Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina

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I. Introduction

During the past three decades, approximately two percent of all homicides committed in the United States with known offenders have resulted in a death sentence.¹ Before homicide cases reach that critical stage of criminal procedure, numerous consequential decisions must be rendered by judicial officials, including prosecuting and defense attorneys, judges, and jury. In practical terms, these decisions animate and shape the nature of capital prosecution and punishment in the United States.

In spite of several legal guidelines that have been instituted to safeguard the integrity of the U.S. criminal justice system, law enforcement remains today an imperfect manifestation of the hope and ideals of governmental power. The human decision makers who staff the judicial system, including prosecutors, judges, and juries are not infallible. Yet they exercise broad discretion within a porous network of rules when deciding which homicide cases merit the death penalty and which do not. Because the death penalty is exceptional and totally irrevocable as a mechanism of social control,² it is especially important in a democratic society that citizens and policy makers understand how prosecutors, judges, and juries exercise their discretion and to ensure that the choices they make are not racially motivated. Why this is important is best explained by Justice Anthony Kennedy in Edmonson v. Leesville Concrete Company (1991) when he stated that “racial bias mars the integrity of the judicial system and prevents the idea of

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² That death is qualitatively distinct from other forms of punishment was an argument first made by Justice Potter Stewart in his concurring opinion in Furman v. Georgia (1972). He further noted in that case that the death penalty is unique in “its absolute renunciation of all that is embodied in our concept of humanity.” The exceptionality argument was eventually made most fervently by Troy Gregg through his lawyer during oral argument in Gregg v. Georgia. The Court went on to reinstate the death penalty in that case after a four-year hiatus.
democratic government from becoming reality.”

Citizens will only bestow a high level of public esteem upon the criminal justice system if the stewards of that system are perceived to be fair rather than unfair in the decisions they make.

In the United States, the discretionary use of the death penalty creates many systemic dangers. Two of the most important are arbitrariness and discrimination. Both are salient and highly contested subject-matters in social science scholarship and in law. Do criminal prosecutors select the small number of death penalty cases from the large number of homicides solely on the basis of legally relevant criteria such as the severity of the offense? Or is the decision to “go for death” linked in an important way to legally intolerable criteria such as race or gender? These are important questions and they form the centerpiece of this paper. My central objective is to contextualize the prosecutor’s decision to seek the death penalty by empirically examining the potential importance of race, gender, and legally relevant factors. I conduct and

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3 500 U.S. 614 (1991)
report an empirical analysis that relies on new homicide prosecution data from Durham County, North Carolina from 2003 to 2007. Focusing on this time period is appropriate because it coincides with a general decline in the use of capital punishment in North Carolina and, indeed, nationwide.

In sections II and III of the paper, I examine respectively the problem of untrammeled prosecutorial discretion and why it is important that this analysis focuses on Durham County, North Carolina. Because this is an empirical study, I discuss in section IV the dependent variable (the issue I seek to explain) and in section V the independent variables (or explanatory factors). Section VI provides a focused description of the Durham County capital prosecution data. Section VII examines the results and their implications. Finally, sections VI and VII discuss respectively the limitations and conclusions of the study.

II. Addressing the Problem of Unfettered Prosecutorial Discretion

In the American scheme of justice, state prosecutors exercise unfettered power and discretion to decide which felony cases to prosecute for capital punishment and what prosecutorial strategy to adopt. Despite this widespread prosecutorial discretion and the fact that prosecutors operate within a relatively stressful legal environment, the decisions they make are still supposed to follow neoclassical legal theory. According to this theory, the process for determining criminal punishment should be based solely upon legal rules established and sanctioned by state government to communicate the priorities of the political community. But

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because these rules are in many ways imprecise, questionable prosecutorial decisions are likely. Indeed they do occur regularly and, unfortunately, often because of the need for prosecutors to enhance their own professional careers. Importantly, when prosecutors do exercise poor judgment, they are rarely punished politically through electoral defeat.

During the 1970s and 1980s, the United States Supreme Court grappled with the issue of discretionary decision making in capital cases and established contemporary guidelines known as “guided discretion” through its 1972 landmark decision, *Furman v. Georgia*. Guided discretion introduced individualized consideration into the process of determining capital punishment. The purpose of guided discretion was to bring about uniformity and eliminate bias in the administration of capital punishment. Through *Furman*, the Court invalidated every death penalty statute in the United States. Although a majority of the justices agreed that the death penalty was being applied arbitrarily in Georgia based on race, they were bitterly split on their reasons. Only Justices Brennan and Marshall considered the death penalty unconstitutional *per se* and all five members of the *Furman* majority wrote separate opinions in what remains the longest

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7 At the district court level, some courts have found prosecutors’ use of religious appeals in pursuing criminal prosecution to be improper because it suggests prosecutors are relying on laws other than the laws of the state (*Commonwealth v. Daniels*, 644 A.2d 1175 (Pa. 1994)).


9 *Caldwell v. Mississippi* (472 U.S.328) provides evidence that prosecutors do make mistakes in interpreting state law. In this case the Supreme Court reversed a death sentence because the prosecutor overstated the extent and scope of appellate review of the jury’s death sentencing decision under Mississippi law. This error has the effect of diminishing the jury’s sense of responsibility for its death penalty decision. See Justice Marshall’s lead opinion, at 333. At the district court level, some courts have found prosecutors’ use of religious appeals in pursuing criminal prosecution to be improper because it suggests prosecutors are relying on laws other than the laws of the state (*Commonwealth v. Daniels*, 644 A.2d 1175 (Pa. 1994)).

10 Incumbency protection is a common feature of all levels of American electoral politics. In addition incumbent prosecutors often face weaker opponents, making defeat of these incumbents unlikely and their power largely unchecked. For more on this, see Fred B. Burnside. 1999. “Dying to Get Elected: A Challenge to the Jury Override” *University of Wisconsin Law Review*, 5:1015-1049
opinion in Supreme Court history. The most tenuous support for the decision came from justices
White and Stewart.\textsuperscript{12} Both expressed the view that the death penalty as \textit{practiced} during the
early 1970s was unconstitutional because of the capricious manner capital defendants were
selected by state prosecutors.\textsuperscript{13} Justice White wrote that the death penalty “is exacted with great
infrequency even for the most atrocious crimes and that there is no meaningful basis for
distinguishing the few cases in which it is imposed from the many cases in which it is not.”\textsuperscript{14}
Justice Stewart concurred, noting that this arbitrary meting out of death sentences constituted
cruel and unusual punishment under the principles of the \textit{8} th Amendment. Stewart argued the
death penalty:

\begin{quote}
  Is cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all
  the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in
  \textit{Furman} were] among a capriciously selected random handful upon whom the sentence of death has
  in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction
  of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so
  freakishly imposed.\textsuperscript{15}
\end{quote}

Chief Justice Burger’s opinion, dissenting from the majority and joined by justices
Blackmun, Powell, and Rehnquist, emphasized the hope that state legislatures will in the future
draft capital punishment statutes to guide the decisions of discretionary actors and prevent the
kind of “freakish” application of capital punishment struck down in \textit{Furman}.\textsuperscript{16} In three 1976

\begin{flushright}
13 408 US 238 (1972)
14 Ibid.
15 Ibid.
16 Ibid.
cases, *Gregg v. Georgia*,\(^{17}\) *Jurek v. Texas*\(^ {18}\) and *Proffitt v. Florida*,\(^ {19}\) the Supreme Court upheld new death penalty sentencing schemes drafted by states in response to *Furman*. The new sentencing schemes required bifurcated capital trials, including a separate sentencing phase in which juries were required to make a post-conviction determination of the presence of at least one statutory aggravating factor relating to the homicide. Unless a jury finds at least one statutory aggravating factor that increases the severity of the murder, the state cannot impose the death penalty. These factors typically include (but are usually not limited to) murders incident to additional felonies, such as armed robbery, burglary, killing of multiple victims, or defendant endangering other people besides the victim.

