Journal of Criminal Law and Criminology

Volume 74
Issue 3 *Fall*

Article 13

Fall 1983

The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes

William J. Bowers

0091-4169/83/7403-1067
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 74, No. 3

THE PERVASIVENESS OF ARBITRARINESS AND DISCRIMINATION UNDER POST-*FURMAN* CAPITAL STATUTES*

WILLIAM J. BOWERS**

I. INTRODUCTION

The United States Supreme Court's decision in *Furman v. Georgia*[1] was not a clear statement reflecting a single perspective on the ills of capital punishment. Rather, it was nine separate statements reflecting the particular views and concerns of each Justice. Of the five concurring Justices, Brennan and Marshall found that, arbitrariness aside, the death penalty was cruel and unusual punishment per se; Justice Marshall also found that it was used in a discriminatory way against blacks and other minorities. Justices Douglas, Stewart, and White, on the other hand, found the death penalty unconstitutional because of the arbitrariness of its administration under then existing statutes. Justice Douglas identified discrimination against minorities, blacks, and disadvantaged persons as an aspect of the arbitrariness. Justice Stewart and White, however, described the arbitrariness in different terms—as "freakish," "random," and "rare," like being "struck by lightning" or being "chosen in a lottery." These two pivotal members of the *Furman* plurality thus adopted formulations of the arbitrariness as unsystematic in nature, dissociated from specific extralegal sources, such as race or class, that might exercise a systematic effect. The problem, according to their diagnosis, was like that faced by a traveler following an unclear or

* Will appear in an expanded form as Chapter Ten in W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982 (Northeastern University Press, Spring, 1984) (forthcoming).

The author wishes to thank Glenn Pierce and Tracy Mayors for their help in the analysis of Florida court processing data, David Baldus and Mary Brennan for permission to reproduce and cite portions of their unpublished research, John McDevitt and Augusto Diana for their help in the analysis of data on the Georgia appellate review process, and Jeanne Winner and Susan Laws for their assistance in the preparation of the manuscript. This work was supported in part by a grant from the Chicago Resource Center.

** Director of the Center for Applied Social Research, Northeastern University; Ph.D., Sociology, Columbia University, 1965; B.A., Washington & Lee University, 1957.

[1] 408 U.S. 238 (1972).

imprecise map; he or she must rely on intuition and guesswork and is thus apt to make mistakes. The solution for the traveler is, obviously, a better map.

By a similar logic, the Court blamed this arbitrariness on shortcomings in the pre-*Furman* capital statutes. These laws provided unclear or insufficient guidance to those who must decide whether to impose a sentence of death. The unguided, standardless exercise of discretion in capital sentencing is subject to errors of judgment in much the same way as is the traveler with an inadequate map. The solution was to formulate capital statutes with (1) clear standards that would guide juries in sentencing, (2) procedures to remove these decisions from extraneous influences, and (3) provisions that would subject the decisions to oversight. Thus, the statutes included provisions for explicit enumerated aggravating and mitigating circumstances, separate guilt and sentencing hearings, and automatic appellate review. This was the remedy approved four years after *Furman* in *Gregg v. Georgia*,[2] which upheld the capital statutes of Florida, Georgia, and Texas with the concurrence of Justices White and Stewart of the *Furman* plurality.

There is, however, another view of the arbitrariness found unacceptable in *Furman*. That some persons are sentenced to death and others are not for essentially the same crime is not, according to this interpretation, simply the result of confusion owing to insufficient guidance, insulation, and oversight in the exercise of discretion. Rather, it exists because those who exercise such discretion are consistent *and* because their behavior reflects systematic, though perhaps unrecognized, extralegal influences such as race, class, and origin.

Behind this alternative diagnosis is a perspective on capital punishment which holds that death as punishment is unique in its power to express community sentiments of condemnation. Death, therefore, will be imposed for those crimes that most offend community conscience, not strictly because they are the most legally culpable, but because they violate social mores and boundaries.[3] Thus, offenses will be viewed as more or less shocking and abhorrent depending upon who the victims and offenders are in social, not just legal, terms. Persons disfavored or disadvantaged by class, race, or origin will be singled out disproportionately for capital punishment, especially when their victims are members of the dominant group in the community. Further, the death penalty's expressive functions will be sought especially when cultural mores and boundaries are threatened by social change, when social change is asso-

---

2 428 U.S. 153 (1976).

3 For a fuller discussion of this analysis, see W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982 (forthcoming) (see especially Chapter Five).

ciated with rising crime rates, and when those crime rates are attributed to socially disfavored or disadvantaged persons. Under such conditions, community sentiments will call for capital punishment whether it is legally justified or not.

As a representative cross-section of the community, the jury embodies community sentiments. Jurors are not like travelers in an unfamiliar territory. They have their own internalized maps of the social landscape. Jurors may have difficulty replacing their socially conditioned views of victims and offenders with strictly legal considerations, especially for the crimes they find most shocking and abhorrent. Thus, interpretations of statutory aggravating and mitigating circumstances in the sentencing decision are apt to be colored by extralegal considerations. Such extralegal influences will not be restricted to the sentencing process; indeed, according to this view, they will be deeply imbedded in other discretionary decisions in the processing of potentially capital cases.

Prosecutors, who are typically elected,[4] must be sensitive to community sentiments and reactions to crime, which they will encounter in the media, among associates; and from the police, families of victims, and prominent community spokesmen. In addition to the courtroom presentation of a case, such sentiments and reactions may influence a host of less public actions that greatly affect the likelihood of a death sentence: whether to bring a capital charge, whether to accept a guilty plea in return for a reduced charge or sentence, whether to offer a reduced charge or sentence to one defendant in return for testimony against another, whether to develop evidence of statutory aggravating circumstances, and whether to seek a death sentence given conviction. To maintain community support and to win reelection, prosecutors are likely to seek the death penalty when the community wants it, apart from strictly legal considerations.

Defense attorneys in capital cases are also affected by community sentiments. A disproportionate number of them are court-appointed, rather than privately retained attorneys, who work with severely limited resources for conducting investigations, hiring expert witnesses, and in general preparing an effective capital defense.[5] Intense community hostility toward defendants can add to the difficulty of investigating the

[4] *See* National Criminal Justice Information and Statistics Service, U.S. Department of Justice, Sourcebook of Criminial Justice Statistics 100 & Table 1.51 (1979). Forty-four states have only elected prosecutors; one state has both elected and appointed; three states have no local prosecutors because all cases are handled by the attorney general.

[5] The figures compiled by the State Public Defenders' Office in California give some indication of which lawyers defend capital cases. There were 336 capital cases pending as of July 1, 1983. Of these, 154 defendants were represented in court by public defenders; 182 by private counsel, of which approximately 95% were court-appointed. Personal communication

case, identifying rebuttal witnesses, and developing evidence of mitigation. Community sentiment may also develop into mistrust or animosity toward the lawyer who aggressively attempts to build a strong trial record, expose police, prosecutorial, or judicial errors, and challenge the constitutionality of capital punishment itself. For court-appointed attorneys in particular, this sort of defense can provoke impatience and resentment from the bench, and thus jeopardize future court appointments. In other words, the system assigns to the least experienced, resourceful, and independent members of the bar these especially difficult cases where the defendant's life is at stake and extralegal influences are strongly felt.

Nor are judges—federal, state, or local—immune from extralegal influences. Like prosecutors, defense attorneys, and jurors, they are the products of the cultures and the communities from which they come. In many places, state and local judges, like prosecutors, are elected and thus accountable to the public. Appellate court judges usually are removed from the specific influences at work in the local community where a crime occurs, but they are not removed from the broader historical, political, and social context that has supported the arbitrary and discriminatory imposition of capital punishment. Indeed, most appellate court judges are only a step or two removed from the trial court where they themselves may have imposed the death penalty.

To summarize the argument, if the death penalty exists primarily for the extralegal functions it serves, and if the arbitrariness found unacceptable in *Furman* is a systematic reflection of this fact, then this arbitrariness should be evident in the decisions of participants at the various stages throughout the processing of potentially capital cases. Statutory reforms designed to regulate the exercise of discretion at one stage of the process, such as those approved in *Gregg*, are predicated upon a diagnosis that fails to recognize the pervasive and systematic character of the problem. To the extent that such reforms are effective at one point in the process, they may simply shift or displace arbitrariness to other points in the process.

This Article analyzes the decisions and actions of individuals involved at four stages in the procedural history of potentially capital cases: the prosecutor's discretionary decision to bring charges and to go

---

with Michael G. Millman, Director, State Public Defenders' Office, California, September 28, 1983.

For a discussion of how restricted the resources of court-appointed attorneys are and how they depend upon the presiding judge's authorization for payment of the costs they incur in preparing a defense, see M. Brennan, Capital Representation in the State of Florida 75-77, 81-83 (First Working Paper of the Draft Report prepared for the Florida Justice Institute, 1982).

to trial; the allocation and effectiveness of defense services; the decisions to seek and to impose the death sentence upon convicted offenders; and the proportionality review of death sentences by state appellate courts. The analysis concludes with a closer look at the exercise of discretion in the federal appeals process.

