EMPIRICAL ANALYSIS OF RACE AND THE PROCESS OF CAPITAL PUNISHMENT IN NORTH CAROLINA

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ABSTRACT

The process of determining recipients of capital punishment in the United States involves sequential stages of decision making by the prosecutor and jury. In this Article, I argue in favor of modeling capital punishment as a process rather than simply as an outcome by decomposing the various stages of decision making. Using a Heckman procedure along with a rich criminal prosecution and sentencing dataset from North Carolina, I analyze the potential influence of race in the application of the death penalty. The results indicate that despite structural reforms designed to minimize its policy effects, race still plays a crucial role in determining capital punishment. This key result was obtained even after controlling for numerous legal factors sanctioned by the North Carolina General Assembly, institutional factors connected to the political process, and structural factors involving victims, defendants, and their backgrounds. More importantly, the analysis points to the jury stage as the place where racial discrimination in capital punishment is most acute.

INTRODUCTION

The question of whether people should be put to death by the state is of great social and political consequence and is sharply debated in both scholarly and public arenas.[1] Yet no serious proponent of capital punishment argues that its application should be racially biased. Indeed, persistent racial bias in capital prosecution and sentencing would devalue the death penalty as a just form of social control, not only in the United States, but worldwide. As Justice Anthony Kennedy stated in *Edmonson v. Leesville Concrete Company*, "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."[2]

Whereas scholars have traditionally examined capital punishment as an outcome by focusing on its incidence on various social and ethnic groups,[3] I think that this distributive strategy is unproductive. It undermines

1. DEBATING THE DEATH PENALTY (Hugo Adam Bedau & Paul G. Cassell eds., 2004); William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Evidence and an Examination of Police Killings*, 50 J. SOC. ISSUES 53 (1994); Thomas J. Keil & Gennaro F. Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 CRIMINOLOGY 511 (1989).

2. 500 U.S. 614, 628 (1991).

3. Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Shel-

our ability to gain a better understanding of the dynamics of race as an important and controversial factor in the disposition of death penalty cases, and it stifles public discourse surrounding crime policy and punishment. By focusing narrowly on outcomes rather than on process, scholars very often ignore important decisional events of low visibility that take place at earlier stages of capital prosecution but are connected to later stages within a much broader and complex process. Events such as the prosecutor's decision to "go for death" may well hold information that can advance our understanding about the contours of discrimination in modern criminal punishment and help us to pinpoint where discrimination largely resides in the capital prosecution process. Ultimately, this can both inform and guide how social scientists and legal scholars can provide valuable counsel to policy makers and help them to improve social justice.

I. THE PREMISE OF THIS STUDY

As American states have become more multiracial and multiethnic conglomerations over the last twenty years, the significance of investigating the linkages between racial and ethnic membership, political ideology, and death penalty processing is increasingly being recognized in criminological,[4] political science,[5] sociological,[6] and legal communities.[7] One common theoretical dimension of these analyses is the recognition of juridical punishment as a political construction. Criminological theorist Michel Foucault calls it "a political tactic,"[8] and David Garland describes it as an "apparatus of power and control,"[9] which is situated within an interconnected field of power relations aimed at achieving social solidarity and order. Within this understanding of punishment, the role of electoral ideology in shaping death

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don Eckland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade after* Furman *in Texas*, 69 SOC. SCI. Q. 853 (1988).

4. John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85 (2006); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

5. David C. Nice, *The States and the Death Penalty*, 45 W. POL. Q. 1037 (1992).

6. David Jacobs et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 AM. SOC. REV. 656 (2005); Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81 (Austin Sarat ed., 1999).

7. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

8. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 23 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

9. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 2 (1990).

penalty decision making is enhanced by the visibility and salience of crime since the 1970s. Empirical evidence shows that when an issue gains in political salience, public and elected officials are likely to cultivate an accurate perception of public desires and develop incentives to respond even if for the sake of political self-preservation.[10]

Another important theoretical dimension of the literature on judicial punishment focuses on race as a symbol of social class conflict in which economic inequality that is usually associated with African Americans and other racial minorities threatens the interest of the powerful and politically well-connected, leading to escalation in punishment in order to control these members of the lower socioeconomic class.[11] Further linkage between race and the death penalty is provided by the controversy over whether racial diversity enhances the appeal of capital punishment. For example, the incidence of capital punishment is found disproportionately in southern states, which are more racially heterogeneous than in northern states, which are more racially homogeneous.[12] Although early research reported that black defendants were excessively more likely to be discriminated against in capital prosecution and punishment than their white counterparts,[13] more contemporary evidence suggests something different.

One of the earliest examples is the Baldus Study,[14] which used Georgia death penalty data from 1973 through 1978 to examine the impact of race in capital sentencing.[15] Relying upon several independent models to evaluate specific stages of capital prosecution, the study reported strong race-of-victim discrimination in the application of capital punishment.[16] Race-of-defendant effects were anemic. These outcomes were specifically attributed to the discretionary choices exercised by district attorneys in

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10. Robert Erikson et al., *Knowing One's District: How Legislators Predict Referendum Voting*, 19 AM. J. POL. SCI. 231 (1975).