The Court expected these statutes to eliminate arbitrariness by directing the attention of prosecutors and juries to specified characteristics of the offense.\(^ {20}\) The majority in *Gregg* held that, “[t]he concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”\(^ {21}\) The Court believed the new standards were significantly more structured than the pre-*Furman* sentencing schemes. Under the new “structured” sentencing guidelines pronounced in *Gregg*, the Court opined that, “[t]he jury's discretion is channeled. No jury can wantonly and freakishly impose the death sentence; it is

\(^{17}\) 428 US 153 (1976)

\(^{18}\) 428 US 262 (1976)

\(^{19}\) 428 US 242 (1976)

\(^{20}\) 428 US 123 (1976)

\(^{21}\) Ibid.
always circumscribed by the legislative guidelines.” 22 The Supreme Court’s acceptance of Georgia’s new guidelines in Gregg led other states to adopt death-sentencing schemes similar to Georgia’s. Nearly all of the 38 states 23 currently permitting capital punishment employ a bifurcated sentencing process modeled after Georgia. 24

Despite the safeguards established by the Court in Gregg, empirical research suggests that sharp racial disparities persist in capital prosecution and sentencing. Many post-Gregg studies indicate profoundly different sentencing rates for different racial combination of victims and defendants. 25 Eleven years after the Gregg decision, the use of statistical evidence demonstrating discriminatory impact in capital sentencing came to the Supreme Court in McCleskey v. Kemp. 26 McCleskey, a black Georgia man convicted of killing a white police officer, presented a comprehensive study of Georgia’s post-Gregg capital punishment system conducted by David Baldus and his colleagues. 27 The Baldus study, after controlling for dozens of potentially significant homicide conditions, determined that the odds of receiving a death sentence were 4.3 times greater in white-victim cases than in black-victim cases. 28

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22 Ibid.

23 See Appendix II for a listing of states and their death row populations.


26 481 US 279 (1987)


28 Ibid.
Despite powerful statistical documentation of racially disparate sentencing patterns, the Court in its 1987 *McCleskey* decision ruled that direct evidence of purposeful discrimination was necessary to overturn death-sentencing schemes. The Court affirmed that the presence of discriminatory intent in a defendant’s case was an absolute requirement for showing racial discrimination. Writing for the 5-4 majority, Justice Lewis Powell noted “Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions. At most, they may show only a likelihood.”\(^{29}\) Four justices dissented from the majority’s discriminatory intent requirement and insisted that the demonstrated patterns of racial disparity alone were sufficient to invalidate the sentencing statute. Justice Brennan contended,

> The studies demonstrate a strong probability that McCleskey’s sentencing jury was influenced by the fact that he is black and his victim was white, and that this same outrage would not have been generated if he had killed a member of his own race. This sort of disparity is constitutionally intolerable. It flagrantly violates the Court’s prior insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all.\(^{30}\)

Despite these objections, the Court’s five-member majority mandated that defendants prove specific discrimination in their own cases, rendering impotent virtually all statistical challenges to death penalty statutes based on racial disparities.\(^{31}\) Through *McCleskey*, the Court affirmed its prior position announced in *Gregg* that structured sentencing schemes sufficiently limit the arbitrary and discriminatory imposition of capital punishment and comply with *Furman v. Georgia*.

While the Court’s death penalty decisions have focused mostly on arbitrariness in sentencing, there is an implicit assumption that the legal reforms or innovations instituted by the

\(^{29}\) 481 US 279 (1987)

\(^{30}\) Ibid.

\(^{31}\) Despite its reticence to see the value of statistical evidence in disposing of death penalty cases, the Supreme Court has routinely permitted the use of statistical evidence in employment discrimination cases and others brought under
Court, especially through *Gregg*, will be reflected not only in jury decision making but also in the prosecutor’s selection of cases for the death penalty. Indeed the Gregg decision envisioned that prosecutors seeking the death penalty would emphasize classical legal factors, that is, only those state sanctioned aggravating circumstances that applied to the murder at issue rather than be influenced by legally irrelevant considerations such as race or sex. I address in this paper whether this vision expressed in Gregg has obtained in Durham County by analyzing the extent to which extra-legal factors such as race and gender exert influence on the choices prosecutors make about who should face a capital trial and who should not.

**III. Why Study Durham County, North Carolina?**

This study focuses on Durham County for several reasons. First, the County is situated at the heart of the Research Triangle Area of North Carolina, and is one of the largest and politically most progressive counties in North Carolina and throughout the South. Theoretically, this should make it difficult to find evidence of racial disparity and discrimination in the prosecution of capital cases. Second, the County is similar to most other North Carolina counties because it is neither among the most aggressive nor the least aggressive in pursuing the death penalty since reinstatement of capital punishment in 1976. Based upon a relatively recent study of capital prosecutions in North Carolina, Durham County ranks slightly above the median in death penalty prosecutions among North Carolina districts.32 Thirdly, the County population is 38 percent black33 in a region that is predominantly white, a feature that is shared by many other urban counties in the state. Finally, Durham County is similar to other death penalty jurisdictions in that

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it employs a bifurcated judicial process for determining the death penalty as mandated by the Supreme Court in *Gregg v. Georgia.* 34 Therefore, while I cannot claim that Durham County is representative of other counties within North Carolina or other states, I do claim that Durham County is not an outlier and that it exhibits political and legal characteristics that have been found in most other death penalty jurisdictions in North Carolina and nationwide. For example, prosecutors in Durham County are popularly elected and thus must face constituency pressure as in most other death penalty jurisdictions statewide. For these reasons, it is reasonably to conclude that while the analysis and findings herein reported are most germane to Durham County, the conclusions reached are useful in informing death penalty debates throughout North Carolina and indeed nationwide.

**IV. Dependent Variable: The Decision to Seek the Death Penalty**

The empirical analysis herein reported deals primarily with the causal factors linking the selection of death penalty cases by Durham County prosecutors. Therefore, the dependent variable is a binary outcome: whether the prosecutor seeks the death penalty or not. Although the Supreme Court in *Gregg v. Georgia* asserted that some racial difference in criminal justice decision-making is inevitable, prosecutors as agents of the state are expected to apply state laws fairly, uniformly, and dispassionately. A number of scholars have criticized prosecutors claiming that their decisional choices are biased on the basis of race and other extra-legal considerations. 35

34 428 U.S. 153 (1976)
Quite often these claims rest largely on untested observational evidence. Those who make such claims operate under the assumption that unbridled prosecutorial discretion creates the potential for racial bias in capital case selection. For example, Harvard Law professor, Randall Kennedy, asserts that prosecutorial discretion is “the most significant factor that affects the far-flung and subtle racial selectivity that infects the death penalty system.”36 In a 1998 study, Jeffrey Pokorak concludes that, “The dangers of discrimination are inherent in the system’s unfettered prosecutorial discretion.”37 If these claims are true, the virtually unlimited discretion bestowed upon district attorneys in Durham County and elsewhere, permitting them to select cases for capital prosecution, does raise the potential for extra-legal bias, especially since the prosecutor enjoys a tremendous informational advantage where only the prosecutor knows the true strength of her case and the defendant cannot shop around but must deal with the prosecutor. Clearly, the claims made by critics of prosecutors would gain more credence if backed up by strong empirical justification. I shall attempt here to provide such justification using data from Durham County, North Carolina and employing rigorous statistical methodology.

V. Independent Variables: Factors Affecting the Decision to Seek Death Penalty in Durham County

My selection of independent variables is of course guided by theoretical considerations expressed in the empirical literature. These considerations suggest that extra-legal factors such as race and gender are realistic and potentially important independent determinants linking case


facts with a prosecutorial decision to seek the death penalty. On the issue of race, one recurrent and much debated finding in the death penalty literature is that defendants of whatever race accused of murdering white victims are far more likely to receive death sentences than defendants of whatever race who are accused of murdering blacks.\(^\text{38}\) This tends to suggest that the black victims pay a race penalty and that the justice system places a higher premium on the lives of white victims than the lives of black victims. But findings at the stage where the prosecutor actually chooses whether to “go for death” remain somewhat mixed. Some analyses have reported the prevalence of racial discrimination at the charging decision stage\(^\text{39}\) while others find strong evidence of discrimination appearing elsewhere, primarily at the jury decision stage.\(^\text{40}\)

In 1990, the U.S. General Accounting Office added further assurance that race is important when it released an authoritative report analyzing 28 death penalty studies. The GAO’s report found that in 82% of the studies, the race of the victim influenced the likelihood of being convicted of capital murder.\(^\text{41}\) The agency concluded that this finding “was remarkably consistent across data sets, states, data collection methods, and analytic techniques.\(^\text{42}\)

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\(^{41}\) US GAO Report S6889-90.