II. PROSECUTORIAL DISCRETION IN CHARGING AND TRYING CASES

A beneficial effect of post-*Furman* guided discretion statutes, noted Justice White in *Gregg v. Georgia*, is that prosecutors will be guided in their exercise of discretion by the same statutory aggravating and mitigating standards "as those by which a jury will decide the questions of guilt and sentence."[6] Our analysis posits, however, that in the hands of prosecutors the statutory guidelines approved in *Gregg* may operate to promote, rather than to curb, arbitrariness and discrimination early in the handling of potentially capital cases. In a previous examination of data on the grand jury indictments of persons charged with criminal homicide in Florida, we observed that indictment disparities by race and location within the state contribute substantially to the overall level of arbitrariness and discrimination in the process leading to the death sentence.[7] These data suggested further that racial considerations lead prosecutors to "upgrade" some cases by alleging an aggravating felony circumstance or charging the defendant with an accompanying felony, and to "downgrade" others by ignoring evidence in police reports or withholding a charge, depending upon the race of the offender and the victim.[8]

Using the Florida processing data, we now carry the analysis of prosecutorial discretion a step further by examining factors that may affect the prosecutor's ability to obtain a first degree murder indictment.

---

[6] Gregg v. Georgia, 428 U.S. 153, 225 (1976) (White, J., concurring).

[7] *See* Bowers & Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME AND DELINQ. 563 (1980). The work of Bowers and Pierce will be published as Chapter Seven of W. Bowers, *supra* note 3. Later references to this article will, for the sake of brevity, be restricted to Chapter Seven of the book, but this is identical to Bowers & Pierce, *supra*.

[8] A further study of the upgrading and downgrading of cases in terms of an aggravating felony circumstance is now being extended. *See* M. Radelet & G. Pierce, Race and Prosecutorial Discretion in Homicide Cases (Sept. 4, 1983)(paper presented at the 1983 meeting of the American Sociological Association in Detroit). With additional information on homicide victims from the Florida Bureau of Vital Statistics, Michael Radelet has succeeded in matching many more police reports and court records. Moreover, these data show that in upgraded cases (those having a felony circumstance added in the court case records when the police reports indicated no such circumstances), prosecutors were less likely to offer or accept a plea bargain—further suggesting their determination to seek a death sentence. Similar patterns are now under investigation in South Carolina by Joseph Jacoby and Raymond Paternoster. *See* Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982).

With a sample of persons charged with criminal homicide in twenty Florida counties during 1976-77,[9] we have conducted a multiple regression analysis (see Table 1) to determine how the indictment decision was affected by extralegal factors such as race, region, and attorney type, and a broader group of legally relevant factors than we have previously considered.[10]

The aggravating circumstances include: (1) the presence of an accompanying felony; (2) multiple alleged offenders; (3) multiple murder victims; (4) the fact that the murder victim was old, young, or female (suggesting victim vulnerability); and (5) the use of a gun as the murder weapon (suggesting intent to kill). The mitigating factors include evidence from the court record (1) that the defendant was an accomplice or accessory to the crime, but not the triggerman or actual killer; (2) that the crime was the result of, or precipitated by, an argument, dispute, or quarrel; and (3) that the offender was less than eighteen years of age.

We have included in our analysis three factors that in principle should not affect the handling of the defendant's case: (1) three variables designating the racial character of the crime—black kills white, white kills white, white kills black (black kills black is omitted); (2) two variables identifying the location of the crime within the state: the northern region, including the north and panhandle of Florida, and the central region (the circuits of the southern region are omitted); and (3) two variables indicating type of attorney: private attorneys appointed to the case and paid for their services by the court, and attorneys employed as public defenders by the state to provide services to indigent clients (privately retained counsel is omitted).

The interpretation of the regression coefficient is straightforward. All variables in the analysis have been entered in binary forms,[11] hence the regression coefficient for a given variable corresponds to the percentage difference in first degree murder indictments between the category of that variable in the table and the omitted or reference category, controlling statistically for all other variables in the analysis. For example, a coefficient of .25 for a felony-related killing corresponds to a twenty-five point difference in the percentage receiving first degree murder indictments between cases with and cases without an accompanying felony, controlling for the other variables entered into the regression analysis. In cases where several mutually exclusive binary variables have been con-

---

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

10 These were restricted to variables in the Florida court processing data with missing information on no more than 15% of the cases.

11 The characteristic or category of the variable identified in the table is scored "1" and all other cases are given a value of "0."

TABLE 1

ESTIMATED EFFECTS OF LEGAL AND EXTRALEGAL FACTORS ON FIRST DEGREE MURDER INDICTMENT AMONG PERSONS CHARGED WITH CRIMINAL HOMICIDE IN FLORIDA, 1976-1977

		Regression Coefficients
A.	Legally Relevant Factors	
	Felony related killing	0.25**
	More than one offender	0.20**
	More than one victim	0.18
	Female victim	0.18**
	Victim 60 years or older[a]	0.04
	Victim 16 years or younger[a]	−0.07
	Gun used as murder weapon	−0.06
	Defendant accessory	−0.04
	Defendant 18 years or younger	0.12
	Quarrel precipitated killing	−0.04
B.	Race	
	Black kills white[b]	0.19*
	White kills white[b]	0.15**
	White kills black[b]	−0.08
C.	Region	
	North[c]	−0.02
	Central[c]	0.10*
D.	Type of Attorney	
	Court appointed[d]	0.17**
	Public defender[d]	0.03
	Adjusted R^2	0.27
	Number of Cases	507

[a] Victims aged 17-59 is the reference category.

[b] Black kills black is the reference category.

[c] Southern region of Florida is the reference category. Regional groupings of circuits are as follows: panhandle (1, 2, 3, 14); north (4, 5, 7, 8); central (6, 9, 10, 12, 13, 18, 19); south (11, 15, 16, 17).

[d] Privately retained attorneys is the reference category.

* $p < .05$, t test.

** $p < .01$, t test.

structed, as with race, region, and attorney type, the reference category is restricted to those cases excluded from all the component variables. That is, they share the common reference category of the cases they jointly exclude. Consequently, the coefficients for the three racial combinations in Table 1, for example, (.19, .15, and - .08) represent the percentage difference in first degree murder indictments between the respective categories and the black kills black category (the jointly excluded cases). In the 1976-77 sample, data are available on all seventeen

of these variables for 508, or sixty-six percent of the 771 cases.[12] The regression results appear in Table 1.

The analysis shows that four legally aggravating factors play a substantial role in determining a first degree murder indictment: a felony-related killing has the greatest effect, followed by multiple offenders, multiple victims, and female victims. Three of the four of these variables show effects significant beyond the .01 probability level. Contrary to expectation, one other factor advanced as a mitigating circumstance—the offender's youthfulness—also appears to contribute to a first degree murder indictment, though not significantly so. The remaining legally relevant factors show slight effects, not exceeding coefficients of .10.

Critically, the variables designating racial combinations show substantial and significant effects. That a black has killed a white is virtually as strong a predictor of a first degree indictment as any of the legally relevant factors except felony circumstance, *i.e.*, the commission of a separate felony in the course of the homicide.[13] When the offender and victim are both white, the effect is not quite as strong but even more significant statistically. Together, these two racial variables represent a white-victim effect on first degree indictment that is statistically significant well beyond the effect of either variable alone. A further examination of the data shows that white-victim cases tend to be more aggravated, but the remaining strongly significant race-of-victim effect in Table 1 indicates that race figures prominently in the first degree indictment decision above and beyond legally relevant considerations.

The location of the crime within the state also is an important factor. The analysis shows a significantly higher level of first degree murder indictments in the central region of Florida (the southern region is the reference category), when other legally relevant factors have been controlled. Moreover, the disparity is even greater if we compare this region with the rest of Florida (the southern and northern regions combined as the reference category). In other words, the chances of a first degree murder indictment for otherwise comparable cases were significantly greater in the central region than elsewhere in Florida.

---

[12] Michael Radelet has supplemented the information available at the time of our earlier analysis, *see* W. Bowers, *supra* note 3, at Chapter Seven, with additional data on race of victim and date and location of offense from the Florida vital statistics records. The 1976-1977 sample of criminal homicide arraignments used here excludes four cases used by Radelet. *See* Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981).

[13] Because there are relatively few black-kills-white cases among all criminal homicide arraignments in these Florida counties, the statistical significance of this effect (a .03 probability) is less than that of some other variables showing comparable regression coefficients, but still well within the .05 standard.

Finally, defendants with court-appointed attorneys were far more likely to receive a first degree murder indictment compared to those with privately retained attorneys. Analysis of the data further indicates that court-appointed attorneys typically handle more difficult cases in terms of legally aggravating and mitigating considerations than do public defenders or privately retained counsel. However, the highly significant regression coefficient for court-appointed attorneys in the presence of these legally aggravating and mitigating factors strongly suggests that such attorneys are less effective in averting a first degree murder indictment than are other types of attorneys.

Thus, the statistical evidence shows that race and location are powerful independent influences on the likelihood of a first degree murder indictment. At this early stage in the process that leads to the death sentence, the prosecutor exercises almost total discretion over the decision whether to indict for first degree murder.[14] The effects of race and location remain strong not only in the presence of felony circumstances, but also with controls for other legally relevant considerations.

How does this statistical evidence square with the experiences of those who handle capital cases? The decisions of prosecutors to bring a capital charge and to take such a charge to trial recently have been examined by the Florida Justice Institute through interviews with judges, prosecutors, and defense attorneys.[15] The sample was drawn from the same counties as the Florida court processing data presented above. Many of the respondents had participated in the cases that constitute the data base for the analyses presented above.

