.

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