

RACE AND PROSECUTORIAL DISCRETION IN HOMICIDE CASES

MICHAEL L. RADELET*
GLENN L. PIERCE

This paper examines the cases of 1017 homicide defendants in Florida. Two main data sources are used: the police department's classification of the case, as found in the FBI's Supplemental Homicide Reports, and the prosecutor's classification, as determined by court records. Each data set characterizes the homicide as involving felonious circumstances, possible felonious circumstances, or nonfelonious circumstances. Attention is focused on cases that differ in their police and prosecutorial classifications. Results indicate that differences in these classifications are related to defendant's and victim's race, with blacks accused of killing whites the most likely to be "upgraded" and the least likely to be "downgraded." The process of upgrading is then shown to significantly increase the likelihood of the imposition of a death sentence in cases with white victims where no plea bargain is offered.

I. INTRODUCTION

Like other people-processing organizations, prosecutors' offices must make decisions concerning the allocation of their limited resources to the large number of cases that are presented. These decisions include such choices as how thoroughly to investigate each case, whether or not to file formal charges, the number and severity of violations to allege, the rigor of prosecution, and whether and how much to plea bargain. Every case cannot be given top priority. While some potential evidence may be ignored or discounted in cases in which a plea bargain is desired, the evidence in cases deemed deserving of a maximum penalty will be thoroughly documented and buttressed in the attempt to present the

* This research was supported in part by grants from the NAACP Legal Defense and Educational Fund, Inc. and the Chicago Resource Center. We would like to thank Kay Isaly for her assistance in overseeing the data collection, Margaret Vandiver for her assistance in preparing the data for analysis, Alan Agresti and Jane Pendergast for their statistical advice, and William J. Bowers, Samuel R. Gross, Hugo Adam Bedau, Colin Loftin, Daniel Givelber, and two anonymous reviewers for their helpful comments on earlier drafts. We are especially indebted to Professor Richard O. Lempert for his many hours of extraordinary editorial work with the paper.

strongest case possible. Indeed, the work of a prosecutor can be viewed in part as a process through which evidence is selected and shaped to enhance the likelihood of a desired outcome.

The prosecutor's role is probably most important in criminal homicide cases. In these cases there is a wider range of sanctions available (typically, from probation to death) than for any other criminal offense. In addition, homicide cases often reflect a much broader spectrum of motivation and planning than do other types of serious criminal behavior. This requires the prosecutor and judge to make numerous distinctions among the population of homicide cases that come to their attention. Thus, not only is a prosecutor's work typically more difficult in criminal homicide cases, but the stakes are also typically higher for the defendant on trial, and the prosecutor may feel that his or her professional reputation will be affected by the outcome of a high visibility homicide case.

This paper focuses on prosecutorial decisions in Florida homicide cases. We are particularly interested in identifying those cases in which the prosecutor's assessment of the case is either more or less severe than its initial assessment by the investigating police department. At issue are 1) whether alterations in assessments of the seriousness of cases are associated with extra-legal factors such as race, independently of legally relevant factors, and 2) whether such alterations affect the severity of sanctions that defendants receive. In particular, we examine how this exercise of prosecutorial discretion affects the likelihood of receiving a death sentence. We focus on the sentence of death not only because it is qualitatively different from other criminal sanctions, but also because it is a penalty for which arbitrary or discriminatory behavior by prosecutors raises clear policy and constitutional issues.

II. THEORETICAL BACKGROUND

Between 1930 and 1972, 54 percent (N=2,066) of the 3,859 persons executed in the U.S. were black, including 89 percent (N=405) of the 455 men executed for rape (U.S. Department of Justice, 1982). In part because of this racial disparity, most death penalty statutes then in existence were invalidated by the 1972 Supreme Court decision in *Furman v. Georgia*. Led by Florida, the states then began to rewrite their capital punishment statutes (Ehrhardt and Levinson, 1973). By 1985, 37 states had active capital punishment laws, and 32 of these

jurisdictions had at least one person awaiting execution (Legal Defense Fund, 1985). Nationally, 51.2 percent of the 1,590 death row inmates on October 1, 1985, were white (Legal Defense Fund, 1985). Between 1930 and 1972, 49.9 percent (N=1,664) of the 3,334 executions for murder involved white offenders, so the proportion of whites among the population of those on death row today is virtually the same as the proportion of whites executed in the 42 years before *Furman*.

How does the criminal justice system select the small proportion of convicted murderers it sentences to death, and the even smaller fraction who are eventually executed?¹ If those convicted murderers who are sentenced to death cannot be distinguished from those not sentenced to death on the basis of legally relevant variables, then the process through which some are selected for execution can be said to be arbitrary. Should that arbitrariness parallel race, sex, or social class lines, independently of legally relevant variables, it can be said to be discriminatory as well. The most thorough discussion of the likelihood that the death penalty will be imposed in a capricious and discriminatory manner has been presented by Black (1981). He argues that every decision point in the criminal justice process, from arrest through appeal to executive clemency, is characterized by inexact standards and wide discretion, leading to a high degree of arbitrariness in the determination of who is eventually executed. The decisions by the prosecutor of what charge to file, how rigorously to prosecute the case, and whether or not and how much to plea bargain occur at the beginning of the process. The quality of the defendant's lawyer, witnesses, and psychiatrist(s) (if the insanity defense is pled) will affect the probabilities of a guilty verdict and a death sentence. Given similar circumstances, the discovery of aggravating and mitigating factors in the sentencing phase of the trial varies widely (Mullin, 1980). In short, Black argues that because so many vague factors are used to evaluate the seriousness of an offense, the final determination of who are the worst murderers and who should be executed is necessarily capricious and significantly influenced by legally irrelevant variables.

Discretion, as Black argues, may be exercised at any point in the criminal justice decision-making process. Numerous

¹ Recently, Gross and Mauro (1984) estimated that during the period 1976 through 1980 the ratio of the number of persons arrested for homicide in the United States to the number of persons sentenced to death was nearly 100 to 1.

investigators have examined the impact of arbitrary and discriminatory factors at particular stages of the criminal justice system (see, e.g., Dike, 1982; Pannick, 1982; Bowers, 1983; Bowers, 1984; Baldus *et al.*, 1983; Gross and Mauro, 1984). Evidence of racial disparities has been found at the postsentencing, sentencing, and presentencing stages of the process.

Postsentencing

In a seminal postsentencing study of 412 persons sentenced to death in Pennsylvania for first-degree murder between 1914 and 1958, Wolfgang *et al.* (1962) found that black offenders were significantly less likely than whites to have their death sentences commuted. This remained true even after controlling for whether or not the homicide was classified as a felony murder. A second study of 660 death sentences handed down in North Carolina between 1909 and 1954 reported similar results: whites sentenced to death were significantly more likely than their black counterparts to have their death sentences commuted (Johnson, 1957). A more recent postsentencing study of the first 145 cases decided by the Florida Supreme Court under the post-*Furman* statute found, controlling for the type of defense attorney, that the number of victims, the trial jury's sentence recommendation (life or death), and the interaction between victim's sex and defendant's race all exerted significant effects in a regression equation predicting outcome (Radelet and Vandiver, 1983). Black defendants with female victims were the most likely group to have their death sentences affirmed.

Sentencing

Other studies have examined racial disparities at the sentencing stage. Research on pre-*Furman* statutes found that racial disparities were most pronounced in the punishment for rape (LaFree, 1980; Wolfgang and Riedel, 1973), but since 1977 rape that does not eventuate in homicide is no longer a capital offense (*Coker v. Georgia*).

Several studies have found racial disparities in the post-*Furman* application of the death penalty in the United States, particularly with regard to the race of the victim. Riedel (1976), examining patterns of death sentencing under the statutes enacted shortly after *Furman*, found that the proportion of blacks among those condemned to death had increased rather than decreased. Bowers and Pierce (1980),

using data from Georgia, Texas, Ohio, and Florida, found that the races of victims and defendants were significant factors in the imposition of the death penalty in all four states. The same pattern, although somewhat reduced in strength, was found when only those homicides with an accompanying felony were examined (an analysis not done for Ohio). Restricting his analysis to homicides in Florida involving strangers, Radelet (1981) found that 17.5 percent of the blacks accused of killing whites were sentenced to death, compared to 12.6 percent of the whites accused of killing whites and 5.8 percent of the blacks who allegedly killed blacks. Similar but less extreme differences were found when only those homicides between strangers that resulted in a first-degree murder indictment were examined, although the reduced sample size eliminated the statistical significance of the differences.

Two recent projects have extended this line of inquiry. First, in the most extensive social science study ever conducted on capital sentencing patterns, Baldus *et al.* (1983) found that blacks accused of killing whites in Georgia were more likely to be sentenced to death than were other defendants (see *McCleskey v. Kemp*). This difference remained after considering the effects of over 200 control variables. Second, Gross and Mauro (1984) used the FBI's Supplemental Homicide Reports to examine sentencing patterns in eight states (Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia). They found "remarkably stable and consistent" discrimination, based on victim's race, in all the states. Again, these results held when several other factors that might affect sentencing decisions were statistically controlled.