The respondents reported a wide range of extralegal influences on prosecutors' decisions to charge and try capital cases. The answers of a state circuit court judge illustrate the point. To the question, "What influences the decision to indict for first degree murder?" he answered:

> A high publicity case is more likely to be filed first degree murder. [Also] pressure from the police—the police will convince themselves they've got a better case than they do, and the Assistant State Attorney assigned to charge the case may not be strong enough to stand up to a particular police investigator.[16]

In response to the question, "What influences the decision to take the case to trial on a first degree murder charge?" he answered:

> Facts of the case plus how well the attorneys know each other and how closely they worked together. You pay more attention to a good attorney

---

[14] *See* LaFave, *Prosecutors' Discretion in the United States*, 18 AM. J. COMPAR. L. 532 (1970). For a more specific discussion of the extent of prosecutorial discretion in capital cases, see Boris, *Sterotypes and Dispositions for Criminal Homicides*, 17 CRIMINOLOGY 139 (1979); *see also* W. Bowers, *supra* note 3, at Chapter Seven.

[15] M. Brennan, *supra* note 5.

[16] Letter from Mary Brennan to author (Spring, 1983).

TABLE 2

FACTORS AFFECTING THE DECISION TO BRING A CAPITAL CHARGE AND TO TAKE SUCH A CHARGE TO TRIAL ACCORDING TO FLORIDA JUDGES, PROSECUTORS AND DEFENSE ATTORNEYS

		Number of Responses	Percent of Total
A.	Legal Factors or Considerations	75	39.9
A1.	Facts of the case, fact pattern, facts (e.g., do facts fit the definition of Murder 1)	20	10.6
A2.	Aggravating or mitigating considerations (presence, number, relative weight)	16	8.5
A3.	Particular aggravating circumstance (prior record, accompanying felony, premeditation, heinous or execution-type killing)	16	8.5
A4.	Overall strength of case/probability of conviction	13	6.9
A5.	Evidence, quality of evidence/witness credibility, reliability	10	5.3
B.	Personal Orientations or Values of Prosecutors	30	15.9
B1.	Aggressiveness, competitiveness, ambition (e.g., personal pride, win-loss record, notch-in-the-gun syndrome, desire to be re-elected)	16	8.5
B2.	Orientation toward punishment (deterrence, retribution, appropriateness)	8	4.2
B3.	Attitude toward particular defendant or victim (prominence, character, class, race)	6	4.2
C.	Situational Pressures or Constraints in Handling Cases	44	23.5
C1.	Plea bargaining strategy, opposing counsel (e.g., indict high to force plea, plead 2° for accomplice testimony, experience of defense counsel)	19	10.1
C2.	Time, caseload, office policies, judge's reputation	11	5.9
C3.	Influence of victim's family (e.g., victim's family wants death, can't reduce charge)	8	4.3
C4.	Pressure from police (e.g., police press for Murder 1)	6	3.2
D.	Social Influences or Pressures from Community	39	20.7
D1.	Media coverage, publicity, notoriety (including effects on political climate, plea bargaining, re-election)	17	9.0
D2.	Public opinion, reaction (community conscience, confidence, outrage, anger)	17	9.0
D3.	Political/racial climate (politics, political realities, race, racism)	5	2.7

than one you know is a lightweight, when he communicates with you about the case . . . .

[Also] pressure from the top, the supervisor of the Assistant State Attorney assigned to try the case. Even if the Assistant State Attorney assigned to try the case knows he can't win it, he may go to trial anyway because a directed verdict by the judge [a ruling that first degree murder is

> not proved as a matter of law so the jury is not allowed to convict for first degree murder regardless of the original charge] looks better publicity-wise on the elected State Attorney's record than the office dropping [dismissing or reducing] the case.[17]

Pressure from the police, the division of responsibility in the prosecutor's office, the prosecutor's relationship with the defense attorney, and the political advantage of seeking a death sentence even when the facts of the case do not warrant it are only a few of the extralegal considerations described by respondents. A more comprehensive picture emerges from the answers of all respondents. The two questions about filing a capital charge and taking such a charge to trial yielded some 188 codable responses[18] from sixteen judges, sixteen prosecutors, and thirty-eight defense attorneys.[19] These responses have been grouped into fifteen categories under four general headings in Table 2.

Respondents mentioned more extralegal considerations—including the personal orientation of the prosecutor, situational pressures and constraints in handling a case, and social influences and pressures from the community—than factors falling within the general category labelled "legal factors or considerations." The personal characteristics of prosecutors most frequently mentioned were aggressiveness, competitiveness, and ambition (B1). The only legal consideration that is cited more often than these personal attributes is the "facts of the case" (A1). Among situational pressures and constraints, the most frequently cited were those referring to plea bargaining (C1). This category includes statements such as "indict high to force a plea," and "plead to second degree murder for accomplice testimony." Two themes were prominently mentioned under "social influences or pressures from the community:" media coverage, publicity, and notoriety (D1), and public opinion and reactions (D2). Only two other specific categories (A1, the facts of the case, and C1, plea bargaining) were more frequently mentioned.

Thus, the influence of extralegal considerations on the decision to bring a capital charge and to take it to trial is broadly recognized by those who prosecute, defend, and judge such cases. One could quarrel with the placement of certain categories of response in the general groupings in Table 2. For instance, pressures from the victim's family (C3) or from the police (C4) might be regarded as social rather than situational factors; the use of a single aggravating factor to the exclusion

---

17 *Id.*

18 Answers were recorded, written down verbatim, and classified into 15 categories. Most respondents provided a single answer to each question, but some gave more extensive, multiple responses.

19 Responses to these two questions were forwarded to us by Mary Brennan for tabulation and do not appear in the Florida Justice Institute's Report, which deals chiefly with defense services.

of others (A3) might be considered a personal predisposition of the prosecutor rather than a strictly legal consideration. But these objections do not alter the fundamental picture of a decision-making process which responds to social influences from the community, situational pressures in handling cases, and personal orientations of prosecutors, as well as legal considerations.

III. ALLOCATION AND EFFECTIVENESS OF DEFENSE SERVICES

It is generally said that a good lawyer can greatly affect the outcome of a case. The unavoidable implication is that those who can afford to retain a good lawyer will have a distinct advantage in the legal process. Does it work the other way as well? Are impoverished or indigent defendants who must rely upon public defenders or court-appointed attorneys at a distinct disadvantage in the legal process? The type of attorney is not a legally relevant consideration that should influence the outcome of any case, certainly not that of a capital case.

We have seen in Table 1 that defendants with court-appointed attorneys are more likely to be indicted for first degree murder than those with public defenders or privately retained counsel, and that this is not simply because the most difficult cases end up in the hands of court-appointed attorneys. Indeed, in equally death-prone cases,[20] court-appointed attorneys are evidently less effective than other types of attorneys in maneuvering to avert a first degree murder indictment. For whatever reasons, court-appointed attorneys appear to provide less effective defense services at this early stage in the process. Is this disadvantage to their clients cumulative? Does the defendant with a court-appointed attorney lose ground at each successive stage of the process?

To learn more about how attorney type affects the defendant's overall chances of receiving a death sentence, we examined the separate and joint effects of attorney type, race, region, and legally relevant factors on the likelihood of a first degree murder conviction from the sample of those indicted for first degree murder in Florida from 1973 through 1977.[21] The independent variables and the analytic procedures are the same as those used in Table 1 to examine the factors influencing indictment. The difference is that we are now considering only those defendants who moved a step closer to a death sentence. The data on all variables was available for 613, or fifty-nine percent, of the 1045

[20] Death-prone cases are cases that, by our analysis, are equally likely to lead to a first degree murder indictment.

[21] Linda Foley and Richard Powell have reported differences in the likelihood of death sentence by attorney type, but without controlling for other factors associated with the imposition of a death sentence. *See* Foley & Powell, *The Discretion of Prosecutors, Judges and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16 (1982).

TABLE 3

ESTIMATED EFFECTS OF LEGAL AND EXTRALEGAL FACTORS ON FIRST DEGREE MURDER CONVICTION AMONG PERSONS INDICTED FOR FIRST DEGREE MURDER IN FLORIDA, 1973-1977

		Regression Coefficients
A.	Legally Relevant Factors	
	Felony related killing	0.15**
	More than one offender	0.10*
	More than one victim	0.11
	Female victim	0.13**
	Victim 60 years or older[a]	−0.06
	Victim 16 years or younger[a]	0.09
	Gun used as murder weapon	−0.03
	Defendant accessory	−0.29**
	Defendant 18 years or younger	−0.16**
	Quarrel precipitated killing	0.02
B.	Race	
	Black kills white[b]	0.29**
	White kills white[b]	0.18**
	White kills black[b]	−0.07
C.	Region	
	North[c]	0.07
	Central[c]	0.13**
D.	Type of Attorney	
	Court appointed[d]	0.06
	Public defender[d]	0.00
	Adjusted R^2	0.14
	Number of Cases	612

[a] Victims aged 17-59 is the reference category.
[b] Black kills black is the reference category.
[c] Southern region of Florida is the reference category as defined in Table 1, note c.
[d] Privately retained attorneys is the reference category.
* $p < .05$, t test.
** $p < .01$, t test.

cases in the combined sample of 1973-1977 criminal homicide cases.[22] The results of the regression analysis appear in Table 3.

22 The cases in this sample were collected at two different times by Dr. Linda Foley of North Florida University and Professor Hans Zeisel of the University of Chicago. Information was gathered on all first degree murder indictments from 1973 through 1976 in twenty-one Florida counties. This accounted for approximately 75% of Florida's death sentences over that period. To obtain a broader range of homicide cases, including all homicide charges at arraignment, data later were gathered for the period 1976 through 1977 in a sample of twenty Florida counties, including some but not all of the counties sampled in the first phase of the data collection.

