

**RACE AND THE DEATH PENALTY: AN EMPIRICAL
ASSESSMENT OF FIRST DEGREE MURDER CONVICTIONS IN
TENNESSEE AFTER *GREGG V. GEORGIA***

Hemant Sharma^{**}

John M. Scheb II^{***}

David J. Houston^{****}

Kristin Wagers^{*****}

^{**} Hemant K. Sharma holds a B.A. in English from Cornell University and a Ph.D. in Political Science from the University of Tennessee. He currently serves as a Lecturer in the Department of Political Science, as well as the Director of Soccer Operations for the women's soccer team, at the University of Tennessee.

^{***} John M. Scheb II is Professor and Head of Political Science at the University of Tennessee, Knoxville. He received his Ph.D. in political science from the University of Florida in 1982. His teaching and research centers around constitutional law, criminal justice and the judicial process.

^{****} David J. Houston is a Professor in the Political Science Department at the University of Tennessee and serves as a core faculty member in the university's Master of Public Policy and Administration program. Prior to joining the UTK faculty, he spent five years as a member of the Department of Political Science at the University of Mississippi. He earned a B.A. in Political Science from the State University of New York, College at Fredonia, and a Ph.D. in Political Science from Binghamton University.

^{*****} Kristin A. Wagers is a judicial law clerk for the Presiding Judge of the Tennessee Court of Criminal Appeals. She received her Ph.D. in political science in 2010 and her J.D. in 2011, both from the University of Tennessee. She is licensed to practice law in Tennessee. Her research interests include criminal and constitutional law and the criminal justice system.

I. INTRODUCTION

In 1972, the Supreme Court's decision in *Furman v. Georgia* invalidated Georgia's death penalty statute, effectively imposing a national moratorium on capital punishment.¹ Although the majority failed to agree on a singular rationale for halting the death penalty, Justice William Douglas's concurrence characterized capital punishment in Georgia as "pregnant with discrimination."² Four years later, when the Court reinstated the death penalty pursuant to *Gregg v. Georgia*, the majority declared that the "concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be... best met by a system that provides for a bifurcated proceeding."³ Since *Gregg*, however, many social scientists and legal scholars have examined whether this procedure actually protects against the arbitrary enforcement of capital punishment. This Article extends that line of inquiry, analyzing 1,068 first-degree murder convictions that occurred in Tennessee following the Supreme Court's decision in *Gregg*.

A sizable body of research has focused on the intersection of race and the death penalty. Two scholars, Michael Songer and Isaac Unah, distill the importance of this work, noting that, "[i]n light of the exceptionality and the total irrevocability of death as a form of punishment, it is especially important that citizens and policy makers understand how [the death penalty is implemented]."⁴ Such research, they add, has implications for "the legitimacy of the justice system and the amount of public esteem citizens are willing to bestow upon

¹ 408 U.S. 238, 239-40 (1972).

² *Id.* at 257 (Douglas, J., concurring). Justices Stewart (*Id.* at 306) and White (*Id.* at 310) also authored concurrences that expressed concern about inconsistent application of the death penalty, while Justices Brennan (*Id.* at 258) and Marshall (*Id.* at 315)—though they joined the overall five-vote majority—characterized the death penalty as unconstitutional under any circumstances.

³ 428 U.S. 153, 195 (1976). *Gregg* highlighted the importance of Georgia's statutory mandate that juries in capital cases decide guilt or innocence first, and then separately consider the matter of punishment. Further, in order to impose a death sentence, juries were required to find that a homicide was accompanied by "aggravating" factors, and that those outweighed any potential "mitigating" factors.

⁴ Michal Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S. CAR. L. REV. 161, 162 (2006).

judicial institutions”—largely because, one might submit, these concepts are premised on the notion of fairness.⁵

Early research into the death penalty focused primarily on the race of defendants, ostensibly to determine whether Black defendants were more likely to receive the death penalty than others. David Baldus and George Woodworth noted that “empirical evidence generally suggests that the United States death penalty system is no longer characterized by the systemic discrimination against Black defendants that existed in many states before *Furman v. Georgia*.”⁶ Even so, since *Gregg* many studies have demonstrated that the race of a *victim* is actually more significant of a predictor for a defendant receiving a capital sentence.

The shift in scholarly focus from race-of-defendant to race-of-victim analysis has not diminished the overall importance of examining the relationship between race and the death penalty. Thus, “[i]t is useful to focus on what race-of-defendant and race-of-victim discrimination have in common—that is, decision making based on irrelevant characteristics.”⁷ Indeed, “this common feature is the basis for the Supreme Court’s holding in *McCleskey v. Kemp* that both forms of discrimination violate the Fourteenth and Eighth Amendments.”⁸

This Article builds upon these theoretical underpinnings by analyzing “death-eligible” murder convictions in Tennessee between 1977 and 2007. Its objective is providing the state’s first controlled analysis of the death penalty’s implementation.⁹ Specifically, this

⁵ *Id.*

⁶ David Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1412 (2004).

⁷ *Id.* at 1446.

⁸ *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987) (noting that no proof of specific discrimination was found)).

⁹ In a previous study, Scheb & Wagers located percentage point differences in the application of capital punishment in Tennessee based upon the victim’s race, but their work did so without using any control variables. See John M. Scheb II & Kristin Wagers, *Racial Discrimination in the Death Penalty in Tennessee: An Empirical Assessment*, 5 TENN. J. L. & POL’Y 9 (2009). These authors actually concluded their work with a suggestion for future research to generate a “multivariate model” of race and the death penalty in Tennessee. *Id.* at 25. For similar percentage comparisons with more limited data, see John M. Scheb II, et al.,

Article seeks to explain why death-eligible defendants did or did not receive the death penalty in Tennessee. Its methodology generates variables that address the demographics of both offender and victim in each case, and considers the characteristics of each particular crime and the nature of available evidence. This approach differs from similar research in other states by creating separate statistical models to explain both a prosecutor's decision to seek the death penalty *and* the jury's decision to impose a death sentence, enabling a discussion on different agents' motives in the process.

This Article's assessment of the death penalty begins by reviewing, in Section II, the sizable body of literature regarding capital punishment and race across all jurisdictions. Section III describes statutory requirements for the death penalty in Tennessee, outlines the utilized data collection methods, and discusses the specific details of each variable considered. A presentation of the statistical models follows in Section IV. The Article concludes with a consideration of implications for notions of equality and fairness in the criminal justice system.

II. PREVIOUS LITERATURE ON RACE AND CAPITAL PUNISHMENT

Early social science research located significant disparities in administration of the death penalty based on the race of defendants.¹⁰ Specifically, "these studies determined that Blacks were indicted, charged, convicted, and sentenced to death in disproportionate numbers . . ." ¹¹ However, these early works incurred criticism for failing to implement adequate statistical controls.¹²

Later, Baldus et al. (1983) conducted what is still the most prominent of the modern, controlled studies regarding race and the

Race, Prosecutors and Juries: The Death Penalty in Tennessee, 29 JUS. SYS. J. 338 (2008).

¹⁰ See generally, Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949); Elmer Johnson, *Selective Factors in Capital Punishment*, 6 SOC. FORCES 165 (1957); CHARLES MANGUM, *THE LEGAL STATUS OF THE NEGRO* (Univ. of North Carolina Press 1940).

¹¹ WILLIAM BOWERS, ET AL., *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, 69-70 (Northeastern Press, 1984).