11. HUBERT M. BLALOCK, JR., TOWARD A THEORY OF MINORITY GROUP RELATIONS, (1967); AUSTIN TURK, CRIMINALITY AND LEGAL ORDER (1969); Allen E. Liska & Mitchell B. Chamlin, *Social Structure and Crime Control Among Macrosocial Units*, 90 AM. J. SOC. 383 (1984).

12. Thomas J. Keil & Gennaro F. Vito, *The Effects of the* Furman *and* Gregg *Decisions on Black-White Execution Ratios in the South*, 20 J. CRIM. JUST. 217 (1992); Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 J. CRIM. JUST. 207 (2001); Ernie Thomson, *Discrimination and the Death Penalty in Arizona*. 22 CRIM. JUST. REV. 65 (1997).

13. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119 (1973).

14. BALDUS ET AL., *supra* note 7.

15. *Id.* at 2; *see also id.* ch. 5-7.

16. *Id.* at 154 ("[T]he odds of receiving a death sentence for the average defendant whose victim was white were 4.3 times greater than those of a similarly situated defendant whose victim was black, a disparity that was statistically significant at the .001 level.").

Georgia in both the early and later stages of the death penalty process.[17] But while the Baldus Study is truly seminal in its contributions, the analytical method employed failed to capture the truly *sequential* character of the death penalty process. In this Article, I present an alternative conceptualization of capital punishment not as an outcome but as a process.

With more than thirty years since the time period examined by Baldus and his colleagues, there are impressive signs throughout American society that racial attitudes are changing fundamentally. Surprisingly, no large-scale empirical reexamination of the death penalty in the South based on first-hand data exists, except in Maryland,[18] where the prevailing political culture is actually more consistent with northern liberalism than with southern conservatism. This study is, therefore, important not only because it fills that void by focusing on North Carolina, but because geographic and cultural differences among states introduce the possibility that the conclusions of the Baldus Study may not transfer to states outside Georgia. Furthermore, the changing political and cultural climates in the United States suggest that the findings may no longer hold. Only through careful and detailed study employing data from a more contemporary period can we reevaluate the race-and-death-penalty linkage. Indeed, my study provides reasons to believe that prosecutors are more race-neutral in the 1990s than they were when Baldus and his colleagues first conducted their study. Adaptation to a new political landscape that includes politically attuned and active minority voting populations makes this insight plausible.

I analyze capital punishment as a political process consisting of sequential decisions by the prosecutor and jury. By decomposing the process into several *interconnecting*, rather than independent, stages of analysis, I move the literature beyond distributive results to distinguish a more complex and nuanced decision-making outcome within the capital prosecution process. This will allow social scientists and legal scholars to determine whether racial discrimination, the most politically controversial and multifaceted aspect of the death penalty, continues to play an illegitimate role. While researchers continue to debate the intensity of racism in American society, particularly in the South,[19] widespread agreement exists that generational change as well as legal and social pressures have calmed the once overtly racist tendencies of southern whites. That prevailing sentiment

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17. *Id.* at 328 ("The overall conclusion suggested by the data, therefore, was that the race-of-victim effects in death sentencing observed among defendants indicted for murder were attributable principally to prosecutorial decisions made both before and after trial.").

18. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 U MD. L.J. ON RACE, RELIGION, GENDER, & CLASS 1 (2004).

19. Glenn Firebaugh & Kenneth Davis, *Trends in Antiblack Prejudice, 1972-1984: Region and Cohort Effects*, 94 AM. J. SOC. 251 (1988); James H. Kuklinski et al., *Racial Attitudes and the 'New South,'* 59 J. POL. 323 (1997).

across the South is captured by the descriptive title of an empirical study of racial discrimination in Panola County, Mississippi, which proclaims: "WE AIN'T WHAT WE WAS."[20]

In the research reported here, I address three important questions that I think can shed new light on the debate surrounding the role of race in capital punishment. First, does race *still* contribute significantly to the decision to *prosecute* and *impose* the death penalty in a southern state such as North Carolina? Second, looking beyond race, what are the most important structural, institutional, and legal factors that account for the observed variation in capital prosecution and sentencing? Finally, to what extent do statutory mitigating factors actually mitigate death sentences?

To address these questions, I collected data from eighty of the one hundred counties in North Carolina principally involving murders with known defendants committed between January 1, 1993, and December 31, 1997. Currently thirty-six other states and the federal government also impose death sentences for murder.[21] Thus, while my findings are most germane to North Carolina, they may very well have implications for how we understand the influence of race in modern prosecutorial strategy and in capital jury decision making nationwide.