Again, as with first degree murder indictment, the variables of felony circumstance, number of offenders, and female victim are statistically significant predictors, and number of victims is comparable in magnitude but not significant among the legally aggravating factors. There are, however, two distinct differences between Tables 1 and 3 in the presumably mitigating factors. First, the youthfulness of the defendant has become a significant mitigating factor in the process leading to conviction, as compared to its apparently aggravating role at indictment. Second, the fact that a defendant was an accessory rather than the triggerman significantly reduces the likelihood of a first degree murder conviction. The corresponding reduction in the coefficient for multiple offenders from Tables 1 to 3 suggests that prosecutors typically will indict all offenders for first degree murder in multiple-offender cases in order to bargain for testimony that will convict the alleged triggerman. Again, the age of the victim, a quarrel as a precipitating factor, and the use of a gun as the murder weapon show little effect in the presence of the other predictors.

Race and region remain statistically powerful determinants independent of legally relevant considerations. Black defendant-white victim has as strong an effect as any other variable in the analysis. In fact, the effect on a black offender of having killed a white rather than a black person (the reference category) is equivalent to the effect on any offender of committing the murder rather than being the accessory to the crime. White defendant-white victim is the third strongest predictor of a first degree murder conviction; thus, the race of the defendant given a white victim has a nearly significant effect ($p = .067$) on the likelihood of a first degree murder conviction, controlling for legally relevant factors.[23] Racial bias is stronger in the conviction process than it is in the indictment (as shown in Table 1).

Region has a statistically significant impact on the conviction stage of the process as well, and again it is the central region of Florida where first degree murder convictions are most likely compared with otherwise comparable cases in the rest of the state. The northern region also shows a greater likelihood of first degree murder conviction than the southern region (as the reference category) but the difference does not reach statistical significance. Thus, there are substantial regional disparities in the likelihood that a person indicted for first degree murder will actually be convicted on that charge, and this pattern is compounded when we consider the indictment and conviction stages together.

---

[23] To estimate this effect we have omitted the white kills white category and included black kills black in the regression equation. Black kills white shows a regression coefficient of .11 (equal to the difference between .29 and .18 above in Table 1) with a probability of p.=067.

Attorney type appears to have less effect on conviction than it did on indictment, and less effect on conviction than race, region, or legally relevant factors. In otherwise comparable cases, court-appointed attorneys are less likely to avert a first degree murder conviction than either public defenders or privately retained counsel, a finding consistent with the pattern at indictment, though the effect shown in Table 3 is not statistically significant. That attorney type appears to have less effect on conviction is contrary to our expectation. One reason the difference at conviction is not greater may be that privately retained counsel and public defenders are more effective than court-appointed attorneys in negotiating an agreement that the prosecutor not ask for a death penalty in exchange for the defendant pleading guilty to first degree murder. The data to be presented in Table 4 bear further upon this possibility.

That type of attorney will affect the outcome of capital cases is a fact accepted by most of those members of the bar interviewed in the Florida Justice Institute study.[24] The study concentrated chiefly on the provision of defense services, rather than the exercise of prosecutorial discretion in capital cases. The interviews with judges, prosecutors, and defense attorneys dealt with the selection and appointment of defense counsel in such cases, the remuneration available to them, their motives and justifications for taking such cases, the training and experience they bring to these cases, and the conditions of independence or interference under which they work. Their responses help to explain the relatively poor performance of court-appointed attorneys revealed in the statistical analysis.

In response to questions about the impact of limited resources, especially the $3,500 maximum fee cap for defense services in capital cases,[25] respondents made the following observations:

> The court won't give you anywhere near the kind of money you need to try a capital case—the defendant is supposed to be on the same footing [as one who can afford an attorney] and in no way is he—you can't prepare any case for $2-3,000 and that's about what you're going to get.[26]
>
> * * *
>
> You're doing a disservice to your other clients if you take the appointment and get $3,500 and your paying clients suffer. . . . [t]he cap deters competent attorneys and leaves the judges a smaller pool of good attorneys to

[24] M. Brennan, Capital Representation in the State of Florida 16-18 (Draft Report prepared for the Florida Justice Institute, 1982).

[25] M. Brennan, *supra* note 5, at 75. At the time the survey was conducted, FLA. STAT. ANN. § 925.036 (West Supp. 1983) provided that no matter how many charges or counts were involved, the maximum fee paid an attorney appointed according to FLA. STAT. ANN. § 925.035 (West 1973 & West Supp. 1983) to defend a capital case was $3,500.

[26] M. Brennan, Capital Representation in the State of Florida 83 (Second Working Paper prepared for the Florida Justice Institute, 1982).

> appoint from . . . [and] doesn't provide much incentive to do the job competently.[27]
>
> * * *
>
> Dollar-wise [appointed attorneys] peak out before going to trial, meaning the trial is his gift to the defendant—it's free—that's his practice he's cutting into. His bills continue to pile up, his clients call and ask, "Where is he?" The cap makes hungry, inexperienced guys take cases, but attorneys who can command fees can't afford to.[28]

Several attorneys described the approach of court-appointed attorneys to such cases:

> [W]here a judge appoints an attorney [that attorney's] natural reaction is not to give the judge too hard a time.
> If the defendant has to have an attorney appointed for him, he is lower class and nobody cares if you lose the case.
> [A]n appointed attorney is more likely to plead a defendant guilty—even to first degree murder. They're happy, they got their fee and if they don't negotiate the judge gets pissed.
> It's insane to ruin your practice with a case like that *unless* to curry favor with the judge [by taking the case despite the dollar cap].[29]

Some members of the bar explained that the way appointments are made tends to load the dice against some categories of defendants. According to one judge, "[I don't] go down the list and automatically appoint the next name but [try] to use discretion and appoint a qualified attorney, but not the 'best.'"[30] Another said that a judge in the city where he practices is believed to be "matching up incompetent attorneys with heinous defendants."[31]

Respondents also reported a lack of independence, if not interference, from the bench. One attorney commented,

> There's a problem where the judge holds the purse strings; judges make it clear to the appointed attorney [that his] fee will be diminished and/or he won't be appointed again, according to what he does outside of what they expect of him (*i.e.*, to plead guilty, not make motions, etc.).[32]

Those who take such appointments are generously characterized by their colleagues as "new inexperienced attorneys" or more disparagingly as attorneys who "appear to be competent in the sense that they are not disbarred."[33]

The Florida Justice Institute's analysis of these interviews presents a detailed picture of a system that assigns the most death-prone defend-

---

27 M. Brennan, *supra* note 5, at 86.
28 *Id.* at 75.
29 *Id.* at 73, 76.
30 *Id.* at 65 (corrected by Mary Brennan from verbatim transcript of interview).
31 M. Brennan, *supra* note 24, at 42, 71.
32 M. Brennan, *supra* note 5, at 76.
33 M. Brennan, *supra* note 26, at 66, 75.

ants to the least experienced attorneys, who lack the resources, incentives, and even the independence to provide the kind of defense their clients especially require. Moreover, even if the perceptions of these respondents are not accurate in all instances, they nevertheless constitute a "social reality" that is bound to have a demoralizing effect upon the way court-appointed attorneys approach their work.[34] Thus, the statistical data on court processing of homicide cases in Florida and the interview data from the Florida Justice Institute's study tell the same story in different but complementary ways.

IV. The Exercise of Discretion in the Sentencing Stage of the Process

Sentencing decisions were the chief locus of the arbitrariness in capital punishment according to the Supreme Court's diagnosis. As a solution, the Supreme Court, in *Gregg v. Georgia*,[35] approved sentencing reforms that were supposed to insulate and guide the exercise of sentencing discretion and also were believed to eliminate arbitrariness that might otherwise enter at earlier stages in the process. As we have seen, however, the Court was wrong about the presumed derivative benefits of these sentencing reforms; arbitrariness by race and location are strongly evident at indictment and conviction. What about the primary target of post-*Furman* statutory reforms? Has this solution at least succeeded in purging arbitrariness from the sentencing process?

To carry our analysis of the sentencing decision a step further with the Florida processing data, we have performed a multiple regression analysis using the same legal and extralegal factors examined in Tables 2 and 3. The analysis is based on 191 cases with complete information, or sixty-three percent of the 305 first degree murder convictions in the 1973-1977 combined sample. The results of this analysis appear in Table 4.

---

[34] For a summary discussion of the differences between various types of attorneys and what that social reality is like, see M. Brennan, *supra* note 5, at 90-92.

[35] 428 U.S. 153 (1976).

TABLE 4

ESTIMATED EFFECTS OF LEGAL AND EXTRALEGAL FACTORS ON DEATH SENTENCES AMONG PERSONS CONVICTED OF FIRST DEGREE MURDER IN FLORIDA, 1973-1977

		Regression Coefficients
A.	Legally Relevant Factors	
	Felony related killing	0.23**
	More than one offender	0.11
	More than one victim	0.10
	Female victim	−0.00
	Victim 60 years or older[a]	0.03
	Victim 16 years or younger[a]	0.20
	Gun used as murder weapon	0.02
	Defendant accessory	−0.12
	Defendant 18 years or younger	−0.14
	Quarrel precipitated killing	−0.06
B.	Race	
	Black kills white[b]	0.13
	White kills white[b]	0.13
	White kills black[b]	−0.17
C.	Region	
	North[c]	0.22**
	Central[c]	0.09
D.	Type of Attorney	
	Court appointed[d]	0.22**
	Public defender[d]	0.16*
	Adjusted R^2	0.18
	Number of Cases	191

[a] Victims aged 17-59 is the reference category.