¹² Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AMER. SOC. REV. 783, 786-92 (1981).

death penalty. In upholding the death penalty in *McCleskey v. Kemp*, the Supreme Court cited the work, which examined over 2,000 death penalty cases in Georgia from the 1973 to 1979.¹³ The Court noted that this study found that the race of the defendant was not relevant in death penalty decisions, but offered evidence that offenders who killed White victims were more likely to receive the death penalty, even after controlling for a litany of factors.¹⁴ Specifically, the study examined 230 relevant variables including the nature of the crime, the location of the crime, and the characteristics of offender and victim, finding that a death sentence was 4.3 times more likely in death-eligible cases when the victim was White.¹⁵

Since that study, a substantial body of literature has emerged around the question of race and capital punishment. Oft-cited studies from the 1980s include the work of Samuel Gross and Robert Mauro, Michael Radelet and Glenn Pierce, and Raymond Pasternoster. Gross and Mauro looked at eight states (Georgia, Florida, Illinois, Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas), finding that the presence of a White victim was a significant predictor of a death sentence.¹⁶ Radelet and Pierce examined death-eligible cases in Florida from 1976-1987, noting that defendants were 3.4 times more likely to receive a death sentence for killing a White victim.¹⁷ Pasternoster found that, in South Carolina from 1977-1981, capital charges were 9.6 times more likely when the victim was White.¹⁸

Other studies from this time period arrived at a similar conclusion regarding the race of a victim.¹⁹ In 1990, the United States

¹³ *McCleskey*, 481 U.S. at 286-98.

¹⁴ *Id.* at 286.

¹⁵ David Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

¹⁶ SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 35 (Northeastern Press, 1989).

¹⁷ Michael Radelet & Glenn Pierce, *Choosing Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

¹⁸ Raymond Pasternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. & CRIMINOLOGY 754 (1983).

¹⁹ Richard Lempert, *Capital Punishment in the '80s: Reflections on the Symposium*, 74 J. CRIM. & CRIMINOLOGY 1101 (1983); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade after Furman in Texas*, 69 SOC. SCI. QUARTERLY 853 (1988); Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC. REV. 587 (1985);

General Accounting Office (GAO) undertook an examination of this entire body of research and observed that, of twenty-eight previous studies of race and the death penalty, 82% located evidence that the victim's race influenced the defendant's likelihood of either being charged with capital murder by a prosecutor or being sentenced to death by a jury.²⁰

Subsequently, Baldus and Woodworth reviewed eighteen studies from 1990 to 2003, and again noted that the race of the defendant did not have a significant impact on likelihood of receiving a death sentence, but that the race of the victim did.²¹ At the time of their review, Baldus and Woodworth said that "reasonably well-controlled studies" of race and the death penalty had been conducted in California, Colorado, Georgia, Kentucky, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Pennsylvania and South Carolina.²² Another study from this era addressed San Francisco County.²³ Encapsulating much of this time period's research, one author concluded that "the death penalty is between three and four times more likely to be imposed in cases in which the victim is White rather than Black."²⁴

More recently, within the last ten years, controlled studies have found that the race of the victim is a significant predictor of a death sentence in Maryland,²⁵ Illinois,²⁶ California,²⁷ Colorado,²⁸ and North

Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279 (1987).

²⁰ U.S. Gen. Accounting Office, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1-2 (1990).

²¹ David Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 501, 517-19 (Carolina Academic Press, 2003).

²² *Id.*

²³ Robert Weiss, et al., *Assessing the Capriciousness of Death Penalty Charging*, 30 L. & SOC'Y REV. 607 (1996).

²⁴ Michael Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 47 (2000).

²⁵ Raymond Pasternoster, et al. *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS L. J. 1 (2004).

²⁶ Glenn Pierce & Michael Radelet, *Race, Region and Death Sentencing in Illinois, 1988-1997*, 81 ORE. L. REV. 39 (2002).

²⁷ Glenn Pierce & Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides*, 46 SANTA CLARA L. REV. 1 (2005).

²⁸ Stephanie Hindson, et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549 (2006).

Carolina.²⁹ However, in Nebraska, the Baldus and Woodworth study uncovered no evidence of a race-of-victim effect; understandably so, as the cases that were more likely to advance to the death penalty phase arose in urban geographic regions that were more populated with minorities.³⁰

Another study recognized that a potential mechanism underlying these findings could be that “the jury system explicitly brings community sentiments into the judicial decision-making process.”³¹ More specifically, it stated that, “jury members have difficulty replacing their socially conditioned views of victims and offenders with strict legal considerations, especially for the crimes they find most shocking and abhorrent.”³² In *Turner v. Murray*, Justice Byron White actually addressed this matter by noting that “the range of discretion entrusted to a jury in a capital sentencing hearing . . . [creates] a unique opportunity for racial prejudice to operate undetected.”³³

A subset of death penalty literature ventured beyond the jury’s deliberations to focus more narrowly on a prosecutor’s decision to seek the death penalty in a death-eligible case. Songer and Unah delineated the potential for abuse in this part of the capital punishment phase when they said, “Prosecutors exercise broad discretion within a porous network of rules when deciding which murder cases merit capital punishment and which do not.”³⁴ Indeed, the Supreme Court’s decision in *United States v. Bass* highlighted the breadth of this discretion as it pertains to capital punishment decisions.³⁵

Of course, the inherent ‘check’ on prosecutors’ discretion—their responsibilities to their constituencies as elected officials—can also be a drawback. After all, the biases ingrained in public perception

²⁹ Michael Radelet & Glenn Pierce, *Race and the Death Penalty in North Carolina, 1980-2007*, 89 N. CAR. L. REV. 2119 (2011).

³⁰ David Baldus, et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486 (2002).

³¹ Bowers et al., *supra* note 11, at 69.

³² *Id.* at 339.

³³ 476 U.S. 28, 35 (1986).

³⁴ Songer & Unah, *supra* note 4, at 162.

³⁵ 536 U.S. 862 (2002) (denying the defendant’s motion for discovery to explore the prosecutor’s allegedly selective capital charging practices).

may influence a prosecutor's decision to seek the death penalty, accept a guilty plea for a lesser sentence, or agree to a plea bargain in exchange for testimony against another defendant.³⁶ In particular, Bowers et al. found that prosecutors are more likely to seek the death penalty in response to negative sentiments and reaction to crime³⁷ or "pressure from the police."³⁸ These outside influences heighten the potential for extra-legal factors, like race, to enter into prosecutors' charging decision. Overall, as Harvard Law Professor Randall Kennedy noted, prosecutorial discretion is "the most significant factor that affects the far-flung and subtle racial selectivity that infects the death penalty system."³⁹

Two studies conducted early empirical research on the matter of prosecutorial discretion in seeking the death penalty in New Jersey⁴⁰ and Kentucky;⁴¹ both studies found that the race of a victim was a significant factor in explaining prosecutors' decisions to pursue a death sentence. More recently, researchers noticed similar effects in New Mexico;⁴² Colorado;⁴³ South Carolina;⁴⁴ Durham, North Carolina;⁴⁵ East Baton Rouge Parish, Louisiana;⁴⁶ Arkansas;⁴⁷ and Harris County, Texas.⁴⁸ However, Klein et al. uncovered no clear

³⁶ Bowers et al., *supra* note 11, at 339.

³⁷ *Id.*

³⁸ *Id.* at 345.

³⁹ Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decisions To Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 161-62 (2009).

⁴⁰ Lee Bienna, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 158 (1988).

⁴¹ Gennaro Vito & Thomas Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 J. CRIM. L. & CRIMINOLOGY 301 (1988); for updated research, see Thomas Keil & Gennaro Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM J. CRIM. L. 17 (1995).

⁴² Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis*, 38 NEW MEX. L. REV. 255 (2008).

⁴³ Hindson et al., *supra* note 28.

⁴⁴ Songer & Unah, *supra* note 4.

⁴⁵ Unah, *supra* note 39.

⁴⁶ Glenn Pierce & Michael Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647 (2011).

⁴⁷ David Baldus, et al., *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story From Southwest Arkansas with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555 (2009).

⁴⁸ Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807 (2008).

race-of-victim effect in federal prosecutors' decisions to seek a sentence of death.⁴⁹

Pierce and Radelet posit that the reason for such statistically significant findings may be “that prosecutor’s offices, jurors, judges, investigating police officers, and others involved in constructing a death penalty case are (consciously or unconsciously) not as outraged or energized, on average, when a Black is murdered as when a White is murdered.”⁵⁰ They add that “death penalty cases are expensive, and choices need to be made on how often the death penalty can be sought,” observing that, “as a method to help victims, [the death penalty requires that] prosecutors and other decision makers have to arrange families of homicide victims on a vertical hierarchy, making decisions about which is most ‘deserving’ of a death sentence.”⁵¹ Linking this “hierarchy” to actual legal considerations, Baldus et al. submit that racial prejudice could inflate a prosecutor’s interpretation of “aggravation,” and decrease perception of “mitigation.”⁵²

III. RELEVANT STATUTES, DATA AND METHODS

A. *Statutory Guidelines for the Death Penalty in Tennessee*

Most relevant to the ensuing discussion is the Tennessee statute that defines the elements of first-degree murder, the only death penalty-eligible indictment in Tennessee.⁵³ Tennessee Code Annotated § 39-13-202(a) defines first-degree murder as:

- (1) A premeditated and intentional killing of another; (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or

⁴⁹ Stephen Klein et al., *Race and the Decision to Seek the Death Penalty in Federal Cases*, (National Institute of Justice, research report, 2006), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR389.pdf (accessed May 1, 2013).