Presentencing

Few studies have focused specifically on the possibility of pretrial racial disparities in decisions regarding homicide cases. Garfinkel (1949), studying potential capital cases from North Carolina between 1930 and 1940, found that both defendant's and victim's race correlated with the grand jury's decision to indict for first-degree murder (rather than other degrees of murder) and the prosecutor's decision not to reduce first-degree murder charges. Blacks accused of killing whites were the most harshly treated. More recently, Bowers (1984) found that the races of both defendants and victims affected the likelihood of prosecutors obtaining first-degree murder indictments. Similarly, in an analysis of the first 205 cases that were

potentially eligible for the death penalty under South Carolina's current statute, Jacoby and Paternoster (1982) found that prosecutors were 3.2 times more likely to seek the death penalty for defendants charged with killing whites than for those charged with killing blacks, and prosecutors were four times more likely to seek the death penalty for blacks accused of killing whites than for blacks accused of killing other blacks. This analysis was expanded by Paternoster (1983) to include the first 316 cases eligible for the death penalty under the current South Carolina statute. The probability of a death request was again higher for those defendants with white victims than for those with black victims, with the victim's race being a more powerful predictor than the race of the defendant. These patterns held after controlling for whether or not the homicide involved multiple victims or occurred between strangers. Similar patterns were also found when additional control variables were added and only felony homicides from South Carolina were examined (Paternoster, 1984).

Radelet's (1981) study of Florida homicide cases from the mid-1970s found that after restricting the sample to homicides between strangers (death sentences are rarely given for homicides occurring within primary groups), persons accused of killing whites were significantly more likely than those accused of killing blacks to be indicted for first-degree murder. In fact, the correlation of race with this prosecutorial decision was stronger than at the sentencing stage (see also Foley and Powell, 1982; Bowers, 1984).

Finally, Bowers and Pierce (1980) presented preliminary evidence which further suggests that prosecutors might be more rigorous in their treatment of cases involving black defendants and white victims. They compared police reports and court record summaries in 346 Florida homicide cases (1980: Table 9). According to their data, cases characterized by the police as involving no felony circumstances or only suspected felony circumstances were most likely to be characterized by the prosecutor as felony murder if the defendant was black and the victim white. This selective upgrading, they suggest, is a key reason for the high proportion of blacks with white victims among those sentenced to death. However, because of a large amount of missing data and the lack of multivariate controls, their findings on this point are more suggestive than definitive.

III. RESEARCH ISSUES

It is clear that studies focusing on only one point in the criminal justice process risk missing substantial racial disparities (cf. Berk, 1983; Klepper *et al.*, 1983). As Thomson and Zingraff suggest:

[P]opulations in the later stages of the judicial process may be homogeneous. . . . If, as the research indicates, discrimination is concentrated in the earlier decision-making stages, research which does not account for the processual nature of decision making or which analyzes populations at just the later decision points will tend to produce findings of no discrimination (1981: 871).

Equally important is the possibility that some cases, which initially do not appear to be among the most serious, are first selected for harsh treatment and then characterized so as to *appear* similar to cases that were classified as most serious from the time they entered the criminal justice process. The ability of prosecutors or other criminal justice decision makers to develop or minimize evidence in order to justify the results desired in particular cases may create an appearance of similarity among initially dissimilar cases that reach the later stages of the criminal justice system. If cases that *could* have gotten to that stage but did not are never seen or are otherwise unavailable for comparative analysis, such evidential manipulation will be particularly hard to spot. Most importantly, if the process of selectively developing or ignoring evidence in cases is related to extra-legal factors, such as race, then this process will help create the illusion of even-handed justice at later stages in the criminal justice system. Studies are therefore needed that focus specifically on the process of case selection and the acquisition and development of evidence in the early stages of the criminal justice process (for a case example see Bedau, 1983).

To date, the little research that has been conducted on prosecutorial discretion at the pretrial stage has primarily focused on the indictment decision (Radelet, 1981; Paternoster, 1983; 1984; Bowers, 1984). The issue of whether evidence was selectively developed in order to obtain desired outcomes (i.e., more or less severe sentences) has not been addressed. If prosecutors selectively develop evidence and if this process is in part based on extra-legal factors such as race, the process would obscure or "hide" discriminatory or arbitrary decision-making in the criminal justice system. To understand the implications of race for the death penalty, we must understand the process

through which the pool of potential death penalty cases is narrowed.

The possibility of bias in the identification of potential death penalty cases could be assessed if a description of the criminal homicide that is both logically prior to and independent of the prosecutor's assessment were available. Police reports of criminal homicide, although they may have their own biases and deficiencies, are the only possibility. Data from such reports have been gathered for this paper. If a comparison of the police description of a homicide with the subsequent description of the same homicide in the court records reveals differences that parallel differences in the racial characteristics of defendants and victims, then evidence suggesting selective manipulation or amassing of evidence and racial bias would be found.

The study of disparities between police and court classifications of criminal homicides with respect to accompanying felonious circumstances is important for several reasons. First, it allows us to investigate (for at least a portion of the evidence) the possibility that racial or other extra-legal factors affect the rigor with which the criminal justice system prosecutes homicide cases. Second, it is necessary under most post-*Furman* statutes for the court to find at least one aggravating circumstance in a criminal homicide case in order to sentence the defendant to death. An accompanying felony is probably the most commonly cited aggravating circumstance in death penalty cases today. Bowers and Pierce (1980), for example, found that 79 percent of the Florida death sentences they examined and 85 percent of their Georgia death sentences involved homicides accompanied by some other felony. Finally, the comparison between police and court determinations of felony circumstances surrounding homicides provides an opportunity to study one element in the much broader process of developing and constructing evidence in criminal cases, a topic important in its own right. We focus on one aspect of this process: the possible influence of race.

IV. METHOD

In this section we first describe the court record data on the criminal homicide cases. Next we review the information from police records that has been obtained for this analysis, and outline how these data were merged with those from the court records. Finally, we examine the potential importance of the

felony circumstance designation to sentence outcomes, and in particular to the imposition of a death sentence.

Court Data

The data we examine are drawn from information relating to 1,419 defendants indicted for criminal homicide in Florida between 1973 and 1977. Two overlapping data sets, originally compiled for other research projects, were combined to obtain these cases. The first sample consists of all 892 defendants indicted for first-degree murder for homicides that occurred between 1973 and 1977 in 21 selected Florida counties (Bowers and Pierce, 1980). The second sample consists of all defendants indicted for first-, second-, or third-degree murder in 20 Florida counties for homicides that occurred in 1976 or 1977 (Radelet, 1981).² There are 788 cases in the second sample, but since 9 of the 20 sampled counties are also in the 1973-77 sample, there are only 527 new cases. Thus, when the two samplings were combined, 1,419 individual cases were identified.

Thirty-two cases were deleted from the sample because we could not identify either the defendant's or the victim's race. Five cases in which the defendant died before sentencing, jumped bail, or was never arrested were also deleted, thus reducing the initial sample to 1,382 defendants.

Sampling and data collection procedures were generally similar for both samples. Counties were selected with the probability of inclusion in the sample proportional to population size. Thus, the 21 counties in the 1973-77 sample included 9 of the state's largest 20 counties, and the 1976-77 sample of 20 counties included 16 of the state's 20 largest (including the 11 largest in the state). The actual data were collected by law students and lawyers who visited the courthouse in each county, reviewed the criminal dockets for the sample years, and completed a standardized information sheet for each sample defendant. Where important information, usually involving race and sex of victims, was not available in the case files, a letter was written to the defense attorney. Hundreds of defense attorneys were contacted and responded during the project.

² In Florida, a homicide defendant is arrested on an open charge of murder. Prosecutors decide whether or not to seek a Murder 1 indictment. If they want to prosecute a defendant for Murder 1, they must go before a grand jury to secure an indictment. If prosecutors want to charge any lesser degree of murder than Murder 1, they can bring an information for murder against the defendant and avoid the grand jury.

The field researchers were instructed to pay particular attention to the possibility that an additional felony accompanied the homicide and to include any information relating to this possibility in the case summaries they prepared from the descriptions of the homicide found in court records and charging documents. Any prosecutorial summary, outline, or statement of the case in the court file that was found in charging documents, pretrial motions, or in other miscellaneous documents was examined with special care. These case summaries were coded into three categories: felony, possible felony, and no felony circumstances, corresponding to those used by the Federal Bureau of Investigation (FBI) in classifying police data on homicides. To assure consistency, the same researcher coded this variable in all cases, closely supervised by a criminal attorney who has had extensive experience in Florida capital cases.