[b] Black kills black is the reference category.

[c] Southern region of Florida is the reference category as defined in Table 1, note c.

[d] Privately retained attorneys is the reference category.

* $p < .05$, t test.

** $p < .01$, t test.

Among the legally aggravating factors, felony circumstance, and, to a lesser, nonsignificant extent, both multiple offenders and multiple victims appear to contribute to the imposition of a death sentence. In contrast to the indictment and the conviction stages, however, a female victim has no effect, but a youthful victim has a sizeable, though nonsignificant,[36] effect on sentencing. All three mitigating factors apparently impede the imposition of a death sentence. Because this sample of first degree murder convictions is much smaller than the samples in Tables 1 and 3, estimated effects of a given size are less likely to achieve statistical significance. Thus, of six legally relevant variables with coefficients of .10 or greater, only felony circumstance has an effect that is statistically significant.

Among the variables reflecting offender-victim racial combinations, there is evidence of a white-victim effect at the sentencing stage. Both black kills white and white kills white cases are more likely to receive a death sentence than the black kills black reference category, and far more likely than the relatively few white kills black cases. When the white-victim cases are combined and examined with black-victim cases as the reference category, the effect of having a white victim ($b = .13$) approaches statistical significance ($p = .11$).[37] Thus, racial considerations appear to affect each successive stage of the process and have a consistent cumulative effect over the entire process, apart from a number of legally aggravating and mitigating factors.

Regional disparities in sentencing are even greater than they were at other stages of the process. Courts in the northern region are far more likely to impose a death sentence on convicted first degree murderers than those elsewhere in the state. The difference between the northern and the southern regions (as the reference category) is highly significant and virtually as great as any other effect in Table 4. The likelihood of a death sentence is also greater in the central than in the southern region, though not significantly so, given the size of the sample. Since the central region is also more likely to indict and convict on capital charges, the cumulative effect of the process in the central region may nevertheless rival the death sentence proneness of the northern region at the sentencing stage. At each stage of the process, the southern region is clearly less likely than the rest of the state to move otherwise

36 Because of the relatively small number of youthful offenders convicted of first degree murder in this sample, the regression coefficient that would be significant in a larger sample does not reach statistical significance here.

37 It should be noted at this point that the use of the felony circumstance variable drawn from the court case records may spuriously reduce our estimates of racial effects because of the apparent "upgrading" of white-victim cases to include allegations of a felony circumstance in the court case records where none appeared in the police reports. *See* W. Bowers, *supra* note 3, at 245, Table 7-9. The true effect of victim's race may, therefore, be even stronger than shown in Tables 1, 3, and 4.

comparable cases toward a death sentence. These regional disparities are statistically significant at each stage of the process and their cumulative effect over the entire process is far beyond chance statistical variation.

Finally, type of attorney is among the strongest factors affecting the sentences received by convicted first degree murderers. Being defended by a court-appointed attorney is on a par with having committed a felony-related murder as a predictor that a convicted defendant will be sentenced to death. Having a public defender as counsel is also significantly associated with receiving a death sentence. The disadvantage of being defended by court-appointed attorneys in the sentencing process may reflect, in part, their ineffectiveness at the earlier stage in trading a first degree murder guilty plea for the prosecutor's promise not to seek the death penalty. This would mean that more of the court-appointed attorney's cases that resulted in a first degree murder conviction were subjected to a penalty trial. In any case, over the entire process from indictment through sentencing, having a court appointed attorney is almost as great a disadvantage in the defendant's effort to avoid the death penalty as having killed a white rather than a black person.

Our findings in Florida were replicated recently by a study conducted in Georgia. There, still stronger evidence of racial and regional disparities in sentencing were compiled in the preliminary report of David Baldus, George Woodworth, and Charles Pulaski.[38] Baldus, Woodworth, and Pulaski collected extensive data on more than 600 cases in which the defendants were found guilty by a jury or pleaded guilty to first degree murder charges between 1973 and 1978. They obtained data on over 250 potentially aggravating or mitigating factors for each case from official records of the Georgia Supreme Court, the Georgia Department of Offender Rehabilitation, the Georgia Department of Probations and Paroles, and Georgia's Bureau of Vital Statistics; data were also obtained from questionnaires sent to defense counsel and prosecutors. With these data, Baldus and his associates examined race-of-victim disparities in sentencing for cases that were: (1) eligible for a death sentence on each of Georgia's ten statutory aggravating circumstances; (2) matched in terms of the number of statutory aggravating circumstances present; (3) equated on an index constructed to reflect both aggravating and mitigating factors most predictive of sentencing outcomes; (4) similar in terms of specific aggravating and mitigating fac-

[38] D. Baldus, G. Woodworth & C. Pulaski, The Impact of Procedural Reform on Excessiveness, Differential Treatment Along Racial Lines and Arbitrariness in Death Sentencing: The Georgia Experience Before and After Furman v. Georgia (1982) (Draft Report to the National Institute of Justice, Center for Interdisciplinary Studies, College of Law, Syracuse University).

TABLE 5

LIKELIHOOD OF A PENALTY TRIAL BY RACE OF VICTIM AT VARIOUS LEVELS OF AGGRAVATION/MITIGATION AMONG CONVICTED FIRST DEGREE MURDERERS IN GEORGIA: 1973-1978[a]

Level of aggravation/mitigation	White Victim Cases	Black Victim Cases
1 (low)	.05	.0
	(41)	(70)
2	.08	.07
	(52)	(54)
3	.15	.06
	(60)	(53)
4	.30	.22
	(50)	(23)
5	.71	.35
	(41)	(26)
6	.88	.64
	(50)	(11)
7	.91	.87
	(34)	(7)
8 (high)	1.0	1.0
	(32)	(3)

[a] Drawn from Baldus, Woodworth & Pulaski, *supra* note 38, at n.98, Part II.

tors identified as most important in regression analyses; and (5) alike in "salient features" as determined on an *ad hoc* basis from a close reading of the cases.[39] In each of these analyses, they found substantial and consistent sentencing differences by race of victim in otherwise comparable cases. They found, moreover, that these disparities were due more to prosecutorial decisions to seek the death sentence than to jury decisions to impose the death sentence.

The role of prosecutorial discretion in the sentencing process is presented in Table 5. As to white victim and black victim murders for which there were jury convictions, the Table shows the likelihood of a sentencing trial at corresponding levels on an index constructed to reflect the most predictive aggravating and mitigating factors on the holding of a penalty trial. This is the third and the most conservative of their analytic approaches presented.[40] The regression-based index of aggravating and mitigating factors was constructed specifically to provide a conservative test of hypothesized racial disparities by excluding race of

[39] *Id.* at 17-27.
[40] *Id* at 25.

TABLE 6

LIKELIHOOD OF A DEATH SENTENCE BY REGION AT VARIOUS LEVELS OF AGGRAVATION/MITIGATION AMONG CONVICTED FIRST DEGREE MURDERERS IN GEORGIA: 1973-1978[a]

Levels of aggravation/mitigation	North	North Central	Fulton County	Southeast	Southwest
1 (low)	.0	.0	-	-	-
	(1)	(5)			
2	.0	.0	.0	.0	.0
	(11)	(12)	(7)	(14)	(14)
3	.0	.0	.0	.0	.0
	(14)	(34)	(24)	(45)	(25)
4	.0	.0	.0	.07	.0
	(9)	(21)	(20)	(14)	(26)
5	.0	.14	.06	.0	.17
	(9)	(28)	(17)	(11)	(12)
6	.0	.05	.10	.14	.11
	(2)	(21)	(10)	(7)	(9)
7	.0	.61	.17	.07	.10
	(6)	(18)	(6)	(14)	(10)
8 (high)	.40	.75	.38	.77	.68
	(10)	(51)	(16)	(26)	(28)

[a] Drawn from Baldus, Woodworth & Pulaski, *supra* note 38, at Table 25.

victim as a regressor. Thus, some of the effects of victim's race are incorporated into the index by the presence of correlated factors such as victim's social class.

According to Table 5, Georgia prosecutors decide to hold penalty trials disproportionately in white victim cases as opposed to black victim cases at most levels of aggravation/mitigation. There are consistent and sometimes striking disparities of treatment by race of victim, notwithstanding the conservative bias of this regression-based aggravation/mitigation index. As a consequence, sentencing juries see mostly white victim cases at relatively high levels of aggravation. Race-of-victim comparisons of jury decisions to impose death sentences are thus limited by the small number of black victim cases at a given aggravation/mitigation level. The differences that do appear, however, tend to compound further the disparities at intermediate levels of aggravation/mitigation.