\(^{42}\) Ibid.
Similarly, research suggests that gender also affects the imposition of capital punishment. Women are less likely to face the death penalty than men, and female-victim cases are more likely to result in death sentences than male-victim cases. Finally, a large number of studies tout the importance of legal factors in conditioning criminal prosecution and punishment. In the following sections, we explain the theoretical importance of our three primary independent variables: race, gender, and law.

A. Race

1. The Literature on Racial Influences

The Baldus study of Georgia’s capital punishment system is widely viewed as one of the most comprehensive studies conducted on racial effects in death penalty prosecutions and sentencing within the last 30 years. The study’s findings were presented to the United States Supreme Court in *McCleskey v. Kemp*. The central finding of the Baldus study is simple: vast racial inequality exists in Georgia’s capital punishment system and the primary cause of this inequality is racial bias in the death charging decisions of Georgia prosecutors. Baldus and his colleagues had substantial resources to conduct their study and so were able to control for “every relevant variable other than race, which is why the study is regarded as an exemplary piece of

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45 481 US 279 (1987)
social science research.” The study accounted for 230 potentially relevant non-racial variables for all homicide cases charged in Georgia between 1973 and 1979. The data collected from these cases suggested a staggering disparity in death sentencing based on race.

The centerpiece of the findings of the Baldus study involved a race-of-the-victim multiplier, otherwise known as the odds ratio, which Baldus and his colleagues generated by estimating a 39-variables model with a high explanatory strength. This model included numerous potential aggravating and mitigating factors, the nature and location of the crime, numerous victim and defendant characteristics and relevant legal considerations.

The odds multiplier for race of the victim demonstrated that defendants accused of killing a white victim have a 4.3 times greater odds of receiving the death penalty than those accused of killing a black victim. Baldus et al. declared “the race of the victim emerged as the consistent and powerful factor.” They also suggested that racial disparities illustrated by the study resulted from racially disparate prosecutorial discretion. That is, defendants who kill white victims were more likely to receive the death penalty than were other defendants, largely because prosecutors were more likely to seek the death penalty in white-victim cases and that “Race is particularly important in the charging decisions made by prosecutors following a jury conviction for murder.”

Baldus et al. noted the following prosecutorial death-seeking rates for murders with at least one aggravating factor:

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49 Ibid.
50 Ibid.
<table>
<thead>
<tr>
<th>Racial Configuration</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black defendant/ White victim</td>
<td>70%</td>
</tr>
<tr>
<td>White defendant/ White victim</td>
<td>32%</td>
</tr>
<tr>
<td>Black defendant/ Black victim</td>
<td>15%</td>
</tr>
<tr>
<td>White defendant/ Black victim</td>
<td>19%</td>
</tr>
</tbody>
</table>

Baldus et al. controlled for many independent factors relating to the aggravation of each homicide and calculated an odds multiplier demonstrating that the odds were 3.1 times higher for prosecutors to seek the death penalty in white-victim cases than in black-victim cases (p < .01). These statistics demonstrate that prosecutors are far more likely to seek the death penalty for black defendants accused of killing white victims than for any other racial combination of murder victims and defendants. The numbers also show that prosecutors seriously discounted black-on-black crime. Prosecutors were nearly 5 times more likely to seek the death penalty against black defendants accused of killing whites than against black defendants accused of killing blacks. Thus prosecutors engaged in a phenomenon Baldus et al. call “victim discounting,” meaning that prosecutors discount the lives of black victims while unwittingly providing sentencing leniency for black defendants.  

Finally, the Baldus study concluded that racially disparate treatment was most pervasive in the middle range of homicide cases. Cases wedged between the most aggravated and least aggravated homicides showed the most dramatic evidence of racial disparities in death-charging.

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51 Ibid.
rates. This middle range of cases allows prosecutors the greatest discretion to seek or not seek the death penalty, and prosecutors utilized this unfettered discretion in a racially disparate manner.

Radelet and Pierce’s notable examination of Florida’s capital punishment system involving over 10,000 homicide cases from 1976-1987 also supports conclusions reached by the United States General Accounting Office. The study evaluated the potential effects of eight major factors that influenced whether or not a defendant received the death penalty in Florida: the race of the victim, race of the defendant, whether the crime was a felony or non-felony murder, whether the victim was a stranger or non-stranger, whether the crime involved single or multiple homicides, the gender of the victim, the type of weapon used in the crime (gun, knife, or other instrument), and the location of the crime (rural or urban).

The predictor variables were combined into one statistical model with the dependent variable consisting of a dichotomous outcome: whether a homicide resulted in a death sentence being imposed or not. Using logistic regression method, Radelet and Pierce calculated an odds ratio showing the effect of all statistically significant variables. Controlling for all other factors, the odds of a death sentence were 3.42 times higher when the victim was white than when the victim was black. Once again, the victim’s race was a stronger predictor of receiving the death sentence than the defendant’s relationship to the victim or whether the crime involved multiple murders.

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55 Ibid.

56 Ibid.
In a second study of Florida’s capital punishment system, this time focusing on prosecutors, Radelet and Pierce revealed racially disparate prosecutorial decision-making. The study examined whether the defendant’s race and the victim’s race affected how prosecutors developed evidence in homicide cases. Their dataset consisted of 1,017 Florida homicide cases from the 1970s. Radelet and Pierce used data from two sources: (1) the FBI’s Supplemental Homicide Reports (SHR), and (2) court records. Both data sources classified each homicide as a felony, possible felony, or non-felony murder. Radelet and Pierce then compared how the police report and the court record classified each case.

The comparisons revealed that the police reports and court records were consistently classified in 82.9% of the cases. However, 82 cases were downgraded from a felony in the police report to a non-felony in the court record and 92 cases were upgraded from the police report to the court record. What is important is that cases in which blacks were charged with killing whites were the most likely to be upgraded and the least likely to be downgraded. Radelet and Pierce found that the defendant’s race and victim’s race were both significant predictors of upgrading and downgrading by prosecutors. Furthermore, the study discovered that upgraded cases in which plea-bargaining was prohibited were twice as likely to result in a death sentence compared to cases that were consistently classified as felony murder. Thus, Radelet and Pierce concluded that upgrading was a political tactic used by Florida prosecutors to


58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.
strengthen a decision to seek a death sentence, and that the tactic was used overwhelmingly in
cases involving black defendants and white victims. Although Radelet and Pierce’s findings are
suggestive of racial disparities in upgraded and downgraded cases, the analysis does not explore
whether racial disparities taint the overall selection of death penalty cases.

Samuel Gross and Robert Mauro, who conducted an extensive study of the application of the
death penalty in Georgia, Florida and Illinois in the period immediately following the *Gregg*
decision, found results similar to Radelet and Pierce’s 11-year Florida study. Gross and Mauro
analyzed data from all homicides reported to the FBI in these states between January 1, 1976 and
December 31, 1980.\(^62\) The study analyzed the effect of the same eight variables as Radelet and
Pierce on the likelihood of a defendant receiving the death sentence. In addition, Gross and
Mauro compiled an “aggravation index,” ranging from 0-3, which measured the overall
aggravating circumstances of the crime. The index was calculated by adding one point each for
three characteristics - if a stranger committed the crime, if the crime involved multiple victims
and if the homicide was a felony murder\(^63\) (i.e. a murder committed during the commission of
another felony).

Like Radelet and Pierce, Gross and Mauro analyzed their data using logistic regression and
calculated an odds multiplier for each variable, controlling for all other factors in the study. In
all three states, the study determined that race of the victim had a significant impact on the odds
of a defendant receiving the death penalty. In Georgia, the odds of defendants receiving the

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\(^{62}\) Gross and Mauro, 1984.