Police Data

Because of the gravity of criminal homicide, the FBI regularly collects supplemental information on this offense when it gathers data for its Uniform Crime Reports. Like other FBI crime statistics, the Supplemental Homicide Reports (SHRs) are filled out by local police jurisdictions and submitted to the FBI. For the years prior to 1976, the SHRs contain information about the nature of each homicide (such as the presence or absence of felony circumstances), the type of weapon used, the victim-offender relationship, and the age, sex, and race of the victim. In 1976, these reports were expanded to include the age, sex, and race of the suspected offender. Thus, these data describe the circumstances surrounding the homicide, the demographic characteristics of the victim, and since 1976, the characteristics of the suspected offender. By matching each case in the court data with its corresponding case in the SHR, it is possible to compare the description of a case by the police, when it first entered the criminal justice system (the SHR data), with the description of the same case as presented by the prosecutor.

The SHRs do not, however, include the name of the victim or defendant, thus complicating the task of matching each case found in the court data with its SHR counterpart. Consequently, cases were matched by using the county and month of the offense, the age, sex, and race of the victim, and for the 1976 and 1977 cases, the demographic characteristics of the suspected offender. This was accomplished by generating

computer printouts listing these variables from both data sources, matching the cases one by one, and then merging the two files. Although both the court data and the police data contained information about the characteristics of the homicide itself (i.e., felony/non-felony circumstances), these variables were not used in the matching process because their congruence is a major issue being investigated.³

Using these procedures, we successfully matched 1017 of the 1382 cases from the court sample with corresponding cases in the SHR data (73.59 percent). Cases with black victims were slightly more likely to be matched than cases with white victims, as 79.2 percent of the cases with black victims and 69.7 percent of the cases with white victims were matched with their SHR cases. No relationship was found between the defendant's race and whether the case was matched. On the basis of our examination of the data from the two sources, we believe that errors or omissions in the SHR data are primarily responsible for the failures to match. Indeed, in 89 percent of the unmatched cases from the court data, we had data on date of death and victim characteristics but could find no matching case in the SHRs.

Significance of the Prosecutor's Classification

One might measure the presence of additional felony circumstances by recording whether an additional felony was charged rather than by coding descriptions culled from charging documents and court records. However, prosecutors might refrain from charging additional felonies because they decide to focus their cases squarely on the homicide or because crucial proof is lacking, yet they might be influenced by the felony circumstances in deciding to seek the death penalty (and they might note them in arguing for it). Indeed, it is only where felonious circumstances are brought in some way to the court's attention that we were able to code them.

The data indicate that case record descriptions are substantially more sensitive indicators of felony circumstances than are formal charges. Of the 737 cases in the sample that

³ In matching the cases, we tolerated no variation in the county or month, with the exception of a few cases in smaller counties where variation of up to one month was allowed. We did allow up to five years' variation in victim's or defendant's age if all other criteria matched and no better-fitting case was present. Because the victim's age was frequently missing from the court files, death certificates were purchased for the victims in 516 cases in which this information was missing or no satisfactory match was possible with the data from the court files.

included an indictment for first-degree murder, 353 (47.9 percent) were categorized by their case record descriptions as having a felony or possible felony circumstance present, whereas only 170 (23.1 percent) of the cases with first-degree indictments contained an additional felony charge. More importantly, the death sentence is seldom given when there is no case record indicator of a felony circumstance, but it is frequently found where additional felonies are not charged. Of the 55 death penalty cases in the sample, 50 (90.9 percent) included case records categorized as having evidence of an additional felony or possible felony present, but only 22 (40.0 percent) had a formal additional felony charge. Moreover, in several death penalty cases where there were no charges or convictions for additional felonies, the judge actually mentioned felony circumstances in the sentencing memorandum as a justification for imposing the death sentence. Thus, because prosecutors often decide not to file formal charges for felonies committed concurrently with homicides, case descriptions are a better indicator of the prosecutor's determination of the presence or absence of felony circumstances than are actual charges of an additional felony.

V. ANALYSIS

The analysis proceeds in three stages. First, the SHR and court classifications of the homicide (felony, possible felony, and non-felony) are compared. They are then broken down by defendant/victim race. Finally, a series of loglinear models are generated to ascertain whether discrepancies between police and court findings of a felony circumstance are associated with sentencing outcomes and in particular with the probability of a death sentence.

Police versus Court Record Classifications of Criminal Homicides: Upgrading and Downgrading

Table 1 indicates that 174 cases (17.1 percent) had a classification in the court data different from the classification in the police (SHR) data. A total of 82 cases were "downgraded" from the initial SHR police classification to the description found in the court files (a felony becomes a possible or non-felony, or a possible felony becomes a non-felony, i.e., those cases below the diagonal), and 92 cases were "upgraded" (those cases above the diagonal). This upgrading and downgrading does not, however, involve formal charge

Table 1. Court Record Classification of Homicide Cases by Initial Classification Found in Police Records (row proportions in parentheses)

Police Record Classification of Circumstances	Court Record Classification of Circumstances			Total
	Non-Felony	Possible Felony	Felony	
Non-Felony	585 (.906)	19 (.029)	42 (.065)	646 (1.000)
Possible Felony	20 (.345)	7 (.121)	31 (.534)	58 (1.000)
Felony	52 (.166)	10 (.032)	251 (.802)	313 (1.000)
Total	657	36	324	1017 (1.000)

manipulation, as when the police book someone for sale of marijuana but the prosecutor charges only possession. Rather, it is descriptive or behavioral. The prosecutor, so far as we can determine, presents the case to the court as if it were more or less serious with respect to accompanying felonies than the police originally perceived it to be. We are not directly interested in the diagonal of Table 1, but instead focus attention on the probabilities of falling off the diagonal (i.e., changing classification).

Twelve of the 73 cases upgraded to a felony homicide in the court records (16.4 percent) eventually received a death sentence. In contrast, none of the 52 cases downgraded to nonfelonious circumstances from the police to the court classification received a death sentence, and only one case that was downgraded from felonious circumstances to possible felonious circumstances did so.

Upgrading, Downgrading, and the Racial Characteristics of Victims and Defendants

In this section we examine whether the discrepancies observed in Table 1 between the finding of a felony circumstance in the court records of criminal homicide cases and the initial finding contained in the police SHR records are associated with the race of either the victim or the defendant. Table 2 presents our first analysis of the data addressing this question. In this table we examine variations in court record classifications of a felony circumstance controlling for the initial characterization found in police SHR records for each of four different victim/defendant racial combinations.

We see from Table 2 that of those cases classified as felonies from the police (SHR) data, 91.6 percent remain

Table 2. Court Record Classification of Homicide Cases by Police Record Classification for Different Racial Combinations of Defendant and Victim (row projections in parentheses; N = 1017)

Defendant/Victim Race	FBI Data Circumstance	Court Data Circumstance			
		No Felony	Possible Felony	Felony	Total
Black kills White (13.57% of sample)	No Felony	7 (.636)	1 (.091)	3 (.273)	11 (1.000)
	Possible Felony	0 (.000)	2 (.250)	6 (.750)	8 (1.000)
	Felony	5 (.042)	5 (.042)	109 (.916)	119 (1.000)
	Total	12 (.087)	8 (.058)	118 (.855)	138 (1.000)
White kills White (42.58% of sample)	No Felony	236 (.864)	11 (.040)	26 (.095)	273 (1.000)
	Possible Felony	7 (.233)	2 (.067)	21 (.700)	30 (1.000)
	Felony	25 (.192)	4 (.031)	101 (.777)	130 (1.000)
	Total	268 (.619)	17 (.039)	148 (.342)	433 (1.000)
Black kills Black (41.00% of sample)	No Felony	328 (.945)	6 (.017)	13 (.037)	347 (1.000)
	Possible Felony	7 (.583)	2 (.167)	3 (.250)	12 (1.000)
	Felony	21 (.362)	1 (.017)	36 (.621)	58 (1.000)
	Total	356 (.854)	9 (.022)	52 (.125)	417 (1.000)
White kills Black (2.85% of sample)	No Felony	14 (.933)	1 (.067)	0 (.000)	15 (1.000)
	Possible Felony	6 (.750)	1 (.125)	1 (.125)	8 (1.000)
	Felony	1 (.167)	0 (.000)	5 (.833)	6 (1.000)
	Total	21 (.724)	2 (.069)	6 (.207)	29 (1.000)

felonies in the court descriptions when a black kills a white (BkW), 77.7 percent when a white kills a white (WkW), 62.1 percent when a black kills a black (BkB), and 83.3 percent when a white kills a black (WkB).⁴ Thus, BkW are the most likely to remain classified as involving felony circumstances, and cases with black victims are the least likely. Similar patterns are evident among cases in which the circumstances are classified as a non-felony by the police. Here, 63.6 percent of the cases remain without the suggestion of an accompanying felony in the court data when a BkW, 86.4 percent when a WkW, 94.5 percent when a BkB, and 93.3 percent when a WkB. From these data it appears 1) that the defendant's race does not make much difference in cases with black victims, 2) that cases with white victims are more likely to be upgraded than cases with black victims, and 3) that among cases with white victims, black defendants are more likely than white defendants to be upgraded and less likely to be downgraded.⁵

The next question to be explored is whether this degree of upgrading and downgrading by defendant/victim race is statistically and substantively significant. If the marginal distributions for police classifications were the same for the four racial groups, we could ascertain the possible presence of race effects through a simple comparison of the court classifications for the four racial groups. However, as we see in Table 2, there is not much potential for upgrading among the BkW category because nearly all are labeled as involving additional felonies at the police stage, whereas there is greater potential for upgrading among the WkW group. The statistical analysis must take these disparate distributions into account. This can be done by comparing court record descriptions of the four defendant/victim racial groups (BkW, WkW, BkB, and WkB), *controlling for* the initial police classification. Since our

⁴ At this stage, all killings are alleged and have not been proven in court. Note that there are only 6 WkB cases classified by the police as involving felony circumstances, and therefore one or two case shifts lead to large proportional changes.