II. RACIAL DISCRIMINATION AND THE DEATH PENALTY IN NORTH CAROLINA

North Carolina is among several states that maintain hegemony in the use of capital punishment in the United States. According to the state department of public safety, between 1910 and 2008, North Carolina executed 391 individuals in Central Prison.[22] Figure 1 presents the breakdown of these executions by period, coupled with the racial differentiation of the current death row population. Although African Americans comprise twenty-three percent of the state's total civilian population, they make up fifty-two percent of inmates on death row.[23] There are four women currently on death

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20. FREDERICK M. WIRT, "WE AIN'T WHAT WE WAS": CIVIL RIGHTS IN THE NEW SOUTH (1997).

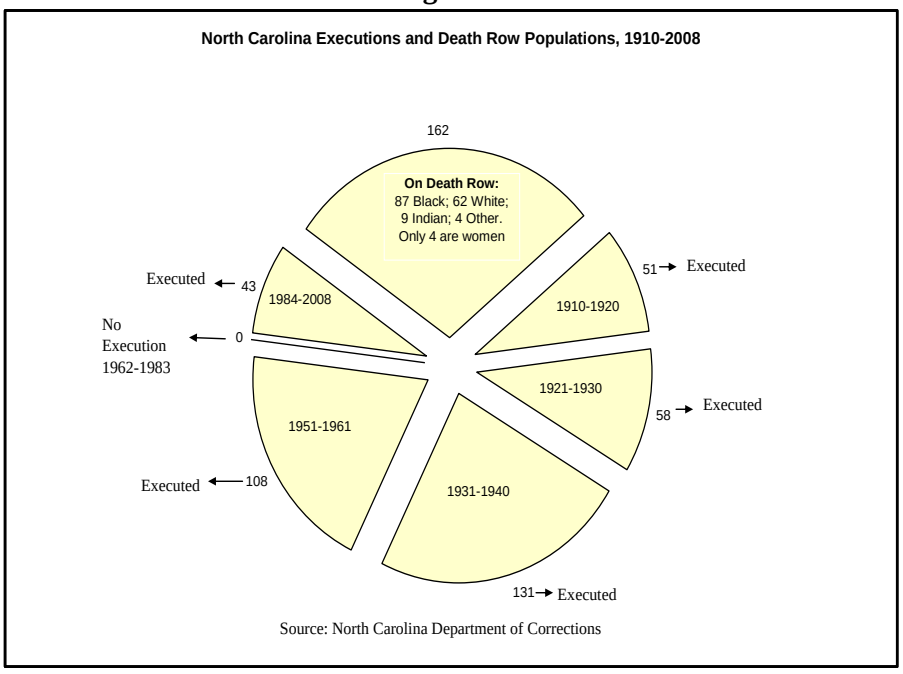
21. Tracy L. Snell, *Capital Punishment, 2010-Statistical Tables*, U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, Table 2 (Dec. 2011), http://www.bjs.gov/content/pub/pdf/cp10st.pdf.

22. N.C. DEP'T OF PUB. SAFETY, http://www.doc.state.nc.us/dop/deathpenalty/personsexecuted.htm (last visited Mar. 23, 2012).

23. As of March 20, 2012, there are 157 offenders on death row. *Offenders on Death Row*, N.C. DEP'T OF PUB. SAFETY, http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm (last visited Mar. 23, 2012). Of these, eight-two are black (fifty-two percent), according to the N.C. Department of Public Safety. *Id.*

row in North Carolina. Due to an on-going moratorium, North Carolina has not executed any death row inmate since 2006.[24]

Figure 1



North Carolina is often viewed both inside and outside the South as an example of racial moderation.[25] But the statistics cited above and death penalty research that emerged from the state during the 1970s and 1980s suggest otherwise. Indeed, they compel the inference that North Carolina values the lives of blacks *significantly less* than the lives of whites.[26] As Emory University political scientists Earl Black and Merle Black observe, part of

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24. Anne Blythe, *Racial Bias Case Begins in Cumberland County*, NEWS & OBSERVER, Jan. 30, 2012, http://newsobserver.com/2012/01/30/1816767/racial-bias-case-begins.html.

25. PAUL LUEBKE, TAR HEEL POLITICS: MYTHS AND REALITIES 102 (1990); Peter Applebome, *In North Carolina, the New South Rubs Uneasily with the Old Ways*, N.Y TIMES, July 2, 1990, at A1.

26. GROSS & MAURO, *supra* note 7; BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987).

the explanation is regional: "[O]ld southern politics was transparently undemocratic and thoroughly racist."[27] Overt racism is, at the very least, partly responsible for the sentencing disparities reported among whites and nonwhites throughout North Carolina before 1980. For example, two UNC-Chapel Hill professors Barry Nakell and Kenneth Hardy reported that the death penalty was imposed on black defendants with significantly higher frequency than on whites charged with comparable offenses and that the death penalty was used as a policy instrument for controlling the behavior of blacks.[28]

Institutional reforms prompted by the civil rights movement, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and Supreme Court decisions such as *Furman v. Georgia*,[29] were intended to challenge racial injustices and to require fundamental change in racial attitudes in government, including the introduction of structured sentencing that accounts for aggravating and mitigating circumstances in death sentencing. Indications are that these reforms have yielded results, showing a transformation in the contours of North Carolina politics.[30]

And so, despite the vitriolic cast of North Carolina's race politics exemplified by the late Senator Jesse Helms, a significant upswing in race relations is manifested in the election of several African Americans to the state legislature and to various judgeships, including the chief justice of the state supreme court.[31] But disagreement remains about the degree to which racial attitudes have been transformed at the individual level, which is where important jury decisions are made.[32] Whereas some scholars have

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27. EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS 3 (2002).