⁵⁰ Pierce & Radelet, *supra* note 46, at 671 n. 54.

⁵¹ *Id.* at 673 n. 54.

⁵² Baldus et al., *supra* note 47, at 566-67.

⁵³ TENN. CODE ANN. § 39-13-202(c) (2007).

aircraft piracy; or (3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.⁵⁴

The State of Tennessee can punish anyone convicted of first-degree murder “by (1) death; (2) imprisonment for life without the possibility of parole; or (3) imprisonment for life.”⁵⁵ At least one of the statutory aggravating factors must be present in order to apply the death penalty.⁵⁶ In other words, to be eligible for the death penalty, a defendant must be convicted of first-degree murder, and a jury must find that at least one aggravating factor exists in order to impose a death sentence. Appendix A describes Tennessee’s statutory aggravating factors.⁵⁷

B. Data Source

Herein, this Article compiles data on first-degree murder convictions (n=1068) rendered by Tennessee criminal and circuit courts over three decades (1977 to 2007, inclusive). The data derives from evaluations submitted pursuant to Tennessee Supreme Court Rule 12, which mandates the completion of detailed reports on first-degree murder convictions.⁵⁸ In all cases resulting in a first-degree murder conviction dating from 1976, irrespective of the sentence, Tennessee trial judges must complete parts of the Rule 12 form for each convicted defendant.⁵⁹ Prosecutors and defense attorneys must also complete certain sections of the Rule 12 form.⁶⁰ The Rule 12 form contains various facts about the criminal case and background information on both the defendant and victim(s).⁶¹ It is unclear what total percentage of first-degree murder convictions from this time period was actually included in the database, but nothing indicates that large numbers of cases are missing.

⁵⁴ TENN. CODE ANN. § 39-13-202(a) (2007).

⁵⁵ TENN. CODE ANN. § 39-13-202(c) (2007).

⁵⁶ TENN. CODE ANN. § 39-13-204(g) (2011).

⁵⁷ See TENN. CODE ANN. § 39-13-204(i) (2011).

⁵⁸ TENN. SUP. CT. R. 12.1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *id.*

Therefore, this Article analyzes all defendants indicted and convicted of first-degree murder in the state of Tennessee from 1976 to 2007 upon which a Rule 12 report exists, regardless of sentencing outcome. According to the database, there were 1,068 first-degree murder convictions in Tennessee during this 30-year time frame. Of these 1,068 cases, prosecutors served notice to seek the death penalty in 361 (33.8%) cases and the court imposed the death penalty in 160 (44.3%) of the 361 cases. Further, of the 1,068 first-degree murder convictions, 994 involved male defendants and 74 involved female defendants. Additionally, 538 defendants were White and 480 defendants were Black. Although this Article focuses exclusively on the dynamics between Blacks and Whites, there were fourteen Hispanic defendants, seven Asian defendants, one Native American defendant, two defendants classified as “Other,” and twenty-six defendants whose race was unknown. Of the victims, 642 were White and 337 were Black. There were eight Hispanic victims, seven Asian victims, two Native American victims, seven victims classified as “Other,” and sixty-five victims whose race was unknown. Lastly, 729 victims are male and 393 are female.

C. Statistical Methods and Hypotheses

The best way to analyze the impact of race on the behavior of prosecutors and juries is to develop a multivariate logistic regression model that incorporates various control variables. This is the statistical methodology used in the majority of studies referenced herein. Early works regarding capital punishment and race highlighted the need for such controls,⁶² and more recent studies have differed only in their focus on selecting the appropriate variables (as this Article will discuss below). Along these lines, Baldus and Woodworth define “well-controlled” as incorporating “adjustment for 15 or more controls.”⁶³

This Article presents two logistic regression models that utilize twenty-three independent variables. First, using all cases in the

⁶² Alfred B. Heilbrun, Jr., et al., *The Death Sentence in Georgia, 1974-1987: Criminal Justice or Racial Injustice?*, 16 CRIM. JUST. & BEHAV. 139, 141 (1989); Stephen Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 35 (1991).

⁶³ Baldus & Woodworth, *supra* note 6, at 1495 n. 22.

dataset, the initial model explains the prosecutor's decision to seek the death penalty. It codes the dependent variable, the prosecutor's decision to seek capital punishment, as '1' when the prosecutor seeks the death penalty, and as '0' otherwise. Missing data on the control variables for the regression models render the sample size for this model at n=1006.

The next model, using only those cases in which the prosecutor sought the death penalty (n=337), explains jury decisions to impose the death penalty, coding the dependent variable, the jury's decision to recommend capital punishment, as '1' when a jury sentences a defendant to death and as '0' otherwise. Again, since the dependent variables in these models are dichotomous, they utilize logistic regression.

This Article's primary hypotheses relate to the race of the victim, and are as follows:

Hypothesis #1: Prosecutors will be more likely to seek the death penalty when the victim of a death-eligible homicide is White.

Hypothesis #2: The likelihood of a jury imposing a death sentence for a death-eligible homicide will be greater when the victim is White.

D. Independent Variables

In keeping with the previously discussed literature, the central independent variables of this Article's analysis are the race of the defendant, labeled *Black Defendant*, and the race of the victim, labeled *White Victim*. As noted earlier, based on prior studies, this Article advances that the race of the defendant will not be a relevant consideration. This Article includes twenty-one other control variables drawn from previous literature. For clarity, those variables fit into four categories: 1) Characteristics of the Homicide; 2) Evidence Against the Defendant; 3) Victim Traits; 4) Defendant Traits.

1. Independent Variables, Category 1: Characteristics of the Homicide

The intuitive starting points for this analysis are the variables that assess the nature of the homicide. Justice Stevens thought, at least

until recently,⁶⁴ that an infrequently administered death penalty, limited to only the most heinous of murders, could be purged of racial discrimination.⁶⁵ Dissenting in *McCleskey v. Kemp*, Justice Stevens observed that:

“... there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If [the State] were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.”⁶⁶

The key, though, is to determine how to control for “extremely serious crimes,” because as Cheatwood recognizes, so-called “lesser” homicides—“where the crime is not as brutal or as heinous”—ripen the opportunity for “racism [to come] into play.”⁶⁷ This Article accounts for the possibility that different types of homicides may be treated differently by prosecutors and juries by including the following dichotomous control variables:

Three or More Victims. The regression models code the killing of three or more victims within the same crime spree or within a 48 month period as ‘1.’ As Baldus et al. say, “additional deaths amplify culpability... [and] are so egregious that they should have comparably harsh procedural outcomes....”⁶⁸ Previous literature has controlled for the number of victims and found that the likelihood of a death sentence increases with that number, including the work of Pierce and Radelet,⁶⁹ Radelet and Pierce,⁷⁰ Baldus et al.,⁷¹ Unah,⁷² Phillips,⁷³ and

⁶⁴ See *Baze v. Rees*, 553 U.S. 35, 71-87 (2008) (Stevens, J., concurring).

⁶⁵ James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1646 n. 175 (2006).

⁶⁶ *McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting).

⁶⁷ Derral Cheatwood, *Capital Punishment for the Crime of Homicide in Chicago, 1870-1930*, 92 *J. CRIM. L. & CRIMINOLOGY* 843, 847 (2002).

⁶⁸ Baldus et al., *supra* note 47, at 578.

⁶⁹ Pierce & Radelet, *supra* note 46, at 668.