⁵ Supporting data can be compiled from Table 2. For claim 1, of the 382 black victim cases classified by the police as "No Felony" or "Possible Felony," 22/359 (6.1%) with black defendants and 2/23 cases (8.7%) with white defendants (note small sample size) were upgraded. For claim 2, 68/322 (21.1%) of the cases with white victims that could have been upgraded were upgraded, while 24/382 (6.3%) of the analogous cases with black victims were upgraded. For claim 3, 322 cases with white victims could have been upgraded and, counting police "Possible Felony" cases twice, 287 cases could have been downgraded. We see that in cases with white victims 10/19 cases (52.6%) with black defendants were upgraded, compared with 58/303 cases (19.1%) involving white defendants. Similarly, 10/127 (7.9%) of the BkW cases were downgraded, compared with 36/160 (22.5%) of the WkW cases.

Table 3. Comparison of Independence and Row Effects Loglinear Models

Model	Interpretation	Goodness of Fit	
		χ^2	d.f.
1. Independence Model $\log m_{ijk} = \nu + \tau_i + \tau_j + \tau_k + \tau_{jk} + \tau_{ik}$	Race and Court classification independent, given police classification, where M_{ijk} is the expected frequency at level i of Race (R), level j of Court (C), and level k of Police (P).	73.75	18
2. Row Effects Model $\log m_{ijk} = \nu + \tau_i + \tau_j + \tau_k + \tau_{jk} + \tau_{ik} + j\tau_i$	Court classification depends on race, given police classification.	16.88	15

H_0 : No race effect (all $\tau_i=0$) has $\chi^2=73.75-16.88 = 56.87$. Based on three degrees of freedom (18-15), $p < .001$, and therefore the null hypothesis is rejected.

measure of felonious circumstances is an ordinal variable, we do not use standard loglinear models to do this, but use instead a model that is a multivariate generalization of a “row effects” loglinear model suggested by Goodman (1979). This method takes account of the ordinal qualities of the variables and allows us to compare not only shifts in classifications by race, but also shifts in direction (i.e., upgrading and downgrading) by race, controlling for the differential possibilities for upgrading and downgrading.⁶

To begin, the row effects loglinear model, which posits an effect of race on court classifications, can be compared to a simple loglinear model in which the court classification of criminal homicides is treated as independent of racial group, controlling for the police classification. A comparison of these two models is presented in Table 3. The independence model is the special case of the row effects model in which all the effect parameters are zero; that is, it is the model in which there are no differences in court classifications, controlling for police classifications, between the racial configurations.

The independence model fits poorly, with a chi-square of 73.75 and 18 degrees of freedom. The row effects model has only three more parameters than the independence model, but fits well, with a chi-square of 16.88 and 15 degrees of freedom. The difference in chi-squares of $73.75-16.88=56.87$, based on $df=18-15=3$, gives a test of the null hypothesis that court classification is independent of racial group, controlling for

⁶ A more detailed discussion of the application of this and other models to the data compiled for this paper is presented in Agresti (1984: 210-14).

Table 4. Comparison of Racial Categories

Group	Difference in Estimated Taus	Antilog of Difference	Standard Error of Difference in Estimated Taus	Z ¹
BkW, WkB	1.3250	3.76	.3199	4.14**
BkW, BkB	1.2250	3.40	.1914	6.40**
WkW, WkB	.6445	1.90	.2825	2.28*
BkW, WkW	.6805	1.98	.1825	3.73**
WkW, BkB	.5445	1.72	.1173	4.64**
BkB, WkB	.1000	1.11	.2891	.35

¹ Computed as difference in estimated taus divided by standard error. The Z score has a standard normal distribution, with a mean of 0 and a standard deviation of 1 under the hypothesis that the true difference between the groups is zero.

* $p < .05$

** $p < .01$

police classification. The chi-square is significant at the .001 level. Thus, there is extremely strong evidence that the court classification varies by the racial configuration of defendants and victims, controlling for police classification.

According to the row effects model, the four racial configurations can be compared with respect to court disposition using four parameters estimates:

$$\hat{\tau}_1 = 1.325 \text{ (BkW)}, \hat{\tau}_2 = .644 \text{ (WkW)}, \hat{\tau}_3 = .100 \text{ (BkB)}, \hat{\tau}_4 = 0 \text{ (WkB)}$$

These taus can be interpreted as the effects of the racial configuration on court classification, controlling for police classification. The higher the tau estimate, the more severe the court classification for that racial configuration, given the initial police classification.

With these estimates, each of the four configurations can be compared to each of the others, for a total of six comparisons. This is done in Table 4. Differences between taus give comparisons of the court classifications for the four racial configurations, controlling for police classifications. The larger the difference between taus for any two racial groups, the greater the difference between their respective court classifications, controlling for police classifications. The magnitudes of these differences are interpreted as odds ratios by computing antilogs of the differences in the taus.⁷ Table 4

⁷ The odds ratio is a ratio of ratios. It is computed by examining adjacent categories of court classification, controlling for police classification. To compare a particular pair of racial configurations, say BkW and BkB, first, for BkW, the ratio of the number of cases with accompanying felonies to the number of cases with possible accompanying felonies is estimated. This is done next for BkB. When these two ratios are divided (the ratio for BkW divided by the ratio for BkB), the resultant statistic measures the magnitude of their difference. The model we fit assumes that this particular odds ratio is

orders these comparisons from the pair of racial configurations that we would expect to be most different in the propensity of prosecutors to upgrade or downgrade police classifications, assuming race of defendant and race of victim effects (BkW vs. WkB), to the comparison in which the least difference would be expected (BkB vs. WkB). When the pattern of odds ratios obtained when comparing each of the six possible racial pairs is examined, the ordering of the magnitude of their differences corresponds very closely to what would be expected if race of both defendant and victim influenced prosecutorial behavior. The largest difference between groups is found when comparing BkW and WkB. Here, when the police report that the homicide was not or was only possibly accompanied by a felony, the ratio of cases involving an upgrade of one level to cases in which the court and police classifications are the same is estimated to be 3.76 times higher for the BkW configuration than for the WkB configuration. Conversely, when the case circumstance is classified as Felony or Possible Felony by the police, the ratio of cases classified similarly by courts and police to cases downgraded one level is estimated to be 3.76 times higher for the BkW configuration than for the WkB configuration, indicating that the latter are more likely to be downgraded. We expect this comparison to show the greatest difference between pairs of racial configurations because it matches the group that should produce the most upgrading (BkW) (if race were operating) against the group that should

identical to one formed using the other two adjacent categories (possible felony circumstances vs. no felony circumstances). This assumption is justified by the fact that the model fits the data well.

For example, again compare the configurations for BkW and BkB. The difference in their taus is 1.225, the antilog of which is 3.40. This latter figure is obtained by first, for the BkW configuration, computing the ratio of the estimated number of cases with accompanying felonies to the estimated number of cases with possible accompanying felonies. This is also done for the BkB configuration, and the first ratio (for BkW) is divided by the second (for BkB) to obtain 3.40. This same number results from dividing the BkW and BkB ratios of Possible Felony/No Felony. Thus, when the police classification is No Felony Circumstances (or Possible Felony Circumstances), the estimated ratio of cases "upgrade one level" to "no change" is 3.40 times higher for the BkW configuration than for the BkB configuration. Similarly, when the FBI classification is Felonious or Possibly Felonious, the estimated ratio of "no change" to "downgrade one level" is 3.40 times higher for the BkW configuration than for the BkB configuration.

It follows that a two-step odds ratio (e.g., to compare non-felony circumstances upgraded two steps to felony circumstances) is the product of the two one-step odds ratios described above that were computed for adjacent categories (i.e., upgraded or downgraded one level). For instance, the ratio of the estimated number of cases of Felony/No Felony is estimated to be $(3.40) \times (3.40)$ or 11.56 higher for the BkW configuration than for the BkB configuration.

produce the least amount of upgrading (WkB). Not surprisingly, the smallest and only nonsignificant difference between pairs of racial configurations among the six possible comparisons occurs between the two groups we would expect to produce the least (WkB) and second least (BkB) amount of upgrading. It is interesting to note that despite the low frequency of WkB homicides ($21/1017 = 2.06$ percent), the evidence strongly suggests that cases with this racial configuration are treated differently than either BkW or WkW cases. In sum, the results strongly indicate that given the initial police description, the court or prosecutorial description is most likely to be upgraded in cases with a BkW racial configuration, followed in order by WkW, and then BkB and WkB.