28. NAKELL & HARDY, *supra* note 26; Wolfgang & Riedel, *supra* note 13.

29. 408 U.S. 238 (1972).

30. Charles Prysby, *North Carolina: Two-Party Competition Continues into the Twenty-first Century*, *in* THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 170 (Charles S. Bullock III & Mark J. Rozell, eds., 3d ed. 2007).

31. In 1995, twelve percent of judges in North Carolina were African American or Native American. Jack Betts, *The Debate over Merit Selection of Judges*, *in* NORTH CAROLINA FOCUS: AN ANTHOLOGY ON STATE GOVERNMENT, POLITICS, AND POLICY 322 (Mebane Rash Witman & Ran Coble eds., 2006) [hereinafter NORTH CAROLINA FOCUS]. In 1999, Henry Frye became the first African American chief justice of the N.C. Supreme Court. Tom Lawrence, *Frye Sworn in as First Black N.C. Chief Justice*, WRAL.COM, Sept. 6, 1999, http://www.wral.com/news/local/story/136109/. Between 1900 and 1968 no African American was elected to the N.C. legislature. Milton C. Jordan, *African American Legislators: From Political Novelty to Political Force*, in NORTH CAROLINA FOCUS, *supra*, at 211. This changed in 1969 when one African American was elected and served in the legislature. *Id.* In 1979, that number increased to six. *Id.* In 1989, nineteen African Americans served in the state legislature and in 1999, twenty-four African Americans served in the state legislature. *Id.*; TYSON KING-MEADOWS & THOMAS F. SCHALLER, DEVOLUTION AND BLACK STATE LEGISLATORS: CHALLENGES AND CHOICES IN THE TWENTY-FIRST CENTURY 13 (2006).

32. For example, as early as the 1980s, researchers reporting significant positive change in racial attitudes in the South include Firebaugh & Davis, *supra* note 19. Research-

proclaimed the emergence of a "New South," characterized by a progressive attitude toward race relations,[33] skeptics maintain that through unobtrusive measures of racial attitude, in which white respondents are persuaded "that they can express hostility toward blacks without anyone's being aware that they have done so," racism remains high in North Carolina and in other southern states, especially among white southern men.[34]

A. Why Study North Carolina?

North Carolina provides an excellent setting for studying the linkages between race and capital punishment. For one thing, North Carolina is one of the leading death penalty states.[35] According to Blume, Eisenberg, and Wells, North Carolina has the fourth largest number of death row inmates and ranks among the top ten in the number of blacks sentenced to death.[36] Second, over ninety-five percent of prosecutors in North Carolina are whites who were elected through district-level elections.[37] These are characteristics shared by most other prosecutors nationwide.[38] Finally, V.O. Key's penetrating analysis of southern cultures and politics in 1949 revealed the importance of intra-regional variation in the intensity of racism among Southern states.[39] Key singled out North Carolina as the most presentable "progressive plutocracy,"[40] a state that held promise to be "something of a living

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ers finding little evidence of regional convergence of racial attitude between southern and northern whites include Charlotte Steeh & Howard Schuman, *Young White Adults: Did Racial Attitudes Change in the 1980s?*, 98 AM. J. SOC. 340 (1992).

33. Firebaugh & Davis, *supra* note 19.

34. Kuklinski et al., *supra* note 19, at 327.

35. From the first known execution in North Carolina on August 26, 1726, to October 27, 1961, there were 784 executions, which ranks North Carolina as fifth nationwide, behind Virginia, New York, Pennsylvania, and Georgia. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119, 2124 (2011) (*citing Executions in the United States, 1608-1976, By State*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/executions-united-states-1608-1976-state (last visited Jan. 23, 2012)).

36. John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 172 tbl. 1, 188 tbl. 5 (2004).

37. Matthew Robinson, *Face Up to the Facts and End the Death Penalty*, NEWS & OBSERVER, Mar. 16, 2011, http://www.newsobserver.com/2011/03/16/1056240/face-up-to-the-facts-and-end-the.html.

38. A Federal Bureau of Justice Statistics Report in 1994 found that ninety-five percent of chief prosecutors nation-wide are elected locally. CAROL J. DEFRANCIS, STEVEN K. SMITH & LOUISE VAN DER DOES, BUREAU OF JUSTICE STATISTICS, BULLETIN: PROSECUTORS IN STATE COURTS, *1994*, NCJ-151656, 1, http://bjs.ojp.usdoj.gov/content/pub/pdf/Pisc94.pdf.