⁷⁰ Radelet & Pierce, *supra* note 29, at 2139-40 n. 106-07.

⁷¹ Baldus et al., *supra* note 47, at 578.

Weiss et al.⁷⁴ This Article focuses on three or more victims because that is a statutory aggravating factor for the death penalty in the state of Tennessee; specifically, the statute references three victims in a “single episode” or in a 48 month period, and the coding of this variable corresponds (*see* Tennessee Code Annotated § 39-13-204(i) in Appendix A).

Dangerous Concurrent Crime. The models code homicide accompanied by arson, robbery, burglary, kidnapping, aircraft piracy, child abuse, or a bombing as ‘1.’ Each of these categories occur separately in the Rule 12 database, but this Article collapses them into a single variable, coding the presence of just one of the crimes as ‘1,’ and the absence of all as ‘0.’ Phillips, in contrast, accounts for the presence of additional felonies by listing them individually as separate controls in a regression model.⁷⁵ This approach is unnecessary for the interests of this Article, as there is little to separate such felonies in terms of their perceived levels of depravity. Pierce and Radelet’s research in North Carolina incorporates a slightly different approach, employing a “count” variable to find that the total number of additional felonies increases the likelihood of a death sentence.⁷⁶ However, the use of a single dichotomous variable in this Article’s regression models comports with the work of Weiss et al.⁷⁷ and Radelet and Pierce in East Baton Rouge.⁷⁸ Kremling et al. discuss differences between “count” and dichotomous variables that account for felonies in a regression model, and imply that the presence of a felony is likely to increase the probability of a death sentence regardless of exactly how a regression model captures these additional crimes.⁷⁹ Hence, this Article uses the dichotomous approach to relay more parsimonious results.

Rape. This Article’s analysis does, however, create a separate category for rape. The regression models code homicide accompanied

⁷² Unah, *supra* note 39, at 143 (citing fn. 35).

⁷³ Phillips, *supra* note 48, at 824.

⁷⁴ Weiss et al., *supra* note 23, at 623.

⁷⁵ Phillips, *supra* note 48, at 820.

⁷⁶ Pierce & Radelet, *supra* note 46, at 664.

⁷⁷ Weiss et al., *supra* note 23, at 623.

⁷⁸ Radelet & Pierce, *supra* note 29, at 2139.

⁷⁹ Janine Kremling, et al. *The Role of Mitigating Factors in Capital Sentencing Before and After McKoy v. North Carolina*, 24 JUST. Q. 357, 363 (2007).

by rape as ‘1.’ Songer and Unah,⁸⁰ Unah,⁸¹ Phillips,⁸² and Williams et al.⁸³ all highlight the need to consider this matter as a separate control in order to isolate the murders most likely to be-perceived as heinous. This Article proposes that homicides accompanied by rape will be more likely to result in a capital charge from a prosecutor and an overall death sentence from a jury.

Abnormal Method of Killing. The models code unusual methods of killing, which include stabbing, throat-slashing, drowning, beating, strangling/suffocating, poisoning, burning, pushing off high building, or hitting the victim with a vehicle, as ‘1.’ Most literature, with the exception of the likes of Phillips, has not extensively analyzed method of killing.⁸⁴ This Article posits that an atypical technique may be perceived as more heinous, and thus may be more likely to lead to a death sentence.

Three or More Co-Perpetrators. The models code homicides involving four or more total perpetrators as ‘1.’ The models include this variable to account for the perception that a group killing might be more heinous, and to account for gang-related killings, as suggested by Caldwell and Fisher-Ogden.⁸⁵ This Article submits that multiple perpetrator offenses may be more likely to result in the death penalty because of a perception that gang activity is involved. Although gang activity is not defined as a statutory aggravating factor in Tennessee, in 2011, the state’s House Bill 870 proposed “murder as the result of gang activity as an aggravating factor for purposes of death penalty sentencing;” while that bill did not advance out of subcommittee deliberations, this Article assesses the relevance of its underpinnings.⁸⁶

⁸⁰ Songer & Unah, *supra* note 4, at 192.

⁸¹ Unah, *supra* note 39, at 160-61.

⁸² Phillips, *supra* note 48, at 820.

⁸³ Marian Williams, et al. *Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision-Making*, 45 CRIMINOLOGY 865, 880 (2007).

⁸⁴ Phillips, *supra* note 48, at 820.

⁸⁵ H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON L. REV. 601 (2004).

⁸⁶ Tennessee House Bill 870, 107th General Assembly, 2011-2012 available at <http://legiscan.com/TN/bill/HB0870/2011> (accessed May 1, 2013).

Urban. The models code homicides as ‘1’ if they occur in any of the four Tennessee counties containing the state’s largest cities: Knox County (Knoxville), Davidson County (Nashville), Shelby County (Memphis), and Hamilton County (Chattanooga). Pasternoster et al. note that death penalty studies should control for potential jurisdictional differences, as “any attempt to deal with any racial disparity in the imposition of the death penalty... cannot ignore the substantial variability that exists in different state’s attorneys’ offices in the processing of death cases.”⁸⁷ More specifically, Pierce and Radelet offer two separate articles that control for differences between urban and rural jurisdictions; their studies from Illinois⁸⁸ and from California⁸⁹ both observe that rural jurisdictions are more likely to impose capital punishment for similar offenses. It could be the case, then, that individuals from certain geographic regions may be more likely to characterize murders as heinous.

2. Independent Variables, Category 2: Evidence Against the Defendant

This Article also includes a set of control variables that much of the previous literature has failed to address: the nature of the evidence against a defendant. Pierce and Radelet note that the race-of-victim element “might correlate with the amount of resources that law enforcement devotes to gathering evidence.”⁹⁰ Berk et al. control for defendant statements, eyewitness testimony and informant testimony in their study of race and the death penalty.⁹¹ This Article’s regression models code as ‘1’ the following variables:

Strong Witness ID, or an identification of the defendant by either a police officer or a Rule 12 “familiar person;” the defendant’s **Confession**; **Scientific Evidence** linking the defendant to the homicide; or **Co-Perpetrator Testimony**. This Article hypothesizes that these factors make prosecutors’ capital charges and juries’ death

⁸⁷ Pasternoster et al., *supra* note 25, at 44.

⁸⁸ Pierce & Radelet, *supra* note 26 at 56, 65-66.

⁸⁹ Pierce & Radelet, *supra* note 27, at 29-30

⁹⁰ Pierce & Radelet, *supra* note 26, at 41.

⁹¹ Richard Berk, et al., *Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland*, 21 J. QUANT. CRIMINOL. 365, 370 (2005).

sentences more likely by reducing the uncertainty involved in determining a verdict and by mollifying the concerns of a potentially unjust outcome.

3. Independent Variables, Category 3: Victim Traits

Victim traits are the third set of variables whose relationship to the death penalty this Article considers.

White Victim. A White victim is, to reiterate, the primary independent variable drawn from the literature; the regression models code White victims as ‘1’ and all others as ‘0.’ This Article submits that homicides involving White victims will be more likely to result in a prosecutor’s charge of a capital offense and will also be more likely to result in a death sentence from a jury, as discussed in the literature review.

Female Victim. The models code female victims as ‘1.’ Unah notes that, “White females are perceived as a subgroup deserving of special protection and this has often led to differential responses to their victimization.”⁹² Williams et al. also observe that “several studies find that cases with female victims are more likely to receive a death sentence than cases with male victims.”⁹³ Further, Williams et al.’s own research finds that the victim’s gender is more relevant to juries than to prosecutors, a division that this Article’s split models will reconsider.⁹⁴

Killing of Law Agent. The models code victims who were police officers, District Attorneys, or judges as ‘1.’ Cheatwood’s research suggests that such offenses against law enforcement agents are likely to be perceived as more heinous by both prosecutors and juries.⁹⁵

Stranger Victim. The models code victims with whom the defendants were unacquainted as ‘1.’ The literature differs on this matter, as Songer and Unah find that “stranger homicide” is more likely to result in a death sentence than other homicides,⁹⁶ Weiss et al.

⁹² Unah, *supra* note 39, at 160.

⁹³ Williams et al., *supra* note 83, at 870.