Consideration of Additional Correlates

Thus far, it has been demonstrated that given the prosecutor's police classification, the severity of the description of the felony circumstances of a homicide case is strongly associated with the race of both the defendant and the victim. But will the predictive impact of race be reduced when other possible correlates of upgrading and downgrading are considered? It is possible that while upgrading or downgrading may not be related to the actual factual circumstance of a particular case, these processes may nevertheless reflect a prosecutor's general perception concerning the overall seriousness of a given case. Thus, for instance, while no obvious accompanying felony may have occurred in a multiple murder case, the severity of such a crime would encourage a prosecutor to find evidence of some associated felony such as a robbery (e.g., a missing wallet). If this type of case more often involved white victims, then controlling for multiple victim homicide cases might reduce the association between the victim's race and upgrading, and might explain why felony circumstance murders are especially likely to lead to death sentences. In order to address this issue, it is necessary to introduce possible indicators of the seriousness of the homicide cases (other than felony circumstances) to assess whether their effects qualify the apparent association between race and the upgrading or downgrading of cases.

Table 5 presents the probabilities of upgrading and downgrading across each of eight control variables which might affect or be proxies for factors that affect prosecutorial decisions to seek the death penalty. The 704 homicide cases

Table 5. Proportions of Cases Upgraded and Downgraded by Control Variables

Control Variable	Proportion of Cases Upgraded (N=92/704)	Attained Significance	Proportion of Cases Downgraded (N=62/313)	Attained Significance
Victim's Sex		.4529		.0196*
Male	72/528 = .136		54/237 = .228	
Female	20/175 = .114		8/76 = .105	
Def.'s Sex		.0116*		.3922
Male	83/574 = .145		60/296 = .203	
Female	8/129 = .062		2/17 = .118	
Relation		.0000*		.0000*
Family	4/167 = .024		4/9 = .444	
Stranger/Unk.	67/299 = .224		31/240 = .129	
Known	21/238 = .088		27/64 = .422	
Victim's Age		.9765		.4984
0-19	10/73 = .137		5/19 = .263	
Else	73/528 = .138		52/262 = .198	
Def.'s Age		.0000*		.1826
0-19	26/80 = .325		11/82 = .134	
Else	27/579 = .098		38/188 = .202	
# Victims		.0327*		.2058
One	85/678 = .125		59/285 = .207	
Else	7/26 = .269		3/28 = .107	
# Offenders		.0000*		.0000*
One	45/585 = .077		44/105 = .419	
Else	45/117 = .167		18/207 = .087	
Weapon		.0172*		.0031*
Gun	51/480 = .106		31/203 = .153	
Else	35/203 = .172		30/101 = .297	
Def./Vic. Race		.0000*		.0001*
WW	58/303 = .191		29/130 = .223	
WB	2/23 = .087		1/6 = .167	
BB	22/259 = .061		22/58 = .379	
BW	10/19 = .526		10/119 = .084	

Notes: Sample sizes for cross-classifications vary because of missing data.

For upgrading, we start with felony or possible felony in FBI data (N = 704).

For downgrading, we start with felony in FBI data (N = 313).

Probabilities computed on chi-square statistic.

*P ≤ .05

listed in the police data without mention of accompanying felonies or with only their possibility noted are used as the denominator in determining the proportion of each category upgraded. The 313 cases listed in the police data as involving accompanying felonies are used as a base to calculate proportions downgraded.⁸ It can be seen in Table 5 that while

⁸ Note that 58 "Possible Felony" cases (from the police data in Table 1) are eligible for both upgrading and downgrading. Because later in the paper we focus on the implications of upgrading, we collapsed the police data categories of "No Accompanying Felonies" and "Possible Accompanying Felonies" and treated them as both eligible for upgrading, and only the "Police Felony" category as eligible for downgrading.

the victim's sex has no effect on the probability of upgrading, those accused of killing males are more likely to be downgraded than those accused of killing females. Prosecutors are apparently no more likely to construct felony circumstances that the police did not find when the victim is a woman, but they are less likely to overlook felony circumstances found by the police in such cases. Male defendants are more likely than females to be upgraded, but the defendant's sex has no significant effect on the probability of downgrading. Table 5 also reports the zero order relationship between upgrading and downgrading and the relationship between defendant and victim, the victim's age, the defendant's age, the number of victims, the number of offenders, whether a gun was used, and the racial configuration of defendant and victim.⁹ In most cases, the direction of effects is such that categories of variables that are more likely than average to be upgraded are less likely than average to be downgraded, and vice versa. Only gun usage is significantly related to both a lower probability of upgrading and a lower probability of downgrading. This may be because the use of a gun may, on the one hand, indicate premeditation and thus add to the perceived severity of a homicide case; on the other hand, since it inflicts a quick death, it may reduce the perceived heinousness of a homicide. Thus, prosecutors may be more likely to view gun cases as either clearly justifying or clearly not justifying the death penalty, and they may present the evidence accordingly.

Multivariate analysis can now be used to examine the significance of the relationship between victim/defendant racial characteristics and both upgrading and downgrading, controlling for the other possibly influential factors which appear in Table 5. We first examine the phenomenon of upgrading using logistic regression procedures, and include as predictors all variables that showed a significant bivariate association with upgrading in Table 5. This procedure is then repeated for downgrading. Cases with missing data are deleted. Because the upgrading and downgrading variables are dichotomous—either the court records are consistent with the police reports or they are not—conventional logistic regression

⁹ The significance levels reported for this and the racial configuration variable are based on a chi-square test of the null hypothesis that the proportion of cases upgraded (or downgraded) is the same for all categories of defendant/victim combination. Where a defendant-victim relationship was not apparent in the court records, a case is treated as a stranger homicide, since the failure to mention a closer relationship implies that no such relationship existed.

procedures are used. For each coefficient significant at the .05 level, we also report predicted change in the probability of upgrading or downgrading associated with a unit change in the independent variable, calculated at the mean of the dependent variable. These means are 12.5 percent for upgraded cases and 20.1 percent for downgraded cases, which are the proportion of

Table 6. Logistic Regression Models for Upgrading (N=642) and Downgrading (N=303)

Variable	Beta	Std. Error	Attained Significance	Predicted Change
A. Upgrading¹				
Intercept	-3.180	1.047	.002	-
Def.'s Age	-0.881	0.334	.008	-.10
# Victims	0.833	0.620	.179	-
# Offenders	1.637	0.301	.000	.18
Weapon	-0.688	0.299	.021	-.08
Strangers	0.782	0.305	.010	.09
WkW	0.921	0.312	.003	.10
BkW	2.214	0.626	.000	.24
WkB	-0.228	0.845	.787	-
Def.'s Sex	-0.404	0.461	.381	-
Family	-1.463	0.649	.024	-.16
B. Downgrading²				
Intercept	5.916	1.084	.000	-
Weapon	-0.997	0.393	.011	-.16
Vic.'s Sex	-1.928	0.525	.000	-.31
Stranger	-0.714	0.390	.067	-
# Offenders	-2.077	0.374	.000	-.33
BkW	-1.618	0.521	.000	-.26
WkB	-0.586	1.208	.627	-
WkW	-0.541	0.425	.203	-
Family	-0.598	0.856	.485	-

¹The -2L Likelihood Ratio Chi Square is 126.34, and for the model with intercept only is 482.8. The model was also run using only the three race categories as predictors. In this model, for WkW, Beta = 1.288, S.E. = .264, sig. = .000. For BkW, Beta = 2.834, S.E. = .509, sig. = .000. For WkB, Beta = .378, S.E. = .772, and sig. = .625.

²The -2L Likelihood Ratio Chi Square is 86.20, and for the model with intercept only is 304.35. For the model in which only three race categories were used as predictors, for WkW, Beta = -1.896, S.E. = .427, sig. = .000. For WkB, Beta = -1.117, S.E. = 1.128, sig. = .322. For WkW, Beta = -0.755, S. E. = .343, and sig. = .028.

cases in Table 6 falling into these categories. The three-category "relation" variable was entered as two (0,1) dummy variables, with cases in which the victim was known to the defendant serving as the omitted category. The variable

measuring defendant/victim race was entered as three dummy variables, with BkB homicides omitted.¹⁰

The results of the logistic regression analyses used to model upgrading and downgrading are presented in Table 6. The footnotes to this table give parameter estimates for a similar model in which only the three race categories are used as predictors. The analysis of upgrading reveals that seven of the ten predictive variables (from Table 5) remain statistically significant in the final model.¹¹ Only the number of victims, defendant's sex, and being white with a black victim (compared with being black with a black victim) do not show effects on upgrading in the final model. For downgrading, the defendant-victim relationship (stranger or family) and the categories WkB and WkW are not statistically significant. However, BkW homicide cases are 26 percent less likely than BkB cases to be downgraded, a difference that is statistically significant.