\(^{63}\) Ibid.
death penalty were 7.2 greater in white-victim cases than black-victim cases.\textsuperscript{64} Similarly, the study found a race-of-the-victim odds ratio of 4.8 in Florida and 4.0 in Illinois.\textsuperscript{65} All three results were highly statistically significant at the .001 level or better, indicating that there is less than one in 1,000 chances that the relationship between the race of the victim and the probability of receiving the death penalty resulted by chance. Gross and Mauro conclude their study by stating “The major factual finding of this study is simple: There has been racial discrimination in the imposition of the death penalty in the states that we examined. The discrimination that we found is based on the race of the victim and it is a remarkably stable and consistent phenomenon. Capital sentencing disparities by race of victim were found in each of the states, despite their diversity.”\textsuperscript{66}

Despite these suggestive findings, neither the Gross and Mauro study nor Radelet and Pierce analysis employed multivariate regression techniques to link prosecutorial charging decisions to disparate death sentencing patterns. As a result, neither study commented on whether the identified racial disparities emanated from charging decisions or from other stages of the criminal justice process. Disparate sentencing could feasibly result from unequal jury decision-making or other processes besides the charging decisions of district prosecutors.

Raymond Paternoster determined that disparities in South Carolina’s death penalty system during this time period emanated from prosecutorial charging decisions. Paternoster conducted a comprehensive analysis of all charging decisions for homicides in the state from 1977-1981. Like the Baldus study, Paternoster’s analysis is exemplary because it combines Supplemental

\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
Homicide Report data with original police reports and subsequent investigative reports on each homicide, allowing Paternoster to control for all legal death-charging considerations as well as numerous potentially relevant non-legal factors. After controlling for these myriad considerations, Paternoster found that the odds of being charged with capital murder in South Carolina were 9.6 times greater in white-victim cases than in black-victim cases.\footnote{Paternoster 1983}

Studies of sentencing schemes in various states confirm that racial bias in capital sentencing is a widespread phenomenon. In addition to states previously mentioned, a \textit{Dallas Times Herald} report using data from the early 1980s found that defendants convicted of killing white victims in Maryland were eight times more likely to face the death penalty than killers of black victims.\footnote{“Killers of Blacks Escape Death Penalty.” \textit{Dallas Times Herald}. Nov. 17, 1985.}

In Texas, the paper reported that killers of whites were over three times more likely to receive death sentences than killers of blacks.\footnote{Ibid.} In Virginia, analysis by John Blume and colleagues from 1977-1999 revealed that only 0.36\% of black-on-black murders resulted in death sentences while nearly 6.5\% of cases involving black defendants and white victims led to the death penalty.\footnote{Blume, Eisenberg and Wells, 2004. “Explaining Death Row’s Population and Racial Composition” \textit{Journal of Empirical Legal Studies} 1:164-207.}

black defendants accused of killing whites fare significantly worse than any other group of defendants. Some of these studies, like the Maryland study cited above, have also suggested that unequal prosecutorial charging decisions are likely the root cause of these disparate outcomes.

Despite the studies of prosecutors by Paternoster and by Gross and Mauro, very few empirical studies have sought to scrutinize the potential for racial disparity specifically at the prosecutorial charging stage of the criminal justice process. Indeed, the most comprehensive single-state multivariate regression analysis of prosecutorial decision-making, Raymond Paternoster’s study of South Carolina, does not contain any data from the past 20 years. While capital punishment is used historically as an instrument of social control over blacks, there is reason to believe that American society is more progressive (though not free of racism) than in times past. Through an examination of Durham County, one of the largest in North Carolina, we seek in this study to determine whether race is still a meaningful factor in contemporary capital charging decisions in North Carolina. Based upon the foregoing discussion showing that race matters in death penalty decision making, I formulate the following two hypotheses predicting that race is still an informal guiding principle in prosecutorial decision making in contemporary times.

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74 See Baldus et al. 1990 (showing that Georgia Prosecutors sought the death penalty in 58% of cases involving a black defendant and white victim, 38% of cases involving a white defendant and white victim, 21% of white-on-black cases and 15% of black defendant/black victim cases; Gross and Mauro 1991 (stating that, in Florida, white victim cases are 3.42 times more likely to result in death sentences than black victim cases; Blume et al 2004 (stating that 6.5% of black on white murders in Virginia led to the death penalty, a far higher proportion than any other racial combination of victims and defendants).

**H1:** Prosecutors are more likely to seek the death penalty in homicides involving white victims than in homicides involving black victims.

**H2:** Prosecutors are more likely to seek the death penalty when a black defendant kills a white victim than in any other racial combination of defendants and victims.

In light of these hypotheses, it is curious the mechanism through which race influences prosecutorial decision-making. In the next section, I examine this important issue.77

2. **Process By which Race Influences Prosecutorial Choices**

Across the United States, the vast majority of prosecutors are white. In Durham County, there are 6 district solicitors who make discretionary charging decisions during 2003-2007, which is the period of this study. All are white, except one (Ms. Tracy Cline). Many would think the prosecutor’s race is of no consequence in the charging decision and may ask: But so what? Indeed race should not matter. But the simple answer to the question is that for many of our citizens, race is an important symbol of political power. Hence, the first mechanism through which race influences prosecutorial decisions is in *the symbolic importance of race*. White prosecutors may have internalize the cultural typecasting of African Americans as inferior and thus may come to perceive African American defendants as more violent than white defendants and as potentially dangerous to society.78 Similarly, a crime may seem more horrible to white

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77 This section relies on my previous work, See Songer, Michael J. and Isaac Unah. 2006. “The Effects of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina” *South Carolina Law Review* 58: (discussing the mechanisms of racial influence in prosecutors’ decisions).

prosecutors if the victim is white than if the victim is not.\textsuperscript{79} An array of psychological studies on in-group bias demonstrates that people identify and empathize more closely with members of their own racial group.\textsuperscript{80} Therefore, Durham County’s white prosecutors may show greater empathy towards white homicide victims than black homicide victims by “going for death” more frequently in white-victim cases than in black victim cases.

But no direct prosecutorial racism is necessary for charging decisions to disparately affect African-Americans and this leads us to the second mechanism by which race affects prosecutorial decision making: \textit{Asymmetric effort in gathering incriminating evidence about the crime based on race}. Like all trial attorneys, prosecutors strive to win as many cases as possible in an environment of scarce resources. Prosecutors have an incentive to seek the death penalty in cases that show promise for a successful prosecution. This selectivity logically results in prosecutors seeking the death penalty in cases where they have access to or the willingness to gather abundant information about, the nature, circumstances, and perpetrator of a crime.

In an empirical study published in the September 2000 issue of \textit{Southern California Law Review}, Richard Brooks outlined the differentiated police activity in predominately minority and lower class neighborhoods compared to mostly white and upper class areas.\textsuperscript{81} Brooks demonstrates that crimes in white areas receive far more police attention and resources, usually including extensive interviews with multiple witnesses, lab testing of material evidence and other

\textsuperscript{79} Ibid.


forms of investigation.\textsuperscript{82} Murders in predominantly black neighborhoods, however, often resulted in limited or shoddy investigations, sometimes amounting to nothing beyond filing a missing persons report.\textsuperscript{83} Because more information is usually gathered about the crime and its aggravating circumstances in white-victim cases, prosecutors may be more likely to seek the death penalty in these cases than in black-victim cases.

The third and final mechanism is \textit{impunity from judicial review}. Even if prosecutors submit that the death-charging decisions they make are racially disproportionate, the decisions still enjoy virtual impunity because they are rarely overturned on appeal. In any particular case, it is easy for prosecutors to articulate nonracial justifications for seeking the death penalty.\textsuperscript{84} In many jurisdictions the courts of appeals have repeatedly deferred to the judgment of prosecutors and have refused to overturn death-charging decisions that are claim to be based on race.\textsuperscript{85} Prosecutors who intentionally or unintentionally seek the death penalty in a disproportionate number of white-victim cases thus know that their decisions have a good chance of being upheld on appeal. For prosecutors then the risks associated with such discrimination seem minimal.