Baldus and his associates also examined specific sentencing disparities for convicted first degree murderers in five regional groupings of

judicial circuits in Georgia.[41] Their analysis reveals extreme sentencing disparities by region, especially as aggravation level increases, as shown in Table 6. Thus, among the most aggravated cases, no more than forty percent of the convicted murderers receive a death sentence in the northern region and Fulton County, compared to at least two-thirds of their counterparts in the other three regions. The investigators show, moreover, that these extreme disparities persist when the comparisons are restricted to white victim cases.[42] These regional disparities are underscored by the fact that just twenty-six, or fifteen percent, of Georgia's 159 counties were responsible for eighty-five percent of the death sentences imposed between 1973 and 1978 in that state.[43]

In continuing research, Baldus and his associates have gathered additional data on the process of Georgia homicide cases from indictment through sentencing, extending the period of coverage through 1979. Although the analyses of these data are still preliminary, Baldus summarized the cumulative findings of this research in an affidavit of June 22, 1982, prepared for the petitioner in *Smith v. Balkcom*:[44]

> Differential treatment of white and black victim cases appears to prevail at each stage of the capital charging and sentencing process beyond initial indictment—specifically in plea bargaining decisions, jury guilt decisions, the prosecutor's decision to proceed to a penalty trial, and the jury's decision at sentencing.[45]

With the evidence of race- and region-linked sentencing differentials in Florida[46] and with stronger, more rigorously controlled evidence of this sort now becoming available on Georgia,[47] it is obvious that despite statutory sentencing guidelines and separate sentencing hearings, the sentencing stage of the process is still subject to the extralegal influence of race and place. Thus, of the three reforms approved in *Gregg*—statutory sentencing guidelines, separate sentencing hearings, and automatic appellate review—the last of these must bear a heavy burden if the post-*Furman* capital statutes are to meet the *Furman* standard.

---

41 *Id* at 104-11.

42 *Id*. at 110 Table 26.

43 *Id*. at 106 n.107.

44 Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 181 (1982).

45 D. Baldus, G. Woodworth & C. Pulaski, The Differential Treatment of White and Black Victim Homicide Cases in Georgia's Capital Charging and Sentencing Process: Preliminary Findings 29, app. D to Petitioner's, cert. petition in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. — (U.S. June 22, 1982) (No. 81-6978), *cert. denied*, 103 S. Ct. 181 (1982).

46 *See supra* Table 4; *see also* W. Bowers, *supra* note 3, at Chapter Seven.

47 *See* Table 5 and Table 6.

V. State Appellate Review

The United States Supreme Court declared in *Gregg* that automatic appellate review of all death sentences "serves as a check against the random or arbitrary imposition of the death penalty."[48] In this context, Justice White commented that Georgia's statutory provision for "proportionality review" requires the Georgia Supreme Court to "do much more than determine whether the penalty was lawfully imposed."[49] He noted that "[i]t must go on to decide—after reviewing the penalties imposed in 'similar cases'—whether the penalty is 'excessive or disproportionate' considering both the crime and the defendant."[50]

State appellate courts however, may, be ill-prepared and perhaps disinclined to perform the oversight and monitoring functions assigned to them under the new capital statutes. They generally do not compare the sentence in one case with those in others, nor do they directly collect and evaluate evidence; instead, arguments are reviewed on the basis of evidence that has been admitted in other courts. Evidence that the appellate review process is not living up to the Supreme Court's expectations is mounting. We have demonstrated elsewhere[51] that racial and locational disparities in the imposition of death sentences are not being reduced by the actions of the state supreme courts of Florida and Georgia.

Baldus, Pulaski, and Woodworth recently completed a more detailed study of Georgia's appellate review process.[52] For its proportionality review, the Georgia Supreme Court is required by statute to identify cases "similar" in characteristics of the crime and the defendant to the one under review, and then to compare the sentence under review with those imposed in these similar cases. The pool from which the court may select "similar" cases should, according to the Georgia statute, include capital cases in which sentences were imposed after January 1, 1970. The statute also requires that the cases selected as similar be cited in an appendix to each of the court's published opinions upholding a death sentence.[53]

Baldus and his associates examined the court's selection of similar cases for its proportionaltiy reviews of sixty-eight affirmed post-*Furman* death sentences for murder. Using the detailed data collected on some

---

[48] Gregg v. Georgia, 428 U.S. 153, 206 (1976).

[49] *Id.* at 223.

[50] *Id.*

[51] *See* W. Bowers, *supra* note 3, at 36, Tables 7-14 and 7-15 and accompanying text.

[52] D. Baldus, G. Woodworth & C. Pulaski, Proportionality Review of Death Sentences: An Empirical Study of the Georgia Experience (1982) (Draft report to the National Institute of Justice, Center for Interdisciplinary Studies, College of Law, Syracuse University).

[53] Ga. Code Ann. §§ 17-10-35, -37 (1981).

750 capital cases (approximately 150 pre-*Furman* and 600 post-*Furman*) during the period 1970-1978, Baldus, Woodworth, and Pulaski compared the cases cited as similar by the court with cases identified as (1) comparable in terms of aggravation/mitigation index scores; (2) matched on the basis of specific facts or main determinants analysis; and (3) alike in the salient features of the case.[54] They found that the cases cited as similar by the Georgia Supreme Court were more highly aggravated and more likely to have received a death sentence than those identified as similar by any of the three empirically based and objectively specified methods the researchers employed.

The author is currently conducting an analysis of the Georgia review process using a somewhat different approach.[55] Instead of identifying similar cases by objective standards and then comparing them with those cited by the court as similar, our approach has been to identify the factors that distinguish the cases chosen as similar from those eligible cases the court did not select. That is, we have attempted to discover the criteria the Georgia Supreme Court actually applies, knowingly or otherwise, in the selection of similar cases.[56]

We are using the Georgia Supreme Court's own data, collected specifically for purposes of proportionality review as directed by Georgia's capital statute, on all capital cases resulting in life or death sentences that were appealed to the Georgia Supreme Court after January, 1970. The data come from a six-page questionnaire completed by trial judges in cases where a death sentence was imposed under the post-*Furman* statute, and by a clerk of the court for all cases where the sentence was life as well as for the pre-*Furman* cases where the sentence was death. The questionnaires provide data on the crime, the defendant, the trial process, and the outcome or disposition of the case including jury findings and sentence imposed. The data for some 297 murder cases tried between 1970 and 1977 (including the first thirty-six post-*Furman* death sentences for murder reviewed for proportionality) were obtained pursuant to a motion for discovery filed by Atlanta attorney Millard

---

[54] These correspond to procedures (3) through (5) as enumerated in the text accompanying note 39, *supra*, and they are described in detail in D. Baldus, G. Woodworth & C. Pulaski, *supra* note 38.

[55] W. Bowers, J. McDevitt & A. Diana, Proportionality Review by the Georgia Supreme Court: Evaluation or Rationalization? (1983) (unpublished manuscript, Center for Applied Social Research, Northeastern University).

[56] This approach avoids the difficulty of making *a priori* assumptions about the standards of comparability the Georgia Supreme Court should have used in specific cases. A federal district court judge raised this objection in evidentiary hearings for House v. Balkcom, 562 F. Supp. 1111 (N.D. Ga. 1983), and McCorquodale v. Balkcom, 525 F. Supp. 431 (N.D. Ga. 1981), to our earlier analysis of these data in which we generated groups of similar cases in terms of the number of persons killed, the presence of accompanying felony circumstances, a prior record of criminal violence, and the use of a firearm as the murder weapon.

Farmer.[57] The Georgia Supreme Court has since refused to release the data on subsequently reviewed cases.[58]

These data show that the Georgia Supreme Court chose cases that are not more consistently similar to the ones under review than the other cases in the pool. By statute, the characteristics of the crime and the defendant should determine which cases are similar and the court should compare the sentence imposed in the case under review with the cases found to be similar. Instead, the court seems to have reversed the procedure. What most distinguishes the cases chosen by the court from those eligible[59] but not chosen is the fact that the original sentence was death and has been upheld by the Georgia Supreme Court. In effect, the court defines as similar those cases in which the death sentence has been handed down and upheld, whether the characteristics of the crime or the defendant are similar to the ones under review.

Our complex statistical analysis led us to the simple but revealing picture of the proportionality review process given in Table 7. It shows for each of the first thirty-six affirmed death sentences for murder how many of the cases cited as "similar" were life cases after 1970, how many were death cases under the pre-*Furman* statute, and how many were death cases under the present post-*Furman* statute effective April 1973.

In all, the Georgia Supreme court cited only eighteen life cases (the total of the second column figures), or less than ten percent, of the more than 200 life sentences appealed to the Court between 1970 and 1977. Moreover, seventeen of these were pre-April 1973 life cases cited in the first six reviews, and not cited again after the thirteenth case (A. Smith). The court cited only one life case under the new statute (as similar to Dix). In only one case (Moore) were more life than death sentences cited as similar.[60]

The court cited twenty-two pre-*Furman* death cases, almost two-thirds of them in the very first review. Over half of these were cited in ten of the first fourteen reviews, and no additional pre-*Furman* death cases were cited after the ninth review (Jarrell). Then, as post-*Furman*

---

57 Willis v. State, 243 Ga. 185, 253 S.E.2d 70, *cert. denied*, 444 U.S. 885 (1979).

58 D. Baldus, Personal communication with Curtis French, Clerk of the Georgia Supreme Court (Sept. 28, 1983).

59 For a given proportionality review, the eligible pool is defined as all life and death cases after 1970 that have been appealed to and reviewed by the Georgia Supreme Court on or before the review date of the case in question.

60 Moore's case is truly extraordinary in that the trial judge imposed death—without jury recommendations— after the defendant pleaded guilty and despite the mitigating facts that the defendant had cooperated with the police, had no prior criminal record, was youthful, had been intoxicated, and was first shot at by the victim. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975), *cert. denied*, 428 U.S. 910, *reh'g denied*, 429 U.S. 873 (1976). Federal District Judge Edenfield later vacated the Georgia Supreme Court's proportionality review *sub nom.* Blake v. Zant, 513 F. Supp. 772, 818 (S.D. Ga. 1981), *aff'd*, 709 F.2d 1353 (1983).