39. V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION (1949).

40. *Id.* at 205.

answer to the riddle of race."[41] I think Key's insight remains relevant as I seek to gauge the state's racial progress in the prosecution of society's most heinous offenses. While North Carolina does not represent the entire South in all cultural dimensions, I think that the state's inclination toward racial moderation might serve as a harbinger of good things to come in the region regarding the interconnections between race and criminal justice policy. For these reasons, I think my findings are generalizable to other death penalty jurisdictions across the nation.

Does race *still* contribute substantially to the application of capital punishment in North Carolina? Answering this question is the centerpiece of my study. Criminal prosecutions in North Carolina follow a judicially mandated bifurcated trial scheme, requiring the weighing of aggravating and mitigating circumstances before imposition of a death sentence.[42] In the next section, I detail my theoretical framework through which I hope to make a contribution to the discussion of criminal punishment.

III. A PROCESS THEORY OF CAPITAL PUNISHMENT

My theoretical argument is that capital punishment is properly understood as a *process* that encompasses three sets of decision-theoretic factors. *Socio-structural factors* underscore the racial threat argument and so emphasize personal socio-demographic attributes, such as race and socioeconomic status (SES) of victims, defendants, and the local communities in which a death-worthy crime may have been committed. *Formal legal factors* are alternative systemic mechanisms of control that focus on rules established by the state to communicate the preferences and values of the people through their elected representatives. These legal factors usually target the severity of the crime and past criminal history of defendants. Finally, *institutional factors* emphasize the extent to which capital punishment is embedded within the political process. The factors include political incentives, electoral ideology, and process-oriented characteristics of pivotal actors within the criminal justice system, such as prosecutors and defense attorneys.

I assert that, to varying degrees, these theoretical factors operate simultaneously at each of the various stages of criminal prosecution from indictment to sentencing. Specifically, I identify two main sequential stages of capital prosecution. The first is the pretrial/discovery stage, which features the local criminal prosecutor who exercises untrammeled authority to determine what charges to bring and what prosecutorial strategy to adopt. The second, trial/post-trial, stage features the petit jury, which determines guilt

41. Jack Bass & Walter DeVries, *North Carolina: The Progressive Myth 1976*, *in* NORTH CAROLINA FOCUS, *supra* note 31, at 25, 39.

42. N. C. GEN.STAT. § 15A-2000 (2011).

and pronounces the sentence. In each of these two stages of criminal procedure, I analyze the interconnected decisions of the respective judicial officers as reflected in the actual flow of cases within the judicial system.

In my theoretical framework, I take as given two important truisms. The first is that all homicide suspects processed through the justice system have been formally indicted. The second is that the prosecutor is confronted with multiple alternative choices at each stage of the process. Therefore, I begin my analysis with the plea-bargaining decision, which the prosecutor can make under the assumption that, on balance, the defendant will seek a plea arrangement to avoid the uncertainty of trial and a possible death sentence. Here, the prosecutor's choice option is either to accept or reject a plea deal. Thus, the dependent variable for the initial selection model is the rejection or acceptance (1/0) of a plea agreement by the prosecutor, given the presence of an indictment (γ). This choice option will determine the outcome of the last important pretrial decision the prosecutor has to make, namely, whether to seek the death penalty or not (1/0), given rejection of a plea agreement and presence of a formal indictment. Thus, I shall estimate the following conditional probabilities for an indicted suspect:

(1a) $P(\Re =1|\gamma) \quad \rightarrow$ selection model

(1b) $P(\Omega =1| \Re=1, \gamma) \quad \rightarrow$ outcome model,

where $\Re$ = rejection of plea agreement, γ = indicted suspect, Ω = prosecutor seeks death.

The second set of models focus on trial/post-trial decision making. This time the actor in focus is not the prosecutor but the jury. The dependent variable for the selection model at this stage is whether the defendant was found guilty at the criminal trial or not (1/0), assuming that the prosecutor sought the death penalty, rejected a plea agreement, and an indictment was announced. For the outcome model the dependent variable is whether the defendant was sentenced to death or life in prison without parole, assuming a conviction was obtained. I shall estimate the following corresponding conditional probabilities:

(2a) $P(\Psi=1 \mid \Omega=1, \Re=1, \gamma) \quad \rightarrow$ selection model

(2b) $P(\Gamma=1 \mid \Psi=1) \quad \rightarrow$ outcome model,

where Ψ = conviction, Ω = prosecutor seeks death, $\Re$ = rejection of plea agreement, Γ = death penalty.

No previous studies have modeled capital prosecution and punishment in such a process-oriented framework. Its main advantage is that it accounts for built-in conditionality in the decisions that prosecutor and jury must make. I think that my framework represents an improvement over previous

studies because my models closely reflect the complex sequential process actually used in capital prosecution and sentencing in the United States.[43] My theoretical framework permits us to employ a large set of independent variables to test competing relational explanations about the linkages between race and the death penalty, and to pinpoint the location of any discrimination that may exist in the system and where it might be most acute. I now discuss my independent variables and hypotheses.