⁹⁴ *Id.* at 884.

⁹⁵ Cheatwood, *supra* note 69, at 863.

⁹⁶ Songer & Unah, *supra* note 4, at 190.

find that when the victim is a friend or acquaintance, a death sentence is more likely,⁹⁷ and Berk et al. find no significant effect for the variable.⁹⁸ Accordingly, this Article reassesses these contradictory findings, considering the possibility that killing certain classes of individuals more likely will invoke outrage from both prosecutors and juries. This Article also codes for the following classes of victims examined by Songer and Unah⁹⁹: *Elderly Victims*, or victims over the age of seventy years old; and *Child Victims*, or victims under the age of twelve years old. These criteria both constitute statutory aggravating factors in the state of Tennessee, as well.¹⁰⁰

4. Independent Variables, Category 4: Defendant Traits

Finally, this Article analyzes specific traits of the individual accused of the homicide.

Previous Violent Felony. The models code defendants with previous convictions for a violent felony as ‘1.’ Phillips notes that a violent criminal history can impact likelihood of a death sentence,¹⁰¹ as do Weiss et al.¹⁰² and Baldus et al.¹⁰³ Pierce and Radelet also state that “the defendant’s prior criminal history [is] generally considered to be an important factor in the imposition of the death penalty,” with a criminal history increasing the likelihood of a death sentence.¹⁰⁴

Male Defendant. The models code male defendants as ‘1.’ Streib offers a study of cases from 1900 to 2005 and finds that females are less likely to face the death penalty than males.¹⁰⁵ In discussing Streib’s work, Songer and Unah say, “[e]mpirical evidence suggests widespread reluctance on the part of prosecutors, judges and juries to

⁹⁷ Weiss et al., *supra* note 23, at 622.

⁹⁸ Berk et al., *supra* note 91, at 370.

⁹⁹ Songer & Unah, *supra* note 4, at 194; Phillips, *supra* note 48, at 820, also controls for “child victims.”

¹⁰⁰ Tenn. Code Ann. 39-13-204(i)(1989).

¹⁰¹ Phillips, *supra* note 48, at 820.

¹⁰² Weiss et al., *supra* note 23, at 623.

¹⁰³ Baldus et al., *supra* note 47, at 584.

¹⁰⁴ Pierce & Radelet, *supra* note 26, at 78.

¹⁰⁵ Victor Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 *FORDHAM URB. L. J.* 609 (2005); *see also* Victor Streib, *Death Penalty for Female Offenders*, 58 *U. CIN. L. REV.* 845 (1990).

sentence female offenders to death.”¹⁰⁶ Hindson et al. also find that prosecutors seek the death penalty more often against males.¹⁰⁷

Defendant Unemployed. The models code defendants who were unemployed at the time of arrest as ‘1.’ This variable accounts for the defendant’s socioeconomic status. Cheatwood observes that there is little research on the relationship between that factor and the death penalty, highlighting the lack of data regarding offender economic status. Cheatwood adds, though, that “because it is so difficult to establish reliable data to measure the wealth or poverty level of an offender, one of the few (and by default one of the best) measures we have is occupation.”¹⁰⁸ Cheatwood uses a limited sample of raw data regarding occupation to note that, of those executed in Chicago from 1870 to 1930, “few, if any of them, were rich.”¹⁰⁹ In this regard, Bright suggests that the lack of private counsel may be related to the level of poverty found on death row; he specifically states that “a large part of the death row population is made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty... and the poor legal representation they received.”¹¹⁰ For these reasons, the models control for an accused’s employment status, based on the assumption that the unemployed will be less likely to afford private counsel, and thus could be disadvantaged at trial.

Finally, although Tennessee statutes do not specifically define mitigating factors, this Article identifies three potential considerations that appear in the Rule 12 database: ***Showed Remorse***, ***Learning Disability***, and ***Potential for Rehabilitation***. Because the Rule 12 database presents information on the presence or absence of these factors, this Article considers each matter separately as a dummy variable for which ‘1’ indicates presence and ‘0’ indicates absence. Any of these three factors could adversely affect the likelihood of a capital sentence. In a study of capital juror’s receptiveness to

¹⁰⁶ Songer & Unah, *supra* note 4, at 183.

¹⁰⁷ Hindson et al., *supra* note 28, at 572.

¹⁰⁸ Cheatwood, *supra* note 67, at 848.

¹⁰⁹ *Id.* at 865.

¹¹⁰ Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 278 (Hugo Adam Bedau ed., Oxford Univ. Press, 1998).

considering “mitigating circumstances,” however, Brewer finds that “the more heinous a crime was perceived to be,” the less likely a juror was to consider mitigating information.¹¹¹ In addition, Kremling et al. observe that “accepted” mitigating factors are not as significant in explaining death penalty decisions as “accepted” aggravating factors; nevertheless, they do find that “accepted” mitigating factors will, *ceteris paribus*, slightly decrease the likelihood of a death sentence.¹¹² Before employing a logistic regression analysis with this array of independent variables, this Article will offer some descriptive statistics regarding race and the death penalty in Tennessee from 1977 to 2007.

IV. RESULTS AND DISCUSSION

A. *Summary Statistics for First-Degree Murder Convictions*

An initial examination of contingency tables, or cross-tabulations of this Article’s relevant data, reveals that Tennessee prosecutors sought the death penalty in 34% of the 1,068 cases. In those 361 capital trials, juries returned death sentences 44% of the time (160 cases). Thus, 15% of the first-degree murder convictions studied resulted in sentences of death. From a demographic standpoint, 50% of the defendants convicted of first-degree murder were White; 45% were Black.¹¹³ Contrary to suppositions in early research, prosecutors were actually more likely to seek the death penalty against White defendants, and juries were more likely to return death sentences in cases involving White defendants (*see* Table 1 below). As a result, 19% of White defendants received the death penalty, compared with 11% of African-American defendants.

The results differ somewhat, though, when it comes to the race of the murder victims. As Table 1 shows, prosecutors were more likely to seek the death penalty in cases where the victims were White. Although juries were only slightly more likely to return death sentences in these cases, the result was that 18% of defendants who

¹¹¹ Thomas Brewer, *Race and Juror’s Receptivity to Mitigation in Capital Cases: The Effect of Jurors’, Defendants’ and Victims’ Race in Combination*, 5 L. & HUM. BEHAV. 529, 539 (2004).

¹¹² Kremling et al., *supra* note 79, at 373-74.

¹¹³ Five percent of defendants were of another race or their race was not recorded; those cases will be ignored in this part of the analysis.

killed White victims were sentenced to death, while only 10% of defendants whose victims were Black received the death penalty.

Table 1: Racial Classification of Defendants and Victims

	% of All First-Degree Murder Convictions in Database	% of Cases in which Prosecutor Sought Death Penalty	% of Death Penalty Cases in which Jury Returned Death Sentence	% of Cases Resulting in Death Sentence
White defendant	50.4%	38.5%	48.8%	18.8%
Black defendant	44.9%	28.1%	37.8%	10.6%
White victim	64.0%	39.4%	44.7%	17.6%
Black victim	33.0%	23.1%	41.0%	9.5%
White defendant/White victim	52.4%	39.4%	51.8%	19.0%
White defendant/Black victim	2.0%	21.1%	50.0%	10.5%
Black defendant/Black victim	32.7%	23.2%	41.1%	9.5%
Black defendant/White victim	12.9%	37.9%	29.8%	11.3%

While other researchers who intersected the race of defendants with that of victims found that Black defendants accused of killing White victims were more likely to be sentenced to death than any other

racial combination,¹¹⁴ the cross-tabs do not support the notion that Black defendant-White victim cases are more likely to result in either a capital charge or a death sentence. To more thoroughly address this matter and the primary hypotheses, this Article turns to the logistic regression models.