*The Impact of Upgrading on Sentencing:
The Question of Motivation*

The preceding analysis suggests that the prosecutor's decision to characterize a case as a felony homicide is correlated with the races of the defendant and of the victim. Moreover, the correlation between race and prosecutorial classification remains after controlling for the initial classification found in police records, as well as for a variety of other apparently influential factors. However, the question remains whether the patterns observed in the selective development of felony

¹⁰ If BkW is omitted rather than BkB, both WkW and BkB are significantly different from BkW in the probability of upgrading and downgrading. In the model predicting upgrading, for WkW, Beta = -1.29, S.E. = .611, sig. = .035 and for BkB, Beta = -2.21, S.E. = .626, sig. = .000. In the model predicting downgrading, for WkW, Beta = 1.77, S.E. = .466, sig. = .021 and for BkB, Beta = 1.62, S.E. = .521, sig. = .002.

¹¹ To check the validity of the felony-non-felony classification in the court data, the presence or absence of a formal *charge* for an additional felony (other than the homicide) can be used as the dependent variable, rather than our measure of the presence of additional felony *circumstances*. When this is done, we find that 39 of the 704 cases that the FBI classified as non- or possible felony actually included a *formal charge* of an additional felony. Crosstabulations of this "charge" variable with the variables correlated with upgrading (defined by "circumstance") in Table 5 reveal similar patterns of significance to those reported therein, with two exceptions: here victim's sex is significant and defendant's sex is not. The logistic regression predicting formal charge reveals that number of offenders, weapon, stranger, WkW, and victim's sex are statistically significant predictors, while family and defendant's age are not. BkW and WkW were omitted because no cases in these categories had second felonies formally charged when an accompanying felony was not mentioned in the FBI data. Thus, the definition of upgrading as going from non-felony or possible felony to the actual *charging* of an additional felony does not affect the conclusions.

circumstance evidence actually affect the likelihood of death sentences. If upgrading were motivated by a desire to seek the death penalty, upgraded cases might be more likely to receive the death penalty than cases consistently classified (by police and court) as involving an accompanying felony.

Table 7. The Probability of a Death Sentence among Consistently Classified versus Upgraded Felony Homicide Cases

	Consistently Classified	Upgraded Cases	Attained Significance
Probability of a Death Sentence	.151	.164	.7869
Total	(251)	(73)	

Table 7 compares the probability of receiving the death sentence in cases that have been upgraded to show an accompanying felony in the court records with the probability of the death sentence in cases consistently classified as involving an accompanying felony in both police and court records. The results in Table 7 suggest that the treatment of upgraded cases does not significantly differ from cases consistently classified as involving accompanying felonies. This analysis is highly misleading, however, because it fails to consider two major and mutually exclusive reasons why a prosecutor might decide to upgrade evidence in homicide cases: 1) to induce the defendant to plea bargain, and 2) to buttress a decision to seek a more severe sentence. Where the prosecutor has upgraded with an eye toward a more severe sentence, prosecutorial selectivity means that we expect a higher probability of a death sentence than felony circumstances alone would warrant. If such upgrading is associated with the race of the defendant or victim, it might reflect a prosecutorial decision to “go after” a defendant because of the racial configuration of the crime.¹² Where the prosecutor has upgraded a case as an inducement to a plea bargain, we would expect an inverse relationship between the probability of a death sentence and upgrading, because the prosecutor is aiming at an expedited resolution of the case, without the ultimate sanction. These upgraded cases are presumably less deserving of death than the cases consistently classified as involving accompanying felonies because the former were not initially classified as involving felony circumstances. It is also possible that upgrading occurs

¹² Alternatively, it is possible (although unlikely) that the prosecutor is motivated by characteristics of the crime that are associated with the racial configuration and not proxied by any of the variables we could measure.

Table 8. The Probability of a Death Sentence among Consistently Classified versus Upgraded Felony Homicide Cases by Plea Offered and Not Offered

	Consistently Classified	Upgraded Cases	Attained Significance
1. Plea Offered Defendant			
Probability of a Death Sentence	.144	.028	.0564
Total	(132)	(36)	
2. No Plea Offered or Unknown			
Probability of a Death Sentence	.160	.297	.0636
Total	(119)	(37)	

without any end in view other than the desire to paint a full picture of the crime. The police may have misclassified the case to begin with or evidence of an accompanying felony may have been discovered only after the initial police report. In these circumstances we would expect no relationship between sentence severity and upgrading.

Table 8 reanalyzes the data in Table 7, controlling for whether a plea bargain was offered. Looking first at cases in which plea bargains are known to have been offered, we see that death sentences are less likely among upgraded cases than among consistently classified cases. This suggests that prosecutors upgrade some cases that are not truly death eligible to secure plea bargains. Moreover, defendants who are offered a plea and accept it are not at risk of receiving a death sentence. Thus, the pool of defendants eligible for a death sentence among cases in which a plea was offered includes only those who refused the bargain. Among the 168 cases with a court recorded felonious circumstance in which a plea was offered, 28 of 132 defendants in consistently classified cases refused the offered plea bargain, as did 1 of 36 defendants in upgraded cases. When we examine the probability of receiving a death sentence among the former, we find that 68.7 percent of the 28 defendants eventually were sentenced to death, a surprisingly high figure given the fact that the prosecutor in these cases, at least at some point, did not feel compelled to argue for a death sentence.¹³ This pattern suggests that refusal to accept an offered plea often evokes retaliation by the prosecutor.

¹³ The one case in which an offered plea was refused among upgraded cases also resulted in a death sentence, but obviously no pattern can be inferred from this case.

In sharp contrast, when we examine those cases in which no plea is known to have been offered to the defendant, the relationship, consistent with our expectations, changes directions.¹⁴ Cases in the upgraded category are about twice as likely as consistently classified cases to result in a death sentence. This difference approaches statistical significance ($p=.06$) despite the small sample size. Moreover, *some* of the upgraded cases reflect adjustments motivated not by the desire to build a case that will merit the death penalty but rather by the discovery of new evidence or the realization that the police were mistaken in their original classification. If these cases could be identified and eliminated, the relationship between the death penalty and upgrading in cases in which plea bargains are not offered would be even stronger if we are correct in our supposition that these cases are motivated by the desire to seek a more severe sentence. These results are also likely to underestimate the relation between upgrading and the prosecutor's desire to justify the death sentence because some cases in which the prosecutor seeks the death penalty, unidentifiable with our data, do not result in its eventual imposition by the judge.

Table 9, which includes only cases in which no plea bargain is offered, tests the hypothesis that prosecutors are more likely to *selectively* upgrade cases to justify a death sentence when the victim is white. Consistent with this hypothesis we first note that upgrading in cases where no plea was offered is more likely when the victim is white; 18.3 percent of the 153 cases with white victims that are not classified by the police as involving felony circumstances are upgraded by the prosecutor, compared to 4.9 percent of the 184 cases with black victims that are eligible for upgrading.¹⁵ Second, we find that when victims are black, there is no significant difference between upgraded

¹⁴ If a plea bargain is offered and accepted, this information is readily available from court files. It was more difficult to determine if a plea was offered and rejected, for these data are not generally indicated in court records and were not collected from defense attorneys. If we were not certain of this, the case is treated as one in which no plea was offered. If we are mistaken in some instances, this should bias the data against our suggested hypothesis since the "no plea bargain" group will include some cases that the prosecutor, at least at one point, did not think were good candidates for death. Presumably, these cases are less heinous on variables we could not measure.

¹⁵ Note that this procedure is conservative if, given similar cases, the police are likely to characterize cases with white victims as involving felonious circumstances more readily than cases with black victims. If so, the pool of white victim cases eligible for upgrading would include fewer cases with strong evidence of accompanying felony circumstances than the pool of black victim cases.

and consistently classified cases in the probability of a death sentence, but when victims are white, upgraded cases are twice as likely to result in a death sentence as those that have been consistently classified. Thus, upgrading cases to buttress a decision to seek the death sentence is most clearly a tactic prosecutors use when the victim is white. The evidence with

Table 9. Death Sentence Probabilities among Consistently Classified versus Upgraded Felony Homicide Cases by Race of Victim for Defendants in Cases with No Evidence of Plea Offers

	Consistently Classified	Upgraded Cases	Attained Significance
1. Black Victim Homicides			
Probability of a Death Sentence	.053	.111	.5747
Total	(19)	(9)	
2. White Victim Homicides			
Probability of a Death Sentence	.180	.357	.0451
Total	(100)	(28)	

respect to black victims is ambiguous on this point. Since few cases with black victims are classified by either the police or the prosecutor as involving accompanying felonies, statistical significance is hard to achieve. Although black victim cases in Table 9 have a death sentence probability that is less than one-third that of white victim cases, as with white victims upgrading makes the death sentence twice as likely.

Consideration of Additional Correlates

Finally, we examine the hypothesis that the observed effects of upgrading on the likelihood of a death sentence, shown in Table 9, may arise from the impact of factors other than race that happen to be associated with upgrading. For example, homicides involving multiple victims, multiple offenders, or those occurring between strangers may motivate prosecutors to pursue a death sentence. If these same types of factors are associated with or promote upgrading, we would expect that controlling for these factors would reduce the relationship between upgrading and the likelihood of a death sentence.