A. Racial Threat, Class Struggle, and Other Socio-Structural Explanations of Capital Punishment

The classic racial threat perspective proposes that criminal punishment will escalate as racially marginal populations increase in a state because of the potential threat these populations represent to the white majority, and to existing social, economic, and political arrangements that align with the majority's interests.[44] Indeed, a sizeable literature finds an association between the size of the nonwhite population in a state and escalation in overall punishment severity.[45] Accordingly, I would expect black or nonwhite offenders to receive harsher punishment than white offenders, especially when the victim is white. Furthermore, as the nonwhite population increases in a community, I expect overall death sentences to rise.

Race-based explanations of criminal punishment further maintain that criminal justice outcomes are significantly influenced by racial discrimination among authorities formally entrusted with administering justice, including police officers who investigate crimes, district attorneys who prosecute crimes, and jurors who convict and impose sentences.[46] Empirical research that relied on death penalty outcome data from before 1970 emphasized the criminal defendant's race as the key correlate of capital punishment because

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43. *Contra* BALDUS ET AL., *supra* note 7; GROSS & MAURO, *supra* note 7; Paternoster et al., *supra* note 18.

44. BLALOCK, JR., *supra* note 11, at 29-31.

45. Jeff Yates & Richard Fording, *Politics and State Punitiveness in Black and White*, 67 J. POL. 1099 (2005); Stewart E. Tolnay & E.M. Beck, *Toward a Threat Model of Southern Black Lynchings*, *in* SOCIAL THREAT AND SOCIAL CONTROL 36 (Allen E. Liska ed., 1992); David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109 (2002); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

46. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQUENCY 563 (1980); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC'Y REV. 587 (1985); GROSS & MAURO, *supra* note 7, at 110-15; Paternoster, *supra* note 3; James D. Unnever, *Two Worlds Far Apart: Black-White Differences in Beliefs About Why African-American Men are Disproportionately Imprisoned*, 46 CRIMINOLOGY 511, 511-37 (2008) (finding that the views held by African Americans about criminal punishment are shaped by "their personal experiences with racial discrimination" in the criminal justice system).

state officials used the death penalty as the premiere instrument of social control over blacks.[47] In North Carolina, research conducted during the Jim Crow era indicated that racial discrimination played a regular and illegitimate role.[48] Harold Garfinkel used data on more than 800 homicide cases that took place in ten North Carolina counties from 1930-1940.[49] Garfinkel reported that white defendants in first degree murder cases were somewhat more likely to receive the death penalty than black defendants.[50] Moreover, this difference remained when he compared ratios using both first and second degree homicide cases.[51] On the other hand, Garfinkel reported strong racial disparities when he examined defendant and victim configurations: In both black victim and white victim cases, black defendants were more likely to receive the death penalty than white defendants.[52] The general pattern of death sentences by race of defendant shown in Garfinkel's data reflect the fact that murder is a highly intra-racial event[53] and that defendants of whatever race who kill whites tend to face a higher probability of a death sentence.[54]

Consistent with the racial threat formulation, race-based sentencing patterns persisted even after the Supreme Court reinstated the death penalty in *Gregg v. Georgia*[55] and voiced optimism that two key reforms: (1) bifurcating the trial process and (2) giving juries structured sentencing guidelines will reduce the incidence of racial discrimination in capital sentencing.[56]

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47. Charles David Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918*, 21 LAW & SOC'Y REV. 361 (1987).

48. *Id.*

49. The ten counties are Alamance, Caswell, Chatham, Durham, Granville, Guilford, Orange, Person, Rockingham, and Wake. Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369, 370 tbl. 1 (1949).

50. Out of 112 first-degree murder charges against white defendants, eleven (approximately ten percent) resulted in death sentences. *See id*. at 374 tbl. 6. Out 413 first-degree murder charges against black defendants, thirty (approximately seven percent) resulted in death sentences. *Id.*

51. Out of 258 offense charges against black defendants (regardless of victim's race), thirty received a death sentence (11.6%) and out of sixty-six offense charges against white defendants (regardless of victim's race), eleven received a death sentence (16.7%). *See id.* at 374 tbl. 7.

52. *Id.*

53. In the sociology of crime, the fact that blacks tend to kill blacks and whites tend to kill whites has remained a consistent finding in death penalty research. *See* Guy Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 99 tbl. 1 (1941); *see* GROSS & MAURO, *supra* note 7, at 237 tbl. A7.

54. GROSS & MAURO, *supra* note 7, at 18.

55. 428 U.S.153 (1976).