B. Model of Prosecutor Decisions to Seek the Death Penalty

The next step is to determine whether the disparity with respect to the race of the victim holds when controlling for other variables that impact prosecutorial and jury behavior. This Article achieves that objective by building the two aforementioned logistic regression models, each with the same collection of independent variables. As mentioned, the first model, depicted in Table 2, focuses on the prosecutor's decision to seek the death penalty. Coding for the dependent variable in this model is '1' when the prosecutor seeks a death sentence. Here, a number of variables are significant predictors of that decision. To simplify the discussion of these variables, this section explores the "odds ratio" analysis for those that achieve statistical significance, in order to demonstrate the impact that a particular factor has on a prosecutor's decision to seek a death sentence.

The first conclusion that can be drawn is that a prosecutor is more likely to seek a death sentence when the victim is White, rejecting the null for Hypothesis #1. More specifically, the odds ratio shows that Tennessee prosecutors are approximately twice as likely to seek a capital charge when the victim is White. Additionally, if the victim is female, prosecutors are 1.5 times more likely to charge it as a capital case. It appears that the presence of a certain class of victims motivates the decision to seek a death sentence. Other statistically relevant factors related to the victim include the following: the murder of an elderly victim (2.78 times more likely to seek), the murder of a victim who is a police officer, judge or District Attorney (15.87 times

¹¹⁴ Baldus et al., *supra* note 15, at 707-10; Pasternoster, *supra* note 18, at 776-78; *see also* Baldus, et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 157-65 (1986); Raymond Pasternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & SOC. REV. 437, 450-70 (1984).

more likely to seek), the murder of a victim who is a stranger to the defendant (1.5 times more likely to seek), and the murder of three or more victims (5.21 times more likely to seek). Each of these factors establish a perception that certain murders are more heinous than others, and therefore are more deserving of capital punishment.

For control variables relating to the crime itself, the model shows that a murder accompanied by a rape is also more likely to result in a prosecutor charging a capital offense (2.72 times more likely to seek), as is a murder involving three or more perpetrators (1.77 times more likely); again, the perceived level of depravity associated with a homicide seems to be greater in these situations. Further, prosecutors are 9.37 times more likely to file capital charges when the defendant has a

Table 2: Model of Prosecutor Decisions to Seek the Death Penalty in Tennessee, 1977-2007

(Binary Logistic Regression)

Dependent Variable = Prosecutor Sought Death Penalty ("1")

Independent Variables	Coefficient	Standard Error	Odds Ratio
Victim Traits			
White Victim	.7188***	.234	2.05
Female Victim	.4374***	.171	1.55
Killing of Law Agent@	2.765**	1.1282	15.87
Victim Stranger	.4058**	.184	1.50
Elderly Victim	1.023***	.259	2.78
Child Victim	.3429	.322	1.41
Defendant Traits			
Black Defendant	-.1179	.223	.889
Male Defendant	.3977	.349	1.49
Defendant Unemployed	-.2213	.193	.801

Previous Violent Felony Conviction	2.237***	.252	9.37
Potential for Rehabilitation	.4818	.809	1.62
Showed Remorse	-.5258	.526	.591
Learning Disability	-.1259	.503	.882
Crime Traits			
Urban County	.0621	.174	1.06
Three or More Victims	1.651***	.465	5.21
Three or More Perpetrators	.5696**	.288	1.77
Abnormal Method of Killing#	.0732	.173	1.08
Dangerous Concurrent Crime^	-.0017	.178	.998
Rape	.9993***	.368	2.72
Evidence			
Co-Perpetrator Testimony	.5633**	.263	1.76
Strong Witness ID	.5228	.341	1.69
Confession	.5866**	.253	1.80
Scientific Evidence	.6438*	.361	1.90
CONSTANT	-2.579	.422	
Number of Cases	1006		
Variance Inflation Factor	1.84		
Percent Correctly Classified	76.04%		
Percent Classified A Priori	66.51%		
LR Chi-Square	258.49***		
Pseudo R Square	.202		

= stabbing, throat-slashing, drowning, beating, strangle/suffocate, poisoning, burning, pushing off high building, or hitting with a vehicle

@ = victim was police officer, District Attorney, or judge

^ = arson, robbery, burglary, kidnap, aircraft piracy, child abuse, or bombing

*= $p < .10$; **= $p < .05$; ***= $p < .01$; two-tailed test

previous violent felony conviction. This finding may indicate the type of defendant that prosecutors are likely to target. In that regard, there is no evidence that prosecutors in the state of Tennessee target Black defendants with capital charges more than White defendants; therefore, there is no race-of-defendant effect.

Beyond that, important to the analysis is whether the defendant confessed (1.8 times more likely to seek), whether there was scientific evidence linking the defendant to the crime (1.9 times more likely to seek), and whether a co-perpetrator was going to testify (1.76 times more likely to seek). These findings may suggest that prosecutors are more comfortable seeking a capital sentence when they have a heightened sense of certainty regarding the defendant's guilt, or when they are more comfortable that the jury will be convinced of such guilt through the quality of evidence presented.

C. Model of Jury Decisions to Impose a Death Sentence

The jury model, depicted in Table 3, uses a dependent variable that captures whether the defendant received the death penalty, with '1' indicating a death sentence from a jury. Table 3 focuses exclusively on the behavior of juries; as a result, its model only considers 337 cases in which the prosecutor sought the death penalty.¹¹⁵

In Table 3, the race of the victim is not significant for the likelihood of receiving the death penalty from a jury; thus, the model fails to reject the null for Hypothesis #2. There is no support for the notion that juries consider the race of the victim when choosing a capital sentence. This finding is contrary to almost all recently-published research, as illustrated in the literature review, which has indicated an overall race-of-victim effect related to capital punishment. Unlike juries in many jurisdictions previously studied by other

¹¹⁵ This Article includes three cases in which a defendant waived his right to a jury trial and opted for a bench trial; excluding these cases does not cause any changes in variable significance levels. Some cases that went to trial were excluded from the regression models because of missing "Rule 12" data on key independent variables, which is why the $n=337$ instead of 361.

scholars, Tennessee juries do not seem to be influenced by the race of the victim in a capital case.

Table 3: Model of Jury Decisions to Impose the Death Penalty in Tennessee, 1977-2007 (Binary Logistic Regression)

Dependent Variable = Received Death Penalty ("1")

Independent Variables	Coefficient	Standard Error	Odds Ratio
Victim Traits			
White Victim	-.7401	.462	.477
Female Victim	-.1553	.324	.856
Killing of Law Agent@	3.379**	1.37	29.34
Victim Stranger	-.1284	.328	.880
Elderly Victim	-.0815	.407	.922
Child Victim	-.0202	.573	.980
Defendant Traits			
Black Defendant	-1.50***	.463	.223
Male Defendant	1.733**	.803	5.66
Defendant Unemployed	-.5787	.388	.561
Previous Violent Felony Conviction	2.728***	.363	15.31
Potential for Rehabilitation	-1.6927	1.43	.184
Showed Remorse	-.4499	.897	.638
Learning Disability	-1.3176	1.16	.268
Crime Traits			
Urban County	.4506	.328	1.57
Three or More Victims	.0636	.616	1.07
Three or More Perpetrators	-.3715	.497	.690
Abnormal Method of Killing#	.3129	.325	1.37

Dangerous Concurrent Crime [^]	.0770	.328	1.08
Rape	.6508	.516	1.92
Evidence			
Co-Perpetrator Testimony	1.592***	.440	4.91
Strong Witness ID	1.715***	.610	5.56
Confession	1.032**	.425	2.81
Scientific Evidence	1.916***	.572	6.80
CONSTANT	-2.391	.953	
Total Number of Decisions	337		
Variance Inflation Factor	1.84		
Percent Correctly Classified	77.15%		
Percent Classified A Priori	52.6%		
LR Chi-Square	147.18***		
Pseudo R Square	.318		

= stabbing, throat-slashing, drowning, beating, strangle/suffocate, poisoning, burning, pushing off high building, or hitting with a vehicle

@= victim was police officer, District Attorney, or judge

[^] = arson, robbery, burglary, kidnap, aircraft piracy, child abuse, or bombing

*= $p < .10$; **= $p < .05$; ***= $p < .01$; two-tailed test

This Article's finding on this matter might be the product of including control variables that account for legal factors that many previous studies have neglected. The focus on evidentiary concerns, such as scientific evidence, confessions, witness identification and corroborating witness testimony, may render racial differences related to jury application irrelevant. Therefore, jurors could be acting to "correct" the mistakes of prosecutors who may be considering extra-legal criteria in the application of capital punishment. Specifically, all four of the "evidence variables" in Table 3 are statistically significant predictors of a jury's decision to impose a death sentence (with three occurring at a probability level of less than .01, meaning that such

findings would occur at random less than one time out of 100). In terms of the odds ratios demonstrated for these variables, co-perpetrator testimony makes a jury's death sentence 4.91 times more likely, strong witness identification makes it 5.56 times more likely, a confession makes it 2.81 times more likely, and scientific evidence makes it 6.8 times more likely.