Table 10 examines the possibility that the impact of upgrading on receiving the death penalty is a function of the overall seriousness of the homicide case rather than upgrading *per se*. The dependent variable is the imposition of the death

Table 10. Logistic Regression Predicting the Likelihood of a Death Sentence among Cases with Felony in Court Data, White Victim, and No Plea Offered¹
(N = 121)

Variable	Beta	Std. Error	Attained Significance	Predicted Change
Intercept	-3.238	2.111	.125	-
Upgrade	1.289	0.570	.024	.22
# Offenders	0.162	0.528	.759	-
# Victims	1.508	0.631	.017	.26
Vic.'s Sex	0.416	0.602	.490	-
Def.'s Sex	-1.458	1.152	.206	-
Weapon	-0.263	0.660	.691	-
Stranger	-0.295	0.596	.621	-
Def.'s Race	0.744	0.528	.159	-

¹ -2L Likelihood Ratio Chi Square is 14.58, and for the model with intercept only is 128.47. In a bivariate model in which only "upgrade" is used to predict death sentence, the Beta for upgrade = 0.929, standard error = .473, and significance = .049.

penalty, which occurred in 22.3 percent of the sample cases. Because this is a binary variable, logistic regression is again used. As in Table 6, proportional effects calculated at the mean of the dependent variable are presented for variables with coefficients significant at the .05 level as a general measure of the likely importance of these variables. The "Family" variable used in Table 6 is omitted because few of the homicides in this sample are family killings, and the need to maintain sample size required us to eliminate the age of defendant and age of victim variables due to missing data.¹⁶

It can be seen that upgrading remains a significant predictor of the imposition of the death penalty even when the effects of seven other possibly important variables are controlled. As we see from the footnote to Table 10, this predictor actually attains somewhat greater significance than it does in a model in which it alone is used to predict death sentences. Upgrading increases the probability of a death sentence by 22 percent. These results strongly support the proposition that upgrading evidence to reflect felony circumstances increases the probability of a death sentence in a way that cannot be explained by either the introduction of evidence of a felony (all cases in Table 9 involved accompanying felonies) or by other possibly influential factors. It is the kind of pattern that would be expected if (1) upgrading

¹⁶ Seven cases are excluded because of missing data on other variables.

cases were often done strategically by prosecutors in a special effort to secure the death penalty and (2) if such special prosecutorial efforts secured death sentences in cases that on the objective evidence would not have otherwise merited it. Table 10 does not necessarily suggest that the sentencing judge is responding to extra-legal or improper factors in sentencing defendants in upgraded cases more severely than other felony murderers, for if upgrading is associated with a special prosecutorial effort to secure the death penalty, upgraded cases as presented to the court may appear more heinous than other murders that involve accompanying felonies. With respect to the legal propriety of upgraded sentences, the crucial table is 6, which shows that in deciding whether to upgrade, prosecutors are influenced by the racial configuration of the crime over and above the effects of other more properly influential factors. If this analysis is correct and upgrading reflects a prosecutorial motivation to pursue more severe sentences for selected defendants, the operation of this process masks some of the extra-legal influences on the selection of candidates for the death sentence and gives judicial decisions a greater appearance of propriety than is warranted.¹⁷

VI. DISCUSSION AND CONCLUSIONS

The above data show that between the time a police department classifies a homicide and the time the case is presented in court there can be significant changes in the characterization of the homicide. These changes, which relate ultimately to the imposition of the death penalty, are associated with both the defendant's and the victim's races, and are not explained by factors such as the victim-offender relationship, number of offenders, or number of victims. Thus, race, in effect, functions as an implicit aggravating factor in homicide cases.

¹⁷ An alternative explanation for the observed findings might be that upgraded cases represent particularly death eligible cases because of factors that we cannot measure with the information available from the SHR data. Omitted variables are always a possible explanation for observed correlations, but in order for such factors to produce the pattern of findings observed in this study, these crucial explanatory variables would have to be very unevenly (and unexpectedly) distributed throughout the sample. Among the "Plea Offered" cases, these factors would have to be concentrated among the cases consistently classified as felonies. In the "No Plea Offered" sample, by contrast, they would have to be concentrated among the upgraded cases. In addition, such factors would have to exert their effects above and beyond the controls introduced for the analysis shown in Table 10, none of which affected the bivariate relationship observed in Table 9. This means they would not be highly correlated with any of the control variables.

These results underscore the point that prosecutors have broad discretionary power which affects how homicides are investigated and presented, whether defendants are allowed to plead guilty to noncapital offenses, whether death sentences are sought, and numerous other decisions concerning the processing of a case (Bentele, 1985: 609-16). Sentencing studies that take the prosecutor's case descriptions and the formal charges as objective and unbiased reflections of the seriousness of a crime are based therefore on a questionable foundation that can lead to the underestimation of race effects on sentencing whenever race has affected earlier processing decisions. To understand the full effects of race (and other variables), the presentencing and precharging decisions that affect the prosecutor's construction of a case must be examined (cf. Klepper *et al.*, 1983).

The argument that prosecutorial discretion in homicide cases works to the detriment of black offenders and those with white victims does not depend on a presumption of conscious racial discrimination by prosecutors. Myers and Hagan (1979) have provided what is perhaps the best discussion of the process. Drawing on their study of 980 felony cases arising during the mid-1970s, they argue that a process they call "strong case typification" occurs, in which prosecutorial resources are allocated "so as to maximize the ratio of convictions (and sometimes harsh sentences) to manpower invested" (1979: 440). They find that the strength of evidence in criminal cases (or the opportunity to construct strong evidence) is based in part on extra-legal factors. As Myers and Hagan point out:

[R]egardless of the race of the defendant, prosecutors may consider white victims more credible than black victims or *their troubles more worthy of full prosecution*. Whatever the reason, prosecutors at this stage demonstrate greater concern with the race of the victim, rather than of the defendant (1979: 447; emphasis added).

Thus, the racial effects that we have observed are not unique to homicide cases. In an effort to be responsive to the community and perhaps protect perceived self-interests, prosecutors can use their discretion to allocate resources to the most publicly visible cases. Faced with heavy workloads and forced to make priority decisions (Carter, 1974), prosecutors may downgrade cases because they see no great returns from investing in the substantiation of possible aggravating factors. Conversely, once a case is in the public eye, upgrading may be seen by the

prosecutor as politically expedient, or as worth the extra effort necessary to justify the upgrade. In short, bureaucratic and political variables affect what in theory is a purely legal decision (Jacoby, 1979). If the murder of a white has a different effect on the bureaucratic and political situation than the murder of a black, as it would if murders with white victims are more publicized than murders with black victims or perceived as more threatening by politically powerful groups, racism will enter the legal system through the prosecutor's office even if the prosecutor never explicitly attends to race.¹⁸

This analysis indicates that whether a murder is described in a court record as involving an accompanying felony depends in part on the prosecutor's view of the appropriate penalty, which in some cases may be capricious or influenced by extra-legal considerations.¹⁹ Thus, even apparently concrete information may provide at best a vague standard for determining who from a group of murderers is appropriately sentenced to death.²⁰

The significance of the above findings is amplified when we realize that the selection of homicide defendants for death is the cumulative result of a series of decisions and evaluations. While at any one decision point race may have only a slight

¹⁸ Defendant characteristics are also important. Swigert and Farrell (1977) argue that criminal justice personnel have developed a stereotypical portrait of lower-class and black homicide defendants, whom they refer to as "normal primitives" (see also Sudnow, 1965; Boris, 1979; Maynard, 1982). Violence is seen as a routine and ordinary feature within this subculture, and thus membership in it is equated with dangerousness. The court record can be written to justify this tacit evaluation. As Rosett and Cressey (1976: 102) have argued, criminal justice personnel sometimes first decide how an offender should be treated and then construct a case to fit the desired punishment.

¹⁹ A good illustration of how the determination of accompanying felonious circumstances can be capricious is found in the case of John Spenkelink, who was executed in Florida in 1979. Spenkelink was found guilty of killing a hitchhiker who forced him to have homosexual relations with him, who boasted of killing a fellow inmate while in prison, and who had "relieved [Spenkelink] of his cash reserves" (*Spinkellink (sic) v. State*, 313 So. 2d 666 at 668, Fla. 1975). The victim was killed while Spenkelink was trying to recover the money that the victim had stolen from him. Surprisingly, even the trial judge acknowledged this. Thus, the judge interpreted Florida's statutory aggravating circumstance "pecuniary gain" in such a way as to include the recovery of money that the victim had stolen from the defendant. In the first aggravating circumstance used to justify the death sentence, the judge found this homicide "was committed for pecuniary gain, either for another person's money or to re-coup his own."