56. Isaac Unah, *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*, 15 MICH. J. RACE & L. 135, 143 (2009) (quoting the majority opinion of *Gregg v. Georgia*, 428 U.S. 153 (1976), which held that "'[t]he concerns expressed in *Furman* that the

The Court expressed further optimism toward fairness in death sentencing through its rejection of North Carolina's mandatory death penalty statute for first degree murder in *Woodson v. North Carolina* because of "the problem of unguided and unchecked jury discretion."[57] Given this, one would expect the Court to favor statistical evidence showing disparate application of the death penalty. But in *McCleskey v. Kemp*[58] the Court rejected strong statistical evidence of continued group-based racial discrimination in sentencing, placing the burden on defendants such as McCleskey to prove that they personally suffered discrimination during their capital trial.[59]

Data from the post-*Gregg* era suggest that the Court's optimism is misguided,[60] and this further bolsters my racial threat argument. Barry Nakell and Kenneth Hardy's analysis of North Carolina data during 1977-1978,[61] for example, found a pattern of racial discrimination whereby defendants of whatever race who killed whites were "six times more likely to be found guilty of first degree murder than defendants in cases with nonwhite victims."[62] In addition, nonwhite defendants were more likely to receive the death penalty compared to whites.[63] But the short temporal distance between this study and the *Gregg* decision made it difficult for these authors to assess the decision's true impact. Gross and Mauro in 1989 also examined the post-*Gregg* environment,[64] focusing part of their analysis on the role of race in 126 death sentences imposed in Arkansas, Mississippi, Oklahoma, North Carolina, and Virginia between 1976 and 1980.[65] In each of these states "white-victim homicides were more likely to result in death

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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'").

57. 428 U.S. 280, 302 (1976). The court also stated that "the North Carolina Statute provides no standards to guide the jury in determining which murderers shall live and which shall die." *Id.* at 281.

58. 481 U.S. 279 (1987).

59. The *McCleskey* and *Woodson* decisions test the limits and usefulness of statistics in judicial proceedings. Although the justices have accepted the use of statistics in employment discrimination cases (see for example, Johnson v. Trans. Agency, Santa Clara Cnty, 480 U.S. 616 (1987)), they remain unwilling to permit the same in death penalty cases. According to the *McCleskey* decision, the death penalty is by nature "fundamentally different" from cases invoking Title VII of the Civil Rights Act. *McCleskey*, 481 U.S. *at* 294. The decision to impose death is made by a properly constituted jury, unique in its composition, whose decisions rest upon numerous factors pertinent to the case. However, the decision maker in Title VII cases is a single entity that considers numerous cases, thus making group-based statistics appropriate for showing racial disparities under Title VII.

60. NAKELL & HARDY, *supra* note 26, at 146-48.

61. NAKELL & HARDY, *supra* note 26.

62. *Id.* at 146-48.

63. *Id.* at 94.

64. GROSS & MAURO, *supra* note 7.

65. *See id.* at 88-94.

sentences than black-victim homicides."[66] Unfortunately, the small sample and lack of controls for extra-legal influences other than the victim's race rendered the findings inconclusive.[67]

Perhaps the most wide-ranging post-*Gregg* study in the Deep South was the Baldus Study.[68] Using several empirical models, including one comprised of more than 230 independent variables, the study generally confirmed previous findings regarding the significance of race but with greater specificity.[69] Although the incredibly large number of independent variables raises specification concerns, Baldus et al. concluded that the application of capital punishment favors white victims compared to black victims.[70] The odds of receiving capital punishment were 4.3 times higher for white victim cases than for black victim cases.[71] Similar findings have been reported in other studies.[72] One study commissioned in 2000 by Governor Parris N. Glendening of Maryland utilized data from 1978 to 1999 and similarly reported strong race-of-victim effects: "*Those who kill whites, particularly if they happen to be nonwhite, are at an increased risk of being charged with a capital offense, of having that capital charge not withdrawn, and ultimately of being sentenced to death.*"[73] In all these studies, researchers attributed victim-based effects to unchecked prosecutorial discretion and choice exercised at the earliest stages of case processing.[74] The defendant's race generally reached statistically insignificant impact.[75]

Unfortunately, while Baldus and his colleagues and Paternoster and his colleagues made truly valuable contributions to the race and death penalty debate, both studies are not without problems. First, the theory guiding their selection of independent variables is not fully explicated, raising questions of possible excluded variable bias.[76] For example, in both Georgia and Mar-

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66. *Id.* at 92.

67. Gross and Mauro cautioned that "[c]onsidered in isolation, such small numbers make any sentencing patterns hard to discern: only very strong effects can be seen clearly with so few observations." *Id.* at 88 (footnote omitted).

68. BALDUS ET AL., *supra* note 7.

69. *Id.* at 620-29.

70. *Id.* at 401.

71. *Id.*

72. Keil & Vito, *supra* note 1.

73. Paternoster et al., *supra* note 18, at 41 (emphasis in original).

74. *Id.* at 45; BALDUS ET AL., *supra* note 7, at 328.

75. BALDUS ET AL., *supra* note 7; Keil & Vito, *supra* note 1; Paternoster et al., *supra* note 18, at 34 (noting that across various decision points, "*there is no evidence that the race of the defendant matters at any stage once case characteristics and jurisdiction are controlled*").