TABLE 7

CASES CITED AS SIMILAR BY THE GEORGIA SUPREME COURT IN THE FIRST 36 PROPORTIONALITY REVIEWS OF THE DEATH SENTENCE FOR MURDER

Defendants	Number of Cases Cited as Similar	Life Sentences between 1970 and 1977		Death Sentences prior to June 1972		Death Sentences since April 1973		Number of Citations in Later Reviews
		First Cited	Previously Cited	First Cited	Previously Cited	First Cited	Previously Cited	
House	18	4	-	14	-	-	-	30
Gregg	18	-	3[a]	1	13[a]	1	-	27
Ross	6	-	1[a]	1	4[a]	-	-	3
Floyd	18	-	3[b]	-	13	1	1	27
McCorquodale	20	4	3	-	11	-	2[a]	6
Moore	23	9	4	4	5	-	1[a]	13
Mitchell	16	-	1[a]	1	10	2	2	9
Chenault	15	-	-	-	12	-	3[a]	12
Jarrell	19	-	1	1	12	1	4[b]	11
Berryhill	7	-	-	-	7	-	-	10
Tamplin	16	-	-	-	11	1	4	2
R. Smith	19	-	3	-	13	-	3[a]	12
A. Smith	19	-	3[a]	-	13[a]	-	3[a]	12
Mason	16	-	-	-	12[a]	1	3[a]	11
Dobbs	15	-	-	-	7	3	5	5
Goodwin	12	-	-	-	5[a]	-	7[a]	4
Pulliam	15	-	-	-	7[b]	-	8[b]	8
Spencer	5	-	-	-	4	-	1[a]	1
Davis	15	-	-	-	5	3	7	4
Birt	14	-	-	-	8	2	4[a]	6
Gibson	15	-	-	-	5	-	10	2
Coleman	19	-	-	-	12	1	6	6
Isaacs	19	-	-	-	12[a]	-	7[a]	6
Street	15	-	-	-	5	-	10	0
Dungee	19	-	-	-	12	-	7	6
Banks	19	-	-	-	12[a]	-	7[a]	7
Stephens	19	-	-	-	12[a]	-	7[a]	4
Harris	16	-	-	-	-	10[b]	6[c]	3
Hill	26	-	-	-	4	2	20[b,c]	1
C. Young	26	-	-	-	4[a]	-	22[a,c]	2
Dix	17	1[d]	-	-	-	5	11[c]	2
Pryor	22	-	-	-	-	2	20	1
Douthit	19	-	-	-	6	1	12	0
J. Young	24	-	-	-	12	-	12	0
Gaddis	24	-	-	-	12[a]	-	12[a]	0
Blake	5	-	-	-	-	1	4	-
TOTALS		18		22		37		

[a] Includes only cases of this type cited in the preceding review.
[b] Includes all cases of this type cited in the preceding review.
[c] Includes three post-*Furman* death cases reversed by the Georgia Supreme Court in procedural grounds.
[d] Imposed under the post-*Furman* capital statute.

death sentences were reviewed and affirmed, virtually all were cited by the court in subsequent reviews. Indeed, the court had cited all but one (Street) of the first thirty-two affirmed death cases by the thirty-sixth review (rightmost column of Table 7). Moreover, of the first four post-*Furman* death sentences upheld by the court, three were cited in at least twenty-seven of the subsequent thirty-two reviews; another seven were cited in ten or more subsequent reviews. As the notes to Table 7 indicate, there also was a tendency for the court simply to draw "similar" cases from the group cited in the immediately preceding review.

Thus, from the substantial pool of almost 300 cases available for proportionality review by 1977, the Georgia Supreme Court repeatedly relied upon a small and highly selective subsample. It cited predominantly death cases, then exclusively death cases, and increasingly the death cases it had affirmed in previous proportionality reviews; fewer than one in ten of the available life cases and virtually nine out of ten previously affirmed post-*Furman* death cases were cited in these proportionality reviews.[61]

This is not proportionality review as mandated by the Georgia capital statute and approved by the United States Supreme Court in *Gregg*, but a process of legally rationalizing trial court decisions to impose death as punishment, regardless of proportionality or excessiveness relative to the sentences in similar cases. Thus, arbitrariness is evident in the decisions and actions of state appellate court judges, as well as those of prosecutors, defense attorneys, and juries; automatic appellate review, like sentencing guidelines and separate penalty hearings, also has failed to serve its intended purpose.

VI. FEDERAL APPELLATE REVIEW

The burden of detecting and correcting arbitrariness and discrimi-

[61] Of course, these same data could be used by the Georgia Supreme Court to see whether there are systematic statewide disparities of treatment among cases similar in legally relevant ways. For example, the data show substantial differences in likelihood of a death sentence by race of offender and victim and by geographical location within the state among cases comparable both in felony circumstance and prior criminal record, the principal legally aggravating factors alleged to account for racial differences. *See* Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty* 416 AM. SOC. REV. 783 (1981). Further, these data reveal that 72% of the convicted offenders who were transients in the community where the crime occurred—as compared with 25% of those who were residents—received a death sentence. Although the number of transient offenders is relatively small for statistical comparisons, this difference is not attributable to differences in the felony circumstances of the crime or the prior record of the defendants. With these continually accumulating data on hand and these leads to pursue, the Georgia Supreme Court might be expected to investigate disparities of treatment associated with place, race, residency, and so forth, and make available the accumulating data for what they may reveal about the constitutionality of the death penalty as applied and reviewed for proportionality.

nation in capital sentencing and at earlier stages of the process has fallen by necessity upon the federal appellate courts. Challenges to the death penalty as applied came first to the federal district courts in southern states where death sentences were most commonly imposed. These courts, in turn, looked to the Court of Appeals for the Fifth Circuit (whose decisions then governed the actions of trial and appellate courts in Florida, Georgia, and Texas, as well as most other southern states) for standards to apply in judging death penalty appeals. Such standards were established in the case of John Spinkelink.

In its September, 1977 representation of John Spinkelink, the Legal Defense Fund presented evidence of racial bias—specifically, the disproportionate use of the death sentence in white victim cases—in the administration of Florida's capital statute.[62] At that time there were 114 men on death row, of whom ninety-four percent had killed only whites, two percent had killed both whites and blacks, and four percent had killed only blacks—in a state where most homicide victims are black.[63] Eighty-five of 114 had committed their murders in the course of another felony, typically robbery.[64] Of these, eighty-three were white victim cases; one was a mixed race and one a black victim case. Compared to their incidence in the population, white victim felony-related killings were thirty-one times more likely to be punished by death than black victim felony killings.[65] These statistics were presented by expert witnesses for Spinkelink at an evidentiary hearing in the Tallahassee federal district court with the following statement: "The statistics provide *prima facie* evidence of bias, strong enough to suggest that the burden of proving that no such bias exists should shift to the prosecutor. He should be required to show that the statistical discrepancy is the result of some factor other than bias."[66]

The district court denied Spinkelink's petition,[67] and this ruling was appealed to the Court of Appeals for the Fifth Circuit. A three-judge panel of the Fifth Circuit then ruled that these statistical data were irrelevant and that the defendant must show "racially discriminatory intent or purpose" in terms of specific actions taken against him in his case, in order to demonstrate a violation of constitutional protection.[68] The court held that the Florida statute itself was immune from constitutional challenges of arbitrariness and that such a statistical anal-

62 Unpublished data collected by W. Sheppard & H. Carithers, Jacksonville, Florida (1972-1981) (On file in the Harvard Law School Library).

63 Zeisel, *supra* note 9, at 458.

64 *Id.* at 459.

65 *Id.* at 460.

66 *Id.* at 461, (reprinting the report of the expert witness).

67 Spinkelink v. Wainwright, No. 77-0895, slip op. (N.D. Fla. Sept. 23, 1977).

68 Spinkelink v. Wainwright, 578 F.2d 582, 615, 616 (5th Cir. 1978).

ysis was, therefore, unwarranted and beyond the court's review obligations. Relying upon language in *Proffitt v. Florida*,[69] the court determined that the Florida statute was not subject to challenge as applied except in those cases where petitioners could show specific acts of intentional discrimination against them because of their or their victims' race.[70]

In effect, by closing the door on statistical evidence and restricting the scope of federal appellate review, the *Spinkelink* decision erected a judicial shield against challenges of arbitrariness and discrimination in the states of the Fifth Circuit, where the death penalty is now and has been most widely used. In other words, *Spinkelink* provided the protection behind which the new statutes approved in *Gregg* might operate relatively free of monitoring by the federal courts for the kinds of constitutional violations that invalidated the former statutes.[71]

In June 1979, shortly after Spinkelink's execution, the NAACP Legal Defense Fund challenged Georgia's capital statute in the Atlanta federal district court at combined evidentiary hearings in the cases of *House v. Balkcom*[72] and *McCorquodale v. Balkcom*[73] by presenting statistical evidence on the application of Georgia's capital statute. In *House* and

---

69 428 U.S. 242 (1976).

70 The Fifth Circuit's response to the statistical evidence of racial bias in Spinkelink v. Wainwright closely resembles the Eighth Circuit's reaction to similar evidence ten years earlier in Maxwell v. Bishop, 39 F.2d 138 (1968), *vacated*, 398 U.S. 262 (1970). Both courts held that the statistical evidence of vast racial disparities in the likelihood of a death sentence was, nevertheless, inadequate because some legally relevant but omitted factors conceivably could have accounted for the racial disparities. The courts further found the statistical evidence irrelevant because the data were not specific to the handling of the case under review. Although in *Maxwell* the data on rape cases came from 19 representative counties in Arkansas, the county in which Maxwell was tried was not included.