\section*{B. Gender}

The gender gap is a mainstay of American politics and apparently in the criminal justice system as well. During every presidential election cycle since the 1980 campaign between

\begin{flushright}
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
\textsuperscript{85} Herman, Susan H. “Overcoming race-neutral explanations has not been difficult.” \textit{Tulane Law Review.} Vol. 67 p.1807-1830 (1993).
\end{flushright}
Ronald Reagan and Jimmy Carter, American citizens have been treated to a cocktail of media and public discussions about the gender gap in voting. In the electoral realm, the gender-gap refers to differences between men and women in candidate preference based upon candidates’ issue positions. But the gender-gap is not relegated to presidential election politics alone. Indeed, several studies suggest that a gender gap also exists in the U.S. criminal justice system, especially in the prosecution of cases and in the application of the death penalty. Empirical evidence suggests widespread reluctance by prosecutors, judges, and juries to prosecute and punish women offenders. One explanation lies in the types of homicides women commit. Most homicides committed by women are those involving close relations such as family members, friends, and acquaintances. Such crimes are often thought to have lower elements of aggravation and so are less likely to precipitate a capital prosecution. Another explanation pertains to the structure of gender roles in society. But by and large, the gender gap in capital prosecution and punishment exist because men commit far more crimes (especially violent crimes) than women.

Law professor and former Dean, Victor Streib, compiles and publishes a quarterly statistical overview of women and the death penalty. From this overview, we get an insightful look at the treatment of gender in the criminal justice system. Streib’s January 2002 report reveals that from 1973 to 2001, women committed 12% of all homicides in the United States. However, female defendants account for only 1.9% of death penalty verdicts at the trial level.


during this period and currently constitute only 1.4% of all death row inmates.\textsuperscript{89} Throughout the Twentieth Century, only 0.6% of all executions were of women (45/8,010).\textsuperscript{90} Streib’s statistics demonstrate that female homicide defendants are less likely to face the death penalty than male defendants, but the data do not address the relative severity of crimes committed by men and women. Furthermore, Streib’s analysis is not based on the type of rigorous statistical methodology that has the capacity of demonstrating whether these disparities result from different frequencies of aggravated murders among men and women. But Streib’s data do illuminate trends of gender disparity in capital sentencing that cannot be ignored.

Prosecutors’ broad discretion to choose death penalty cases also facilitates the potential influence of gender in case selection. At the end of 1997, only 1.5% of America’s death row inmates were women even though women commit nearly 12% of the nation’s homicides.\textsuperscript{91} Clearly the criminal justice system is reluctant to impose the death penalty on women offenders. A study of male and female judges in New York and Massachusetts found that women generally receive lighter sentences than men who commit similarly aggravated crimes.\textsuperscript{92} A broader study of six states, published in 1989, demonstrates that women usually receive disproportionately lighter sentences than male defendants for similar offenses.\textsuperscript{93} The disparity in punishments for male and female defendants may also result from different prosecutorial interpretations of the premeditation of any murder, the likelihood of rehabilitation and future dangerousness. Crime and gender expert, Victor Streib, contends that women are

\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
\textsuperscript{92} Shapiro 2000.
more likely than men to be seen as viable candidates for rehabilitation. In addition, gendered cultural stereotypes may encourage prosecutors to doubt whether female defendants are capable of the cold-blooded calculations necessary to commit intentional murders. As a result of these culturally engendered perceptions, it is expected that prosecutors will disproportionately seek the death penalty against male defendants compared to female defendants in homicide cases.

**H3: Prosecutors are more likely to seek the death penalty against male defendants than female defendants.**

Victim’s gender may influence charging decisions in a similar manner. Due to cultural stereotypes of female weakness, prosecutors may perceive female murder victims to be more vulnerable than males killed in a similar manner. Thus, prosecutors may perceive female-victim crimes to be more severe. Even among cases with similar number of offense charges or legal aggravation, prosecutors may seek the death penalty more frequently in female-victim cases than in male-victim cases. Based upon the foregoing discussion, it is hypothesized that gender plays a substantial role in the charging decisions of Durham County prosecutors.

**H4: Female victim-cases are more likely to result in a death penalty prosecution than male-victim cases.**

C. Legally-Relevant Factors

Each year, the district attorneys in Durham County must determine the course of several tens of homicide prosecutions. Due to limited resources, prosecutors must be judicious in selecting cases, usually an even smaller number, in which to seek the death penalty. To help prosecutors

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93 Ibid
95 Ibid
select capital cases and avoid arbitrary decision-making in accordance with *Gregg v. Georgia*,\(^9\) the North Carolina General Assembly requires the state to seek the death penalty only in cases of willful homicide in conjunction with at least one of many statutory aggravating circumstances such as the killing of a peace officer or the killing of, or causing a risk of death to, multiple victims.

In North Carolina, the aggravating circumstances requirement ensures that capital punishment is reserved for the most heinous murders, irrespective of the race or gender of the victim or defendant. Thus prosecutors should choose death penalty cases by identifying aggravating factors incident to a homicide. Furthermore, in North Carolina, a homicide is considered aggravated in the number of tangent crimes accompanying the homicide itself. Thus a charge of premeditated murder plus one charge of robbery with a deadly weapon and one charge of rape are considered more aggravated than a charge of premeditated murder that is accompanied by only one charge of robbery with a deadly weapon.

However, prosecutors must still choose only a small number of these “death eligible” cases to seek the death penalty. By death eligible case, I mean a premeditated homicide with at least one statutory aggravating circumstance in which the accused is at least 17 years of age. During 2002-2007, prosecutors in Durham County sought the death penalty in 13.4 percent of all death eligible homicides. In doing so, prosecutors must define statutory factors to determine whether those factors apply in each particular case. Several aggravating circumstances, such as whether the defendant “knowingly created a great risk to more than one person” or whether the crime involved another felony such as physical torture may be reasonably interpreted in multiple ways.

\(^9\) 428 US 153 (1976)
ways for the same criminal act. This subjectivity has consequences for the decisions of Durham County prosecutors regarding the death penalty. Such discretion can invoke considerations other than the seriousness of the crime. This discussion leads to the following hypotheses regarding the role of legal factors in homicide prosecutions:

**H5: Durham County prosecutors are more likely to seek the death penalty in homicide cases that are accompanied by a higher number of charges.**

**H6: Durham County prosecutors are more likely to seek the death penalty in cases involving multiple murder victims.**

**H7: Durham County prosecutors are more likely to seek the death penalty in cases with a higher total number of individual victims.**

To summarize, it is my contention in this paper that prosecutorial discretion presents many opportunities for the introduction of non-legal factors such as racial or gender discrimination into prosecutors’ choice of cases in which to seek the death penalty.

Because Durham County prosecutors are publicly elected as are prosecutors across North Carolina, they may respond to political pressure from constituents. Such pressure will likely vary according to numerous factors, including the demographic and ideological composition of the prosecutor’s judicial district, the level of media attention that a crime receives, the race and gender configuration of the victim and defendant, the victim’s standing in the community, etc. Furthermore, the ideology of individual prosecutors and their natural affinities for different types of victims and defendants may influence capital charging decisions. Therefore, it is possible that legally similar crimes and criminals will receive different treatment in fact. When evaluated in the aggregate, the decisions of Durham prosecutors may cause some groups of defendants to be consistently more likely to have death sentences sought against them than other types of
defendants. But this does not excuse a pattern of capital prosecutions based strongly on race or gender.

VII. The Data

The data are Durham County homicide cases with known defendants prosecuted from January 1, 2002 to December 31, 2007. The data were derived from the Office of Indigent Defense Services (OIDS) in Durham and the Durham County Courthouse. Only death eligible homicides were considered. Because prosecutors are forbidden by state law to seek the death penalty in homicides involving juvenile offenders, all defendant represented in the dataset are over the age of 17. The unit of analysis is the homicidal action by a single defendant. Homicidal actions are defined as non-negligent killing(s) conducted by one person. Thus if two or more offenders kill a single victim, each defendant was evaluated as a separate case in the dataset since each defendant is potentially culpable for the offense. One defendant accused of killing several victims was evaluated in terms of the number of victims. That is, an offender accused of a double murder was entered in the dataset as two cases, corresponding to the number of victims. Homicides are defined in this manner because prosecutors in Durham County must investigate, charge, and prosecute each defendant for each murder; prosecutors have discretion to charge co-defendants in the same crime separately and unequally.