Other critical factors that increase the likelihood of receiving a death sentence from a jury—just as they increase likelihood of a prosecutor's capital charge—include whether the victim is a police officer, judge or District Attorney (29.34 times more likely) and whether the defendant has a previous violent felony conviction (15.31 times more likely).

Table 3 does not indicate that the presence of any of the three mitigating factors reduces the likelihood of a death sentence—although future research may wish to focus on a wider array of such variables. The model does show, however, that male defendants are 5.66 times more likely to receive the death penalty from a Tennessee jury than female defendants; perhaps jurors are less inclined to give female defendants a death sentence—even though prosecutors demonstrate no propensity to charge male defendants with capital offenses at a higher rate (Table 2). Conversely, while prosecutors are more likely to impose capital charges when the *victim* is a female (Table 2), the gender of the victim is not a statistically significant predictor of jury behavior, as noted in Table 3. Ultimately, unlike jurors, prosecutors may consider the political ramifications of failing to protect certain groups of victims. Jurors, though, may be more empathetic to female defendants who are sitting before them.

In addition, Table 3 also shows that the *Defendant Unemployed* variable is not a statistically significant predictor of a jury's decision to impose a death sentence. This provides some evidence that defendants who might lack the ability to afford private counsel will not necessarily be disadvantaged when it comes to the likelihood of receiving a capital sentence from a jury in the state of Tennessee. Moreover, this finding could indicate a positive development for those associated with the state's public defender system, though future research should evaluate this matter more directly.

Finally, this Article observes that the defendant's race actually *is* a significant predictor of a death sentence in Table 3, even with controlling for the numerous other variables, but the conclusion differs from what very early studies on the death penalty suggested. Over the last three decades, Black defendants in Tennessee have actually been significantly *less* likely than White defendants to be sentenced to death. This finding may stem from the fact that Whites are more likely to kill other Whites (see Table 1) and the fact that prosecutors are more likely to charge a capital offense when a victim is White (see Table 2). Furthermore, prosecutors also might seek capital punishment in cases that they believe are more likely to result in a conviction—possibly cases that not only involve White victims but also incorporate some combination of factors that juries find especially relevant when imposing a death sentence. Along these lines, future research should consider whether law enforcement officials may be more likely to expend resources to locate stronger forms of evidence, the types of evidence that Table 3 indicates are germane to jury decisions regarding capital punishment, when the victim falls into certain demographic categories.

D. Additional Considerations

Further assessing the impact of juries on the overall likelihood of receiving a death sentence in the state of Tennessee is Table A.1, which appears in Appendix B. This model incorporates the full set of 1006 cases addressed in Table 2 (the prosecutor model), but uses a dependent variable that is coded '1' when a death sentence is the ultimate outcome. As a result, Table A.1 predicts a result that stems from both prosecutorial and jury decision-making, and thus identifies the variables that are most important to the "system" in determining which persons receive capital punishment. Most notable within this model is the conclusion that the race of the victim is not statistically significant for explaining the overall likelihood of a death sentence in Tennessee; consequently, juries may be "correcting" a problem emanating from prosecutors' offices.

Odds ratios for variables in the "overall" model also appear in Table A.1. Results are similar to those for the other models, with two exceptions. Those defendants with learning disabilities and those who

are unemployed are less likely to receive the death penalty than others. Accordingly, prosecutors and juries may collectively consider these matters as de-facto mitigating circumstances when it comes to the application of capital punishment.

Lastly, the data also demonstrates that the Black defendant-White victim scenario discussed earlier is not more likely to result in a death sentence than other defendant-victim combinations. This Article examines this matter by replacing the race-of-defendant and race-of-victim variables in the reported models with a dichotomous “Black defendant-White victim” variable, coded ‘1’ when this scenario presents itself and ‘0’ for all other combinations. The “n” for this scenario is 124. Adding the variable in either the prosecutor model (Table 2) or the jury model (Table 3) yields no evidence that Black defendant-White victim homicides are more likely to result in a death sentence in Tennessee. There is also no significant effect after employing an interactive term that captures the simultaneous presence of White victims and Black defendants. Therefore, regarding the overall imposition of capital punishment in Tennessee, race features most prominently in a prosecutor’s decision to levy a capital charge, an event that appears more likely to occur when the victim is White.¹¹⁶

V. CONCLUDING REMARKS AND SUGGESTIONS FOR FUTURE RESEARCH

The primary finding of this Article is that prosecutors in Tennessee are more likely to pursue capital charges against a defendant who kills a White victim. Hindson et al. crystallize the repercussions of such a development by saying, “If the death penalty is supposed to help families of homicide victims, then, at best, it offers that ‘help’ far more often to families of White victims than to families of other homicide victims.”¹¹⁷ While that point certainly has ramifications for the justice system as a whole, this Article’s research

¹¹⁶ Diagnostic statistical tests reported in all three of this Article’s tables demonstrate the respective strength of the models. Specifically, chi-square values—which indicate the overall explanatory power of the models—are all statistically significant at less than a .01 probability level; and, “goodness-of-fit” tests indicate that the each model correctly classifies more cases than one would expect by chance. In addition, the Variance Inflation Factor scores are all low enough to indicate that multicollinearity is not a problem, in spite of the numerous variables.

¹¹⁷ Hindson et al., *supra* note 28, at 581.

examines the overall likelihood of receiving a death sentence and demonstrates that, in the state of Tennessee from 1977-2007, any race-of-victim effect disappears. In other words, when taking the jury's decision into account, those who kill Whites are no more likely to receive a death sentence than those who kill non-Whites. This conclusion falls in line with Phillips' observation that "jurors could... strengthen, attenuate, or eliminate disparities that originate in the D.A.'s office."¹¹⁸ Likewise, in the State of Tennessee, jurors appear to correct charging disparities that emanate from prosecutorial decisions to seek the death penalty.

More specifically, the type of evidence available, rather than the race of a victim, seems to have a profound effect on the likelihood of a death sentence. Hence, the results of this research actually produce confidence in the jury system, especially when prosecutors may have motives other than justice (e.g., political ones) influencing their decisions. Buttressing this assertion is the observation that a prosecutor is more likely to seek a death sentence when a homicide victim is female (perhaps a perceived vulnerable group among constituents); however, the research also demonstrates that a victim's gender does not affect juries that are deciding whether to impose a capital sentence. Still, juries are less likely to impose a death sentence on female *defendants*. This Article also shows that a defendant's criminal history and whether a victim was a law enforcement official (defined as a police officer, District Attorney, or judge) are very strong predictors of *both* prosecutorial decisions to seek and jury decisions to impose capital punishment.

Ultimately, because jury decisions are an important part of this Article's analysis, future research should examine the manner in which juror race interacts with the other considerations discussed herein. Some limited empirical evidence exists from mock-trial experiments that a juror's race might influence their perception of a defendant,¹¹⁹ but assessments from real-world cases have been scant, and actual systematic research on juror-victim racial interaction does not yet exist.

¹¹⁸ Phillips, *supra* note 48, at 834.

¹¹⁹ See Samuel Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOLOGY 171 (2007).

Although no data is available for the racial composition of the juries that rendered decisions affecting the research sample, this Article attempts to address this issue by generating a variable unused in previous literature. Specifically, the “*Batson* variable” is dichotomous and is coded ‘1’ for all cases heard after the Supreme Court’s decision in *Batson v. Kentucky*,¹²⁰ which declared that peremptory challenges during jury selection no longer could be based on a prospective juror’s race.