Ironically, eight years after the *Maxwell* court ruled that this evidence was inadequate and irrelevant, the Solicitor General of the United States conceded, in his *amicus* brief supporting capital punishment in *Gregg* and companion cases, that the statistical evidence presented in *Maxwell* clearly justified conclusions of racial discrimination: "[W]e do not question [the Arkansas study's] conclusion that during the twenty years in question, in southern states, there was discrimination in rape cases." Brief for the United States as *Amicus Curiae*, app. A at 5a, Gregg v. Georgia, 428 U.S. 153 (1976), *reprinted in* Zeisel, *supra* note 9, at 458.

71 The Fifth Circuit's commitment to this *Spinkelink* shield was underscored a year later. In August 1979, a panel of the Fifth Circuit held in Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979) *(Jurek I)*, that statistical patterns of racial disparities could suffice as *prima facie* evidence of "intent to discriminate," citing the legal principle that actors are responsible for the natural and foreseeable consequences of their actions. Within weeks, *Jurek* was withdrawn for rehearing en banc. Within three months, a replacement version of Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), *rev'd on other grounds*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001 (1981), *cert. denied*, 450 U.S. 1014 (1981) *(Jurek II)*, appeared with no reference to the role of statistical evidence in demonstrating intent to discriminate, thus leaving intact the judicial shield established by *Spinkelink*.

72 C78-471A, slip op. (1979), *petition for habeas relief from death sentence granted*, 562 F.Supp. 1111 (N.D. Ga. 1983).

73 525 F.Supp. 431 (N.D. Ga. 1981).

McCorquodale, data revealed both disparities by race like those presented in *Spinkelink* and disparities by region within the state. As in Florida, the data documented disproportionate imposition of the death sentence especially for white victim killings, and the bias was present for both felony and nonfelony homicides. The data further revealed disparities of treatment for judicial circuits grouped regionally, for felony- or nonfelony-type killings, and for white victim or black victim felony-type murders.[74]

To challenge this evidence, the state engaged Timothy S. Carr, Director of Research for the Georgia Department of Corrections, as an expert, but did not call him to the witness stand. In a letter to the presiding federal magistrate, Mr. Carr offered his professional evaluation, saying that the magnitude of the racial disparities "is as great as anything I have ever seen in my seven years of processing and interpreting criminal justice data in Georgia," and that he "did not believe that a difference of this magnitude would 'wash out' statistically even if all the [legally relevant] factors . . . were to work *in concert* to nullify it."[75]

The federal magistrate's order in *House* and *McCorquodale* disallowed further consideration of this statistical evidence of racial and regional disparities, explicitly indicating that such evidence did not meet the standard established in *Spinkelink*.[76] This evidence eventually reached the Fifth Circuit in the case of *Smith v. Balkcom (Smith I)*,[77] at which point the circuit court rejected it, citing *Spinkelink*.

Then came the first scoring of the *Spinkelink* shield. The Fifth Circuit withdrew its *Smith* opinion for rehearing and issued a modified opinion in *Smith v. Balkcom (Smith II)*,[78] which explicitly recognized that statistical evidence could serve as proof of "intent to discriminate" under a fourteenth amendment equal protection challenge. The court, however, rejected the particular statistical evidence presented in *Smith I*, saying that it "falls short . . . of establishing an equal protection violation."[79] This turnaround came just as the Fifth Circuit was split into the Fifth and Eleventh Circuits. Because the case was argued before the bifurcation, however, *Smith II* was binding on the courts of both circuits.

The new Eleventh Circuit court recently took a further step in *Proffitt v. Wainwright*.[80] Citing the United States Supreme Court's decision

---

74 *See* W. Bowers, *supra* note 3, at Chapter Seven.

75 Smith v. Balkcom, *petition for cert.* 24-25 (U.S. June 22, 1982)(No. 81-6978).

76 *See* McCorquodale v. Balkcom, 525 F. Supp. 431, 432 (N.D. Ga. 1981).

77 660 F.2d 573 (5th Cir. 1981).

78 677 F.2d 20 (5th Cir. 1982).

79 This represented a return to the position purged from *Jurek I* by *Jurek II*—a slight but definite weakening of the *Spinkelink* shield. *See supra* note 71.

80 685 F.2d 1227 (11th Cir. 1982).

in *Godfrey v. Georgia*[81] as precedent, the Eleventh Circuit held that both sentencing and review decisions of state trial and appellate courts were open to eighth amendment challenges in the application of statutory and nonstatutory sentencing criteria. The *Proffitt* court held that "in view of *Godfrey*, we can only conclude that the language in the *Spinkelink* opinion precluding federal courts from reviewing state court's application of capital sentencing criteria is no longer sound precedent."[82]

In effect, the protection afforded post-*Furman* capital statutes by *Spinkelink*—which itself arbitrarily impeded constitutional challenges to the application of these statutes—was weakened by *Smith II* in the geographically restricted jurisdiction of the Fifth Circuit, and by *Smith II* and *Proffitt* in the jurisdiction of the newly formed Court of Appeals for the Eleventh Circuit. The actions taken in *Smith II* and *Proffitt* mean that federal courts in these two circuits now have a freer hand in monitoring the application of existing capital statutes, and that statistically-based challenges to the death penalty as applied will soon be brought to the United States Supreme Court on appeal. That is to say, the Supreme Court will soon be faced again with the question it sidestepped in declining to hear *Spinkelink v. Wainwright*, this time with considerably stronger evidence of arbitrariness and discrimination.

VII. CONCLUSION

The evidence of arbitrariness and discrimination presented here is qualitatively more than a statistical demonstration that sentencing practices of certain states have failed to meet the *Furman* standard. Beyond this, we have seen that the arbitrariness is manifold in its links to race, location within a state, and other personal, situational, and social influences; pervasive in its presence at various decision points in the handling of capital cases; intractable under different kinds of statutes in different states; and replicated in different kinds of studies using different kinds of data. These findings represent an extension of our perspective on arbitrariness in capital punishment in that they explicate some of the ways in which extralegal influences operate even in the presence of post-*Furman* statutory reforms—how prosecutors, defense attorneys, and judges, as well as jurors, become the agents of both systematic and unsystematic arbitrariness.

The evidence further confirms the view that arbitrariness is inherent in the use of capital punishment.[83] Where death is available as pun-

---

[81] 446 U.S. 420 (1980).

[82] 685 F.2d at 1262 n.52.

[83] For a further expansion of this theory, see W. Bowers, *supra* note 3, at Chapters Five & Seven.

ishment, according to this theory, it will be used in ways that reflect dominant community sentiments and that override standards of even-handed justice, whatever form the capital statutes may take. To be sure, statutory reforms possibly may affect how and where arbitrariness occurs in the handling of cases, but changes are apt to be more apparent than real. Thus, the vast difference in the use of the death penalty by location within states observed since *Furman* appears to have been a pattern consistent with the pre-*Furman* era. Further, differential treatment by race of victim, so apparent in the post-*Furman* era, also has dominated as a source of bias historically. A great many other extralegal factors such as wealth, property ownership, resident/transient status in the community, and unpopular political or religious beliefs may also affect the handling of cases, but have not been examined thus far for lack of systematic data. The consistent cumulative effect of attorney type adds a further element of arbitrariness and may reflect the influence of factors yet to be examined.

Above all, the evidence presented here should dispel the notion that the problem of arbitrariness is confined to sentencing. Its presence is clear in the sentencing process—disparities by race and location persist under strong statistical controls for legally relevant considerations—but such arbitrariness also appears at every other stage of the process that we have been able to examine. Greater guidance in sentencing and stricter separation between the guilt and punishment decisions have failed not only as a solution to the problem of arbitrary sentencing of convicted offenders, but also, contrary to Justice White's hopes, as a statutory guide to the exercise of prosecutorial discretion. The data show that neither prosecutorial decisions made before or after trial nor the judgment of guilt itself is free from recurrent biases. Furthermore, over successive stages of the process these biases—especially the racial bias—are cumulative in nature.

So far, the federal courts, especially the Court of Appeals for the Fifth Circuit, have taken the narrow view that arbitrariness must be demonstrated strictly and specifically in sentencing, and that statistical evidence is irrelevant, as in *Spinkelink*, or insufficient, as in *Smith II*, because it does not strictly focus upon sentencing or control for conceivably confounding factors. Yet, the *Furman* Justices objected to the freakish, rare, arbitrary use of the death penalty in which one defendant and not another was condemned to death with no meaningful distinction between their cases, whether this was the product of sentencing or decisions elsewhere in the process. That statutory sentencing guidelines would seem, according to the *Gregg* Court, to remedy the problem, does not mean that the Court found arbitrariness constitutionally acceptable if it occurred elsewhere. Why else would Justice White address himself

to the presumed derivative benefits of sentencing guidelines on the exercise of prosecutorial discretion? It is cynical to suppose that the Supreme Court is concerned only with the arbitrariness and biases of jurors, while granting to the regular participants in the criminal justice process the privilege of caprice and systematic bias at the expense of the capital defendant whose cost may be his life. The language of Chief Justice Burger in *Furman* was "evenhanded justice," not "evenhanded sentencing."