During the 2002 to 2007 period, 149 death eligible murders with known defendants were prosecuted in Durham County. These exclude offenses charged as second degree murder or manslaughter. By statute, such lower-level homicides are exempt from capital punishment in North Carolina under the assumption that they lack element of premeditation and aggravation.
Table 1 reports descriptive statistics about the 149 death eligible homicides. Durham County prosecutors sought the death penalty in 13.4 percent of the homicides that were death eligible. This proportion seems small and would tend to suggest that the County is a less active death penalty district compared to other jurisdictions. But in fact, this proportion reflects the overall declining trend in death penalty prosecutions and sentences statewide. While the ratio of death sentences to homicides was 5.02 percent in 1995, that ratio has declined to .93 percent in 2006.97 The vast majority of these capital prosecutions involve homicides committed by defendants who are male (94 percent) and black (85 percent). According to the data, blacks are far more likely to be homicide victims in Durham County, roughly 75 percent compared to 21.5 percent white. Males constitute a much higher proportion of homicide victims (80 percent) than females. Only 7 percent of the homicides in Durham County in the period we examine are multiple homicides. In terms of racial configuration, there are disproportionately more black-on-black homicides than any other racial configuration.

97 These statistics were obtained from Durham County capital defense attorney Jay Ferguson on January 30, 2009.
For the six years of prosecutorial activity examined in this study, several notable patterns in death charging decisions are apparent. To what extent is racial disparity in death penalty prosecutions in Durham County a problem? As indicated in Table 2, between 2002 and 2007, Durham County
prosecutors processed 32 white murder-victim cases and seek the death penalty in 25 percent of them. By contrast there were 111 black murder-victim cases processed during that time and in only 10.8% of them did prosecutors seek the death penalty. The difference between the death-seeking rates for black-victim cases and white-victim cases is statistically significant using a difference of proportions test (p < .01), suggesting that the difference is not due to chance. This finding is consistent with national patterns, which demonstrate that white-victim cases are significantly more likely to lead to capital prosecution than black-victim cases.98

Table 2. Death-Seeking Behavior Grouped by Victim’s Race

<table>
<thead>
<tr>
<th>Victim’s Race</th>
<th>No. Homicides</th>
<th>Death Penalty Cases</th>
<th>Death-Seeking Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>32</td>
<td>8</td>
<td>25%</td>
</tr>
<tr>
<td>Black</td>
<td>111</td>
<td>12</td>
<td>10.8%</td>
</tr>
</tbody>
</table>

Table 3 gives the death-seeking rate of Durham County prosecutors and is grouped by racial configuration of victims and defendants.99 Despite the high number of black homicide victims, Durham County prosecutors seek the death penalty in only 9 percent of cases in which blacks murder other blacks. And they seek the death penalty in 8 percent of cases in which whites murder other whites. This is clear indication that neutral race-based victim-discounting is practiced in the County at least during the period we investigate. This type of victim discounting

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99 Stated differently, the Table 3 gives the death-seeking rates for defendants arranged by race but controlling for the race of the victim.
defines the situation whereby the lives of victims of whatever race are discounted in value through the leniency shown accused murderers of the same race. In the data, there are only two instances in which a white suspect was charged with murdering a black victim. None of these resulted in a death penalty charge, apparently because the murders were not sufficiently aggravated.

By far the most striking result is in the black defendant/white victim category. When a black defendant is accused of murdering a white victim, 37 percent of the time prosecutors seek the death penalty in the case. The proportion is significantly higher than in any other racial combination. Figure 1 presents a graphical representation of the findings.

<table>
<thead>
<tr>
<th>Defendant / Victim</th>
<th>No. Homicides</th>
<th>Death Penalty Cases</th>
<th>Death-Seeking Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black / Black</td>
<td>107</td>
<td>10</td>
<td>9%</td>
</tr>
<tr>
<td>Black / White</td>
<td>19</td>
<td>7</td>
<td>37%</td>
</tr>
<tr>
<td>White / White</td>
<td>12</td>
<td>1</td>
<td>8%</td>
</tr>
<tr>
<td>White / Black</td>
<td>2</td>
<td>0</td>
<td>0%</td>
</tr>
</tbody>
</table>

Previous research has shown predominantly black-victim discounting. See Baldus et al. (1983) for evidence of black-victim discounting in Georgia; Songer and Unah (2006) for evidence of black-victim discounting in South Carolina; and Paternoster et al. (2004) for evidence of black-victim discounting in Maryland.
Turning now to accused offenders, black murder suspects are nearly twice as likely to face the death penalty as white murder suspects. Durham County prosecutors seek the death penalty in 13.38 percent of the 127 death eligible homicides committed by black offenders. White suspects registered 14 homicide offenses and Durham County prosecutors seek the death penalty in 7.14 percent of these.

Finally, the decision to seek the death penalty varies based on sex (see Table 4). In line with the gender gap hypothesis, prosecutors seek the death penalty with greater frequency in cases involving male defendants and female victims. Prosecutors seek the death penalty in 25 percent of all death eligible cases in which a male defendant was accused of killing a female
victim. On the other hand, there are nine female homicide defendants in the data set. Prosecutors seek the death penalty in only one (11 percent) of these homicides. Not surprisingly, the table also makes clear that the vast majority of homicide defendants in Durham County are men.

Table 4

<table>
<thead>
<tr>
<th>Defendant/Victim Configuration</th>
<th>Number of cases</th>
<th>Prosecutor Seeks Death</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male/Female</td>
<td>28</td>
<td>7</td>
<td>25</td>
</tr>
<tr>
<td>Male/Male</td>
<td>112</td>
<td>12</td>
<td>10.7</td>
</tr>
<tr>
<td>Female/Female</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Female/Male</td>
<td>7</td>
<td>1</td>
<td>14.3</td>
</tr>
</tbody>
</table>

While gender is not a legally permissible consideration for death-charging decisions, disparities based on gender do exist in Durham County despite North Carolina’s facially gender-neutral criminal statute.

A correlation analysis of the charging decisions of Durham County prosecutors reveals three distinct groups of murders that are likely to result in capital prosecution: murders committed against white victims; female-victim murders; and murders by male defendants. However, these correlations alone are insufficient to conclude that there is a causal link. It is possible that the racial and gender effects that have been uncovered come from the unequal distribution of the severity of murders. If homicides involving white victims and strangers contain a higher incidence of aggravating factors, for example, prosecutors may be responding to these aggravating factors instead of non-legal stimuli. Multiple regression techniques, which
measure the impact of certain variables while controlling for other possible influences, are necessary to make a more definitive judgment about the role of race, gender, and victim-defendant relationship in prosecutorial charging decisions.

B. Logistic Regression Analysis

The death penalty data facilitates the use of logistic regression techniques to determine the relative influence and statistical significance of numerous independent variables on the decision to seek the death penalty. Since the dependent variable is dichotomous, i.e., whether or not County prosecutors seek the death penalty, ordinary least squares regression technique is inappropriate and use of that technique will produce biased and unstable estimates. Instead, I employ logistic regression, which is a maximum likelihood estimation technique. This method produces parameter estimates for the model’s independent variables in terms of each variable's contribution to the probability that the dependent variable falls into one of the designated categories (either seeking or not seeking the death penalty).

For each independent variable, a maximum likelihood estimate (MLE) is calculated, along with its standard error. The estimates represent the change in the logistic function that occurs from a one-unit change in each independent variable. Since interpretation of the estimate is easily stated, but not so easily understood, I also present the odds ratio (or odds multiplier) for each independent variable. An odds ratio is a ratio of the odds at two different values of the independent variable. Thus, the odds ratio equals the antilogarithm (e to the power) of the MLE. The numerical values of the odds ratios can be used comparatively as a way to describe the

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101 Ordinary least squares estimation technique is inappropriate because, given the dichotomous nature of the dependent variable an important assumption of normally distributed error variance is violated. Logistic regression
strength of the effect of the independent variable on the dependent variable. Each variable’s impact will be assessed using the odds ratio. The results of the logistic regression analysis are presented in Table 5.

