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# Racial Discrimination and the Death Penalty: An Analysis of the United States' Judicial System



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## Abstract:

Racial discrimination plays a role in the administration of the death penalty. This research analyzes the history, and past scholarly research, of the death penalty. The purpose of this research is to understand the correlation between racial discrimination and those sentenced to death. This study includes a literature review regarding the different aspects of the death penalty and race. Following the literature review, an analysis is performed of both previous literature and current death penalty statistics that augments the discussion of the death penalty.

## Introduction and Purpose of Study:

The United States has an extensive history of racial discrimination ranging from the overt discrimination of the Jim Crow era to the more ambiguous discrimination of modern times. Discrimination has permeated into the judicial system of the United States. The purpose of this study is to provide a view of race and the death penalty through a socio-political and historical lens. This study seeks to augment the discussion by analyzing possible future outcomes of the death penalty within the United States.

## Methodology:

The methodology within this research is comprised of case studies and discourse analysis. This methodology gauges the relationship between the death penalty and race. Statistical data regarding death penalty cases bolsters the discourse and historical analysis presented within this research. The units of analysis used in this study are the death penalty cases themselves. The study observes what affect the units of analysis have on the overall decision-making process of judges, juries, and the Supreme Court. The case studies and discourse analysis provide enough information to make an argument regarding the arbitrary application of the death penalty.

## Literature Review:

### Historical Underpinnings

Between 1882 and 1968, about 5,000 people were lynched and this continued into the 1960s (Ogletree 2002 pp 21). Ogletree argued that "lynching was an expression of racism and racial discrimination," citing sociologist Gunnar Myrdal, who "suggested that lynching was a tool used to maintain racial caste distinctions and to keep blacks in a position of subjugation" (Ogletree 2002, pp. 21). To further expand his argument that lynching was a racist act, Ogletree attempts to connect this history with current death penalty patterns. Ogletree discusses the "recreational aspects" of lynching, comparing the lynch mobs with 1,500 journalists applying to "witness Timothy McVeigh's execution" (Ogletree 2002, pp. 22). Essentially, Ogletree argues that modern society still views these executions as recreational to a certain degree.

Marvin Wolfgang conducted the "first major empirical challenge to racial discrimination in the use of the death penalty in the United States" in the 1966 8th circuit case of William L. Maxwell (Gross 2012, pp. 1906). Maxwell was convicted of "raping a 35 year old, unmarried white woman" in Arkansas in 1962 and sentenced to death (Maxwell v. Bishop). He challenged his death sentence by arguing that "certain Arkansas statutes...dealing with the crime of rape and the punishment imposed therefor have been applied unconstitutionally to Negro men convicted of raping white women..." (Maxwell v. Bishop). Wolfgang collected data on about "3000 rape convictions from 1945 through 1965 in selected counties across the southern states," finding that "black men who were convicted of rape were seven times more likely to be sentenced to death than white men, and that black men who were convicted of raping white women were eighteen times more likely to be sentenced to death than men convicted of rape in any other racial combination" (Gross 2012, pp. 1906). Regardless of the statistical results presented, Wolfgang's study was rejected by the Eighth Circuit.

### The Baldus Study

David Baldus, Charles Pulaski, and George Woodworth conducted a large scale study titled "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience." This study discusses the significance of "comparative sentence review," also known as "proportionality review... [which is] a procedure by which a court determines whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases or is comparatively excessive" (Baldus et. al. 1983 pp. 663).

Baldus and his team's study resulted in several distinct findings. One finding is that when analyzing the death-sentencing system of Georgia using their measures it could be identified as "presumptively excessive (Baldus et. al. 1983 pp. 728). Ultimately, they argue that their data "suggested that Georgia's death-sentencing system has continued to impose the type of inconsistent, arbitrary death sentences that the United States Supreme Court condemned in *Furman v. Georgia*" and that the sentence review process failed (Baldus et. al. 1983 pp. 730). With these findings, they question whether or not this system was operating "in the consistent, evenhanded manner required by the Eighth Amendment" (Baldus et. al. 1983 pp. 730).