Little research has examined empirically the impact of *Batson* in regard to capital punishment, and as Diamond et al. note, “Researchers who have examined the impact of *Batson* have looked only at cases in which *Batson* challenges have been mounted.”¹²¹ Diamond et al. highlight a primary flaw with this limitation by suggesting that: “The most direct test of the effect of *Batson* would compare the racial make-up of juries in the years preceding and following *Batson*. That is a test that has not yet been conducted.”¹²² While no data exists to perform the specific test that Diamond et al. propose, adding a “*Batson* variable” to any of this Article’s models yields a negative coefficient that is statistically significant at less than a .05 probability level (and significance levels of other variables are not altered in any relevant way), indicating that both a prosecutor’s decision to pursue a capital charge and a jury’s decision to impose a death sentence in Tennessee have been less likely after the *Batson* decision.

Beyond the broader inferences from this Article’s research, though, there is a litany of plausible alternative explanations that may account for changes in the death penalty’s application over time, as future research may further develop. For example, shifts in public mood regarding capital punishment could provide an alternative explanation. In the end, however, the racial demographics of *all* relevant figures related to the imposition of capital punishment—from defendants and victims to prosecutors and juries—have implications for the function of the justice system.

¹²⁰ 476 U.S. 79 (1986).

¹²¹ Shari Seidman Diamond, et al., *Redefining the Role of the Jury: Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J. L. & PUB. POL. 77, 81 (1997).

¹²² *Id.*

In summary, for at least a segment of the justice system in the state of Tennessee from 1977 through 2007, the data lends itself to a sanguine pronouncement that although prosecutors were more likely to seek the death penalty when the victim of a death-eligible homicide was White, juries were not impacted by the race of the victim when it came to imposing a death sentence—even after controlling for an array of variables related to the victim, the defendant, the homicide itself, and the nature of available evidence. This conclusion also reinforces the notion that race-of-defendant effects are not currently a cause for concern relating to capital punishment, as Black defendants in Tennessee were neither more likely to be charged with a capital crime by prosecutors nor more likely to be sentenced to death by a jury.

Overall, though this Article focuses only on Tennessee, this work adds to a body of literature examining racial influences on prosecutorial discretion and jury decision-making in many jurisdictions. Accordingly, this Article echoes the sentiments of Songer and Unah, whose research from South Carolina declares: “[w]hile we cannot claim that [our state] is representative of other states, we do claim that [our state] is not an outlier and that it exhibits political and legal characteristics found in most of the other thirty-seven death penalty states.”¹²³ Ultimately, the notion of equitable punishment for criminal offenses, especially when such punishment takes the life of a defendant, is worthy of detailed study. This Article’s findings suggest that future research regarding capital punishment in this country should separate the prosecutorial decision to seek the death penalty from the jury decision to impose it, as different influences bear on each phase. Finally, future research should also account for the evidence that juries consider while pondering the implementation of this nation’s severest criminal sentence. The nature and quality of evidence, perhaps even more than the racial demographics of relevant parties, plays a critical role in the imposition of capital punishment in the state of Tennessee.

¹²³ Songer & Unah, *supra* note 4, at 164. This Article also notes that, when it comes total number of executions since 1976, Tennessee should not be considered an “outlier,” as it is ranked 21st out of the 35 jurisdictions (34 states plus the federal government) that have executed at least one prisoner since 1976; see “Number of Executions by State and Region Since 1976,” available at <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (accessed Nov. 1, 2011).

Appendix A: Summary of Statutory Aggravating Factors in Tennessee;

Adapted from Tennessee Code Annotated § 39-13-204(i)

- 1) Murder of a person less than 12 years of age when the defendant was at least 18 years of age;
- 2) Defendant was previously convicted of one or more felonies that involve the use of violence to persons;
- 3) Defendant knowingly created a great risk of death to two or more persons; other than the victim murdered;
- 4) Defendant committed the murder for remuneration or the promise of remuneration;
- 5) Murder was heinous, atrocious, or cruel in that it involved torture necessary to produce death;
- 6) Murder was committed to prevent an arrest or prosecution of the defendant or another;
- 7) Fleeing after first-degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
- 8) Murder was committed while the defendant was in lawful custody or in a place of lawful confinement;
- 9) Murder was committed against any law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such a victim was a person engaged in the performance of official duties;
- 10) Murder was committed against judge, district attorney general or state attorney general, assistant district attorney general or assistant

state attorney general due to or because of the exercise of the victims official duty or status and the

defendant knew that the victim occupies said office;

11) Murder was committed against an elected official, due to or because of the officials lawful duties or status, and the defendant knew that the victim was such an official;

12) Defendant committed mass murder (three or more persons within the same episode or within a period of 48 months);

13) Defendant knowingly mutilated the body of the victim after death;

14) Victim was seventy (70) years of age or older; or victim of the murder was particularly vulnerable due to a significant handicap or significant disability (mental or physical), and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability;

15) Murder was committed during the course of an act of terrorism.

16) Murder of a pregnant woman where the killing was intentional and the perpetrator knew that the woman was pregnant.

Appendix B:**Table A.1: Overall Likelihood of Receiving the Death Penalty in Tennessee, 1977-2007 (Binary Logistic Regression)***Dependent Variable = Received Death Penalty ("1")*

Independent Variables	Coefficient	Standard Error	Odds Ratio
Victim Traits			
White Victim	.2248	.349	1.25
Female Victim	.5411**	.256	1.72
Killing of Law Agent@	4.148***	1.121	63.30
Victim Stranger	.1365	.270	1.15
Elderly Victim	.7229**	.351	2.06
Victim Under 12	.5066	.477	1.66
Defendant Traits			
Black Defendant	-.8161**	.337	.442
Male Defendant	.9618	.674	2.62
Defendant Unemployed	-.6153**	.309	.541
Previous Violent Felony Conviction	3.3278***	.284	27.87
Potential for Rehabilitation	-1.2456	1.241	.288
Showed Remorse	-.1590	.676	.853
Learning Disability	-2.100*	1.252	.122
Crime Traits			
Urban County	.3298	.253	1.39
Three or More Victims	.4631	.562	1.59
Three or More Perpetrators	-.0346	.441	.966
Abnormal Method of Killing#	.0605	.260	1.06
Dangerous Concurrent Crime^	.0053	.264	1.01
Rape	.9518**	.426	2.59
Evidence			
Co-Perpetrator Testimony	1.487***	.336	4.42

Strong Witness ID	1.236***	.427	3.44
Confession	1.077***	.323	2.94
Scientific Evidence	1.512***	.396	4.54
CONSTANT	-4.436	.785	
Total Cases	1006		
Variance Inflation Factor	1.84		
Percent Correctly Classified	89.96%		
Percent Classified A Priori	84.1%		
LR Chi-Square	316.07***		
Pseudo R Square	.375		

= stabbing, throat-slashing, drowning, beating, strangling/suffocating, poisoning, burning, pushing off high building, or hitting with a vehicle

@= victim was police officer, District Attorney, or judge

^ = arson, robbery, burglary, kidnapping, aircraft piracy, child abuse, or bombing

*p<.10; **p<.05; ***p<.01; two-tailed test

Appendix C:**Table A.2: Summary Statistics for Key Independent Variables**

Variable	Number Coded '1' for Prosecutor Model (out of 1006 cases)	Number Coded '1' for Jury Model (out of 337 cases)
Victim Traits		
White Victim	641	252
Female Victim	392	171
Victim Stranger	329	144
Elderly Victim	105	60
Victim Under 12	65	21
Defendant Traits		
Black Defendant	480	135
Male Defendant	993	341
Defendant Unemployed	224	69
Previous Violent Felony Conviction	134	106
Potential for Rehabilitation	10	5
Showed Remorse	24	8
Learning Disability	26	9
Crime Traits		
Urban County	555	188
Three or More Victims	30	22
Three or More Perpetrators	90	41
Abnormal Method of Killing	398	157
Killing of Law Agent	9	8
Concurrent Dangerous Felony	437	165
Rape	52	36
Evidence		

Co-Perpetrator Testimony	97	44
Strong Witness ID	48	20
Confession	109	57
Scientific Evidence	51	32