Three different models are reported in that table. Model 1 uses only the race variables to isolate their independent impact; model 2 adds sex into the mix; finally, model 3 uses all the variables predicted to have a potential impact on prosecutorial charging decisions. Model 3 is therefore the most complete model. That model utilized eight independent variables including legal factors relating to the severity of the crime and the demographic characteristics of defendants and victims such as race and gender. As an indicator of how good the various estimated models are, I have calculated the percent of all homicide cases that are correctly predicted by each model. These percentages suggest that the models are highly plausible. Several independent variables exerted statistically significant influence on death-charging decisions.

techniques overcome this important problem and produces unbiased and reliable estimates (see Aldrich and Nelson, 1984).


The analysis was conducted using the SPSS statistical software.
Table 5

Logistic Regression Models of Prosecutorial Decision to Seek Death Penalty in Durham County, North Carolina (2002-2007)

<table>
<thead>
<tr>
<th>Independent variable</th>
<th>Model 1 (Race Only)</th>
<th></th>
<th>Model 2 (Race and Sex Only)</th>
<th></th>
<th>Model 3 (Race, Sex, and the Law)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>β (Standard error)</td>
<td>Odds ratio</td>
<td>β (Standard error)</td>
<td>Odds ratio</td>
<td>β (Standard error)</td>
<td>Odds ratio</td>
</tr>
<tr>
<td>Black defendant/white victim</td>
<td>1.640*** (.565)</td>
<td>5.153</td>
<td>1.617*** (.574)</td>
<td>5.037</td>
<td>1.855** (.786)</td>
<td>6.391</td>
</tr>
<tr>
<td>White defendant/white victim</td>
<td>-.219 (1.088)</td>
<td>.803</td>
<td>-.168 (1.109)</td>
<td>.846</td>
<td>1.022 (1.335)</td>
<td>2.780</td>
</tr>
<tr>
<td>Victim’s sex (male=1)</td>
<td></td>
<td></td>
<td>-.868* (.545)</td>
<td>.420</td>
<td>-1.487** (.772)</td>
<td>.226</td>
</tr>
<tr>
<td>Defendant’s sex (male=1)</td>
<td></td>
<td></td>
<td>.157 (1.132)</td>
<td>.890</td>
<td>-1.034 (1.311)</td>
<td>.356</td>
</tr>
<tr>
<td>Number of criminal indictments</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1.084*** (.296)</td>
<td>2.955</td>
</tr>
<tr>
<td>Multiple murder victims</td>
<td>-1.530 (1.223)</td>
<td>.589</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of offense Victims</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>.348 (.343)</td>
<td>1.417</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.179*** (.305)</td>
<td>.113</td>
<td>-1.681 (1.184)</td>
<td>.186</td>
<td>-3.585*** (1.471)</td>
<td>.028</td>
</tr>
<tr>
<td>Number of cases</td>
<td>149 109.49 .87</td>
<td></td>
<td>149 107.08 .87</td>
<td></td>
<td>149 68.13 .93</td>
<td></td>
</tr>
<tr>
<td>-2*Log likelihood</td>
<td>.113</td>
<td></td>
<td>.186</td>
<td></td>
<td>.028</td>
<td></td>
</tr>
<tr>
<td>% Correctly predicted</td>
<td>.93</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Dependent variable is prosecutor’s decision to seek the death penalty (coded 1) or not (coded 0). There are 19 homicides prosecuted during the period examined in which the defendant was a juvenile, and 6 cases in which the homicide occurred in 1976 when North Carolina had no death penalty statute. These cases are death ineligible and are not considered in this analysis.

Significance level: ***p<.01; **p<.05; *p<.10 (all one-tailed test)

**Bi: The Role of Race, Sex, and Legally Relevant Factors.**

Beginning with model 1, the analysis indicates that black defendants who murder white victims are 5.153 times more likely to face the death penalty compared to black defendants who kill...
black victims (the unreported base category). That odds ratio of 5.153 is statistically significant beyond the .01 level. That is, the odds are roughly five times higher that county prosecutors would seek the death penalty if the murder involves a black defendant/white victim than if it involves a black defendant/black victim.

There is a less than one in one hundred chance that this finding occurred randomly. Results significant at or beyond the .05 level are generally considered statistically significant.\textsuperscript{104} The model also calculated a “constant” value, which indicates that in the absence of all the variables in the model, prosecutors are .11 times less likely to seek the death penalty in homicide cases in Durham County. This model predicts 87 percent of prosecutors’ decisions correctly.

Model 2 reports the findings that consider race but also include the role of gender in prosecutorial decision making. As in the first model, the black on white murders show the greatest impact. After controlling for sex of the victim and defendant, the odds that prosecutors will seek the death penalty when a black defendant kills a white victim remain virtually unchanged at 5.037, even after controlling for the sex of the victim and sex of the defendant.

The analysis indicates that sex plays an important independent role in the model. The variable called “victim’s sex” is represented in the model in terms of males victims. The result will be compared to female victims. The analysis indicates that male victims are .420 times less likely to precipitate a capital charge compared to female victim homicides. This finding is a confirmation of the gender gap hypothesis (H4). The defendant’s sex fails to reach statistical significance in this or any other model.

Model 3 reports the overall results because it includes all the variables earlier discussed. The analysis indicates that the model is highly plausible because 93 percent of the decisions that
Durham County prosecutors make are correctly predicted by this model. Once again, looking at the racial configuration of the offense, we find that after controlling for variables related to sex and offense severity, prosecutors are 6.391 times more likely to seek the death penalty when a black defendant kills a white victim compared to situations where a black defendant kills a black victim. This finding is statistically significant at the .05 level, indicating that there are less than one in 95 chances that this result occurred by chance. The finding is remarkably consistent across all the models herein reported and remarkably consistent with findings reported by other researchers working with data outside North Carolina. As with the other models reported in this analysis, homicides in which white defendants kill white victims fail to reach statistical significance when compared to homicides in which black defendants kill black victims.

Model 3 also showcases the importance of gender in prosecutorial decision making. The gender variables indicate that male victims are less likely to cause a death sentence to be sought compared to female victims, a finding that is consistent with the gender gap hypothesis.

North Carolina criminal statutes point to legal factors as the citadel of capital charging decisions. How did legally-relevant factors perform in this study? To address that question, I included in the analysis three legal factors relating to the severity of the offense: the number of criminal indictments, including the homicide, filled against the offender; whether the case is a multiple-victim murder transaction; and the total number of offense victims in the offense. Of these legal factors, only the number of criminal indictments reaches statistical significance in influencing Durham County charging decisions.


That variable reported an odds ratio of 2.955, which is statistically significant at the .01 level, holding all other variables constant at their means. Generally speaking, this finding indicates that there is less than a one in 100 chances that the result thus obtained occurred by chance. This finding is legally acceptable and should be applauded because it is based on North Carolina criminal statute. But it is interesting to note that the odds ratio for black defendant/white victim variable is more than doubled the odds ratio for the number of criminal indictments. Thus Durham County prosecutors are making several decisions on a daily basis about which murder cases to “go for death.” Importantly, there are extra-legal factors that are far more important in influencing their calculations than the legally-relevant factors. Among the most important of these factors is the racial configuration of the victim and defendant.

VIII. Discussion and Implications

The new guided discretion rules established by the Supreme Court in *Gregg v. Georgia*\(^\text{106}\) and affirmed in *McCleskey*\(^\text{107}\) were designed to eliminate or significantly reduce the arbitrary nature of capital punishment that amounted to a cruel and unusual punishment.

In the years since the *Gregg* decision, the 38 states with capital punishment have all implemented variations of Georgia’s bifurcated capital trial process, which requires prosecutors and juries to identify at least one statutory aggravating factor before imposing a death sentence.\(^\text{108}\) Despite these efforts, this study indicates that arbitrariness and discrimination have

\(^{106}\) 428 US 123 (1972)  
\(^{107}\) 481 US 279 (1987)  
not been eradicated from Durham County’s capital punishment system. The willingness of prosecutors to seek the death penalty varies profoundly across racial and gender categorizations.