### *McCleskey v. Kemp* 481 US 279 (1987)

The Court held that "the statistical evidence [from the Baldus study] was insufficient to support an inference that any of the decision makers in the accused's case acted with discriminatory purpose in violation of the equal protection clause..." (*McCleskey v. Kemp*, 1987)...

The court also stated that "at most, the Baldus study indicates a discrepancy that appears to correlate with race, but [that] the discrepancy does not constitute a major systematic defect," further illustrating that "the Baldus study does not demonstrate that Georgia capital sentencing system violates the Eighth Amendment" (*McCleskey v. Kemp* 481 US 279 (1987)).

Following this 5-4 decision, many scholars have analyzed the impact the *Kemp* decision has had on the legal system with regard to the discrimination and the death penalty. This decision parallels the court's attitude in *Maxwell* essentially stating that the 1983 Baldus study's statistics, even if valid, could not be applied specifically to the case at hand. Justice Powell delivered the opinion, arguing that the question at hand is "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner *McCleskey's* capital sentence is unconstitutional under the Eighth or Fourteenth Amendment" (*McCleskey v. Kemp* 481 US 279 (1987)).

### Recent Scholarship

Scott Phillips conducted a study from 1992 to 1999, analyzing death penalty and race in Harris County, Texas. This county is "arguable the capital of capital punishment," and Phillips examined "whether race influenced the District Attorney's decision to pursue a death trial or the jury's decision to impose a death sentence against adult defendants indicted for capital murder" (Phillips 2008 pp 809). This study has a far more narrow scope than the Baldus Study, as Phillips only analyzed one specific county and only those defendants who were indicted for capital murder. Phillips argued that while his study was narrow in scope and could not be generalized throughout the country, no death penalty study can be generalized throughout the country due to the vast differences among states and countries. His findings are interesting, as they do not fully focus on the race of the victim, but they also found that the race of the defendant is relevant.

## Analysis:

The historical context and the work of previous scholars have shown that there is a correlation between race and the death penalty. One can see the dialectical process in which the death penalty has become far less applicable in today's society when analyzing historical context, recent studies, and court cases. The former Supreme Court Justices have historically agreed that the arbitrary nature of this punishment is not in accordance with the Eighth Amendment.

Currently, society seems to be moving away from the death penalty. In 2012, "35 states and the Federal Bureau of Prisons held 3,033 inmates" with death sentences, which was a decrease of 32 inmates from the previous year (Snell 2014 pp 1). 2012 was the twelfth consecutive year that such a decrease had occurred (Snell 2014 pp 1). In 2013, only nine states participated in the executions of inmates, despite the fact that 35 states housed inmates with death sentences (Snell 2014 pp 3). The states performing these executions account for almost three-quarters of the executions performed. These states are as follows: Virginia, Georgia, Alabama, Arizona, Missouri, Ohio, Oklahoma, Florida, and Texas (Snell 2014 pp 3). These are considered the Death Belt states, and the majority of them are located in the South. It is important to note that these are the same states that fought against civil rights and desegregation. One is able to see the legitimacy of the argument that the death penalty is applied arbitrarily when analyzing the statistics and simultaneously keeping in mind the historical dialectic.

## Conclusions & Further Study:

Racial discrimination within the death penalty is a contentious subject that continues to stir debate. With this in mind, it is imperative to remain vigilant about the issue in the upcoming years. It seems that the Supreme Court is moving towards an acceptance of statistical data within cases. This is a trend that was previously unheard of as is demonstrated within this research project. With that being said, it would be interesting to analyze whether the Supreme Court would accept the legitimacy of statistical data and declare the punishment unconstitutional if a similar case to *Kemp* were to be introduced today. Further, scholars such as Phillips are studying race and the death penalty prompting other scholars to do the same. There is far more statistical data that must be accumulated in order to fully develop and understand the issue. However, it seems that the death penalty is being implemented in an arbitrary manner today, despite the fact that the Supreme Court attempted to mediate this issue decades ago.

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