²⁰ Compare this situation with the problem that the U.S. Supreme Court had with regard to the "heinous and vile" circumstance contained in Georgia's death penalty statute. The Georgia statute asks if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," and the Court found this criterion unconstitutionally broad and vague as applied in the case of *Godfrey v. Georgia*.

biasing impact, the cumulative product of bias at each point may mean that ultimately the defendant's and victim's races are major determinants of who is selected for execution. Moreover, discriminatory or arbitrary processes and decisions early in the criminal justice process (e.g., in the investigating and building of a case or in the charging decision) will mask evidence of discrimination at later stages. In this way, the criminal justice system, without the venal behavior of anyone, effectively "covers its tracks."

In sum, the question whether the processing of homicide defendants yields racially biased outcomes cannot be answered simply by examining the relationship between race and sentencing controlling for legally relevant variables. The processual nature of the criminal justice system requires the examination of multiple decision points. The present analysis has focused on only one of the early decision points and has found that discretion, arbitrariness, and discrimination are present. The stage we examined, the decision on how to charge and present a case, has been assumed to be free from arbitrariness and bias by three justices of the U.S. Supreme Court whose votes were crucial in reinstating the death penalty. In dismissing this possibility in *Gregg v. Georgia*, Justices White, Burger, and Rehnquist stated:

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts (428 U.S. 153 at 226, 1976).

The analysis in this paper suggests that it is the justices' view that is untenable.²¹ It appears that not only are prosecutors sometimes motivated to seek a death sentence for reasons that reflect the racial configuration of the crime, but that they do so

²¹ Although the justices clearly do not mean to approve of the jury's imposing or recommending a death sentence for racial reasons, their language in the *Gregg* case implicitly accepts the possibility that race is an appropriate consideration in the decision to seek a death sentence. The justices state that prosecutors can be motivated in their charging decisions by "the likelihood that a jury would impose the death penalty if it convicts." This overlooks the possibility that the prosecutor might believe the racial configuration of the crime will make it easier to persuade a jury to impose or recommend a death sentence, and hence be an appropriate factor.

in a way that greatly reduces the possibilities for discovering evidence of discrimination and arbitrariness when only later stages of the judicial process are examined. Moreover, if prosecutorial actions are discriminatory in their consequences, the most objective and unbiased decisions by the judge and jury can create only an image of justice. They will not correct previously embedded biases. As Justice Marshall noted in *Godfrey v. Georgia* (446 U.S. 420 at 442, 1980), "the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system."

REFERENCES

- AGRESTI, Alan (1984) *Analysis of Ordinal Categorical Data*. New York: Wiley Interscience.
- BALDUS, David C., George WOODWORTH and Charles PULASKI (1983) "Discrimination in Georgia's Capital Charging and Sentencing System: A Preliminary Report." Unpublished report submitted by petitioner in *McCleskey v. Kemp*, 753 F. 2nd 877 (1985).
- BEDAU, Hugo Adam (1983) "Witness to a Persecution: The Death Penalty and the Dawson Five," 8 *Black Law Journal* 7.
- BENTELE, Ursula (1985) "The Death Penalty in Georgia: Still Arbitrary," 62 *Washington University Law Quarterly* 573.
- BERK, Richard (1983) "An Introduction to Sample Selection Bias in Sociological Data," 48 *American Sociological Review* 386.
- BLACK, Charles L., Jr. (1981) *Capital Punishment: The Inevitability of Caprice and Mistake*, 2nd Ed. New York: W.W. Norton and Co.
- BORIS, Steven Barnett (1979) "Stereotypes and Dispositions for Criminal Homicides," 17 *Criminology* 139.
- BOWERS, William J. (1983) "The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes," 74 *Journal of Criminal Law and Criminology* 1067.
- BOWERS, William J. and Glenn L. PIERCE (1980) "Arbitrariness and Discrimination under Post-Furman Capital Statutes," 26 *Crime and Delinquency* 563.
- BOWERS, William J., with Glenn L. PIERCE and John F. McDEVITT (1984) *Legal Homicide: Death as Punishment in America, 1864-1982*. Boston: Northeastern University Press.
- CARTER, Leif H. (1974) *The Limits of Order*. Lexington, MA: Lexington Books.
- DIKE, Sara T. (1982) *Capital Punishment in the United States*. Hackensack, NJ: National Council on Crime and Delinquency.
- EHRHARDT, Charles W. and L. Harold LEVINSON (1973) "Florida's Legislative Response to *Furman*: An Exercise in Futility?" 64 *Journal of Criminal Law and Criminology* 10.
- FOLEY, Linda A. and Richard S. POWELL (1982) "The Discretion of Prosecutors, Judges, and Juries in Capital Cases," 7 *Criminal Justice Review* 16.
- GARFINKEL, Harold (1949) "Research Note on Inter- and Intra-Racial Homicides," 27 *Social Forces* 369.
- GOODMAN, Leo (1979) "Simple Models for the Analysis of Association in Cross-Classifications Having Ordered Categories," 74 *Journal of the American Statistical Association* 537.

- GROSS, Samuel R. and Robert MAURO (1984) "Patterns of Death: An Analysis of Racial Disparities in Criminal Sentencing and Homicide Victimization," 37 *Stanford Law Review* 27.
- JACOBY, Joan E. (1979) "The Charging Policies of Prosecutors," in W.F. McDonald (ed.), *The Prosecutor*. Beverly Hills: Sage Publications.
- JACOBY, Joseph E. and Raymond PATERNOSTER (1982) "Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty," 73 *Journal of Criminal Law and Criminology* 379.
- JOHNSON, Elmer H. (1957) "Selective Factors in Capital Punishment," 36 *Social Forces* 165.
- KLEPPER, Steven, Daniel NAGIN and Luke-Jon TIERNEY (1983) "Discrimination in the Criminal Justice System: A Critical Appraisal of the Literature," in A. Blumstein, J. Cohen, S.E. Martin and M.H. Tonry (eds.), *Research on Sentencing: The Search for Reform*, Vol. 2. Washington, DC: National Academy Press.
- LaFREE, Gary D. (1980) "The Effects of Sexual Stratification by Race on Official Reactions to Rape," 45 *American Sociological Review* 842.
- LEGAL DEFENSE FUND (1985) "Death Row, U.S.A." (October 1). New York: NAACP Legal Defense and Educational Fund, Inc.
- MAYNARD, Douglas M. (1982) "Defendant Attributes in Plea Bargaining: Notes on the Modeling of Sentencing Decisions," 29 *Social Problems* 347.
- MULLIN, Courtney (1980) "The Jury System in Death Penalty Cases: A Symbolic Gesture," 43 *Law and Contemporary Problems* 137.
- MYERS, Martha A. and John HAGAN (1979) "Private and Public Trouble: Prosecutors and the Allocation of Court Resources," 26 *Social Problems* 439.
- PANNICK, David (1982) *Judicial Review of the Death Penalty*. London: Duckworth.
- PATERNOSTER, Raymond (1983) "Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina," 74 *Journal of Criminal Law and Criminology* 754.
- (1984) "Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination," 18 *Law & Society Review* 437.
- RADELET, Michael L. (1981) "Racial Characteristics and the Imposition of the Death Penalty," 46 *American Sociological Review* 918.
- RADELET, Michael L. and Margaret VANDIVER (1983) "The Florida Supreme Court and Death Penalty Appeals," 74 *Journal of Criminal Law and Criminology* 913.
- RIEDEL, Marc (1976) "Discrimination in the Imposition of the Death Penalty: A Comparison of Offenders Sentenced to Die Pre-Furman and Post-Furman," 49 *Temple Law Quarterly* 261.
- ROSETT, Arthur and Donald R. CRESSEY (1976) *Justice by Consent: Plea Bargains in the American Courthouse*. Philadelphia: J.B. Lippincott.
- SUDNOW, David (1965) "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," 12 *Social Problems* 255.
- SWIGERT, Victoria L. and Ronald A. FARRELL (1977) "Normal Homicides and the Law," 42 *American Sociological Review* 16.
- THOMSON, Randall J. and Matthew T. ZINGRAFF (1981) "Detecting Sentencing Disparity: Some Problems and Evidence," 86 *American Journal of Sociology* 869.
- U.S. DEPARTMENT OF JUSTICE (1982) *Capital Punishment, 1981*. Washington, DC: Department of Justice National Prisoner Statistics NCJ-78600.
- WOLFGANG, Marvin E., Arlene KELLY and Hans C. NOLDE (1962) "Comparisons of the Executed and Commuted among Admissions to Death Row," 53 *Journal of Criminal Law, Criminology, and Police Science* 301.
- WOLFGANG, Marvin E. and Marc RIEDEL (1973) "Race, Judicial Discretion, and the Death Penalty," 53 *Annals of the American Academy of Political and Social Science* 301.

CASES CITED

- Coker v. Georgia*, 433 U.S. 485 (1977).
Furman v. Georgia, 408 U.S. 238 (1972).
Godfrey v. Georgia, 446 U.S. 420 (1980).
Gregg v. Georgia, 428 U.S. 153 (1976).
McCleskey v. Kemp, 753 F.2d 877 (1985).
Spinkellink v. State, 313 So. 2d 666 (Fla. 1975).