Most distressingly, the study confirms that insidious racial disparities still haunt Durham County’s death penalty system. Durham County prosecutors are 6 times more likely to seek the death penalty in white-victim cases than in black-victim cases. All of these results are statistically significant at or beyond conventional significance levels.

The central finding of this study is simple: North Carolina’s death penalty statute is not uniformly applied in Durham County and has not eliminated arbitrariness and discrimination. Even though North Carolina capital punishment system is enumerated by statewide statutes, its implementation is actually shaped by the proclivities of local prosecutors who exercise virtually unfettered discretion to select death penalty cases within their districts. From 2002-2007, Durham County prosecutors utilized this discretion in a highly arbitrary and discriminatory manner. The results of this analysis are even more disturbing because the study focuses solely on the charging decisions of county prosecutors. Potentially arbitrary jury decision-making cannot account for the racial and gender disparities illuminated by the data.

A county justice system that continues to seek the death penalty based in part on skin color and sex is inexcusable in a region that prides inclusivity and in a nation that champions its multiculturalism and egalitarian political culture, including a “color-blind Constitution that neither knows nor tolerates classes among citizens.”\textsuperscript{109} Despite this enlightened tradition, all death eligible homicide cases in Durham County with comparable severity are not created equal. Murders receive systematically different treatment based upon the race and sex of the victim and perpetrators of the crime. The Supreme Court must therefore continue to confront this
persistently wanton and racially discriminatory application of capital punishment that has not been eradicated by sentencing schemes the Court approved in Gregg and McCleskey. The current application of the death penalty in Durham County is a flagrant violation the Supreme Court’s admonition in Furman v. Georgia that capital punishment should “be imposed fairly, and with reasonable consistency, or not at all.”

The importance of fair application of capital punishment cannot be overstated. Improper application of the rules jeopardizes a defendant’s constitutional right to a fair trial. It also sows the seed of doubt and distrust among the populace in their moral sanctioning of capital punishment as a just form of social control. In his dissent from the Supreme Court’s 5-4 decision in McCleskey, the landmark case that discarded evidence of group based racial bias as a factor in death penalty appeals, Justice Brennan warned American society that: “It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. The way in which we choose those who will die reveals the depth of moral commitment among the living.”

A. Limitations and Caveats of the Study

Any empirical study is only as good as available data used will permit. The analysis reported is limited in some respects. First, because the data are derived from a single county, one should be careful in generalizing the findings to other districts within North Carolina and

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108 From Justice John Marshall Harlan’s dissent in Plessy v. Ferguson, 163 US 537 (1896)
109 408 US 238 (1972)
nationwide. However, it is reassuring that the analysis has been based upon careful research design techniques and the analysis has been conducted with sophisticated methodology which places severe demands on the data. Hence the results can inform discussion about capital punishment in other parts of the state and in the United States.

Second, the analysis covers only a period of six years and this makes it difficult to uncover longer term patterns that might be latent in Durham County prosecutors’ behavioral choices. For example, it is unclear whether the pattern of racial disparity reported here is a recent phenomenon or has a longer but undetected historical trajectory. Third, the data are limited because they do not include information about the role of political pressure in the choices that prosecutors make. It is plausible to believe and some have indeed argued convincingly that electoral pressure is an important consideration that affects the selection of cases for capital punishment. Future analyses should consider how Durham County prosecutors may or may not be influenced by political pressure, especially in light of the public pressure introduced by the recent accusations of rape involving Duke University Lacrosse team members and the eventual disbarment of the chief prosecutor for unscrupulous professional misrepresentations.

Finally, the legal variables addressed in this analysis can be more complete. Future researchers examining Durham County prosecutorial decision making should explore more deeply the role of statutory aggravating and mitigating circumstances in the charging decisions that prosecutors make. Doing so will permit a more detailed account of the considerations that determine whether Durham County prosecutors would seek the death penalty in a particular case or not.
IX. Conclusion

Guided discretion rules announced in *Gregg v. Georgia* were meant to eradicate, or at the very least, minimize arbitrariness and discrimination in death penalty decision making at the prosecutorial and jury decisions stages. This study has reported on the death penalty charging decisions of prosecutors in Durham County, North Carolina.

Contrary to the progressive impulses of the Research Triangle Area of North Carolina where Durham County is located, there is strong evidence that the legal orders issued in *Gregg* against arbitrariness and discrimination are yet to eradicate the problem. Arbitrariness and discrimination remain an on-going problem when Durham County prosecutors decide which homicide defendant shall face the death penalty and which shall be spared. Defendants who kill white victims are significantly worse off than defendants who kill black victims. Prosecutors are far more likely to seek the death penalty when in white victim cases, especially when the defendant in the case is black. Similarly, prosecutors are more likely to seek the death penalty when the victim is a woman rather than a man. These findings were remarkably consistent across the model we reported.

Part of the reason for this finding is that untrammeled discretion that prosecutors enjoy in deciding whom to charge with a capital crime. While Durham County prosecutors may not be consciously engaging in discriminatory behavior, the general pattern of revealed by this study indicates that prosecutorial decisions are being based on extra-legal considerations above and beyond the influence of law. Indeed the explanatory impact of extra-legal factors proves to be far greater than the impact of legal circumstances concerning the severity of the offense. It is important that policy makers take note and devise ways to channel the discretion of prosecutors.
to encourage greater reliance upon legal precepts rather than extra-legal factors such as race and sex when making the capital charging decisions.
Additional References


Appendix 1
Variable Measurements for Logistic Regression Model

Dependent Variable:
Whether the state seeks the death penalty (coded 1) or not (coded 0).

Independent variables:

Multiple murder victims: Cases involving more than one murder victim were coded 1; all single murder-victim cases were coded 0.

White victim: Cases involving at least one white victim were coded 1; cases without a white victim were coded 0.

Female victim: Murders with at least one female victim were coded 1; all others were coded 0.

Total number of offense victims: represents a count of all offense victims in the case including those in a collateral offense who were not killed.

Number of indictments: Count of the total number of indictments brought against defendant.

Black defendant: Black defendants were coded 1, white defendants were coded 0.

Male defendant: Male defendants were coded 1; female defendants were coded 0.
Appendix II
Rank and Number of Death Row Inmates in 38 States with Capital Punishment
(as of February 20, 2009)

<table>
<thead>
<tr>
<th>Rank</th>
<th>State</th>
<th>Total Death Row Inmates [Number of Women]</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>Florida</td>
<td>397 [0]</td>
</tr>
<tr>
<td>3.</td>
<td>Texas</td>
<td>372 [9]</td>
</tr>
<tr>
<td>4.</td>
<td>Pennsylvania</td>
<td>228 [3]</td>
</tr>
<tr>
<td>5.</td>
<td>Alabama</td>
<td>203 [2]</td>
</tr>
<tr>
<td>6.</td>
<td>Ohio</td>
<td>188 [1]</td>
</tr>
<tr>
<td>9.</td>
<td>Georgia</td>
<td>107 [1]</td>
</tr>
<tr>
<td>10.</td>
<td>Tennessee</td>
<td>102 [2]</td>
</tr>
<tr>
<td>11.</td>
<td>Louisiana</td>
<td>88 [2]</td>
</tr>
<tr>
<td>12.</td>
<td>Oklahoma</td>
<td>84 [1]</td>
</tr>
<tr>
<td>13.</td>
<td>Nevada</td>
<td>77 [0]</td>
</tr>
<tr>
<td>14.</td>
<td>Mississippi</td>
<td>64 [2]</td>
</tr>
<tr>
<td>15.</td>
<td>South Carolina</td>
<td>63 [0]</td>
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</tr>
<tr>
<td>21.</td>
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<td>19 [1]</td>
</tr>
<tr>
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<td>24.</td>
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<td>9 [0]</td>
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<tr>
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<td>New York</td>
<td>0 [0]</td>
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