76. As explained by Paternoster et al., under the multiple stage approach, they:

> [F]irst examined each case characteristic . . . separately to see if it was related to the [county] or race variable of interest. . . . [T]hose factors that were significantly related at the .05 . . . level were retained for further analysis, those not meeting that

yland where state prosecutors are popularly elected, electoral incentives are potentially influential considerations for prosecutors, especially in interracial homicides. Yet neither study controlled for possible electoral pressure on prosecutors.[77] Second, neither study accounted for possible case selection bias in any direct way.[78]

The studies I have reviewed here are all valuable. But many suffer from methodological problems ranging from too few cases and weak statistical tests[79] to possible selection bias.[80] But overall, analyses of race and the death penalty are fairly consistent in reporting race-of-victim effects and

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> criterion were dropped . . . . The variables that were retained at [the] first screening were then entered into a full logistic regression model . . . .

Paternoster et al., *supra* note 18, at 23. From this description, I can conclude that the analysis was not entirely theoretically grounded.

77. Because elected officials, including prosecutors, judges, and legislators, must periodically face voters and defend their record, there is every incentive for elected leaders to behave "as if" an election is looming. Melinda Gann Hall has furnished evidence that for State Supreme Court justices in Texas, North Carolina, Louisiana, and Kentucky, "district-based elections, close margins of victory, approaching the end of a term, and certain types of electoral experiences increase the probability that justices will uphold death sentences initially imposed by trial courts." Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 497-98 (1995). As elected officers of the Court, prosecutors may face a similar tendency. Although most prosecutorial elections are uncompetitive (as ninety-five percent of incumbent prosecutors who run are reelected), there is a real possibility that the mere prospect of a challenger emerging will create a shadow effect on prosecutor's behavior, much like the shadow effect of a trial on plea bargaining. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L., 581, 596 (2009).

78. Both Baldus and Paternoster expressed genuine concern for selection issues and attempted to address them through their careful consideration of which cases are death eligible. *See, e.g.*, Paternoster et al., *supra* note 18, at 18 ("We proceed with caution, however, because the issue as to whether or not a murder case is death eligible involves a great deal of ambiguity and inevitable controversy."); BALDUS ET AL., *supra* note 7, at 427 ("How likely, therefore, is it that our research methodology may have artificially enhanced or suppressed the observed levels of arbitrariness or discrimination in either the pre- or post-Furman periods?"). But their estimation methods (logistic regression) *cannot* account for the possibility that selection problems from one stage of analysis, say the prosecutor's decision to refuse or accept a plea deal, can have an effect on outcomes obtained at the next decision stage of analytical interest, namely the decision to file a notice of intention to seek death. The method proposed by economist James Heckman in 1979, called two-step correction, is often used to address selection bias. *See generally* Shawn Bushway, Brian D. Johnson & Lee Ann Slocum, *Is the Magic Still There? The Use of the Heckman Two-Step Correction for Selection Bias in Criminology*, 23 J. QUANTITATIVE CRIMINOLOGY 151 (2007). Failure to consider Heckman correction is by no means a fatal flaw in the analyses presented by Baldus or Paternoster, but it simply raises concerns as to the resiliency or robustness of their estimates. *Id.* at 153.

79. GROSS & MAURO, *supra* note 7, at 88-93.

80. BALDUS ET AL., *supra* note 7, at 435; NAKELL & HARDY, *supra* note 26; Paternoster et al., *supra* note 18, at 23.

absence of defendant's race effects.[81] The question is whether that reported pattern of racial disparities still holds in North Carolina. While my study focuses on race as a condition of criminal punishment, I account for alternative explanations regarding legal, structural, and institutional conditions to assess death penalty decision making.

Among these alternative explanations in the socio-structural landscape is class conflict. Class-based explanation of criminal prosecution and sentencing harkens back to Karl Marx. These explanations assert that punishment is conditioned by where an individual is placed on the social ladder. They predict that intensity of punishment that would befall those with power and social value will be less severe compared to individuals with less power and less social value.[82] Thus the class-based explanation views death penalty prosecution metaphorically as a card game with a deck stacked against low SES players because they lack both affluence and influence with the politically powerful. By contrast, high SES players are advantaged in their capacity to exploit the rules of the game to their benefit. According to this social class argument, high SES defendants can use legal institutions to reduce or altogether escape punishment for criminal transgressions through their social networks and their ability to hire superior lawyers and insiders. Similarly, high SES victims hold greater social and economic value than low SES victims.[83] The antecedent of this differential treatment is social inequality, especially ascriptive inequality. Based upon this logic, high SES victims can be expected to command severe punishment for their killers commensurate with their high social class standing. I test these social

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81. An etiology of capital sentencing studies by the General Accounting Office confirms this conclusion: "In 82 percent of the studies, . . . those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. [The] finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques." U.S. GEN. ACCOUNTING OFFICE, GGD-90-57 DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), *available at* http://archive.gao.gov/t2pbat11/140845.pdf (footnotes omitted).

82. GARLAND, *supra* note 9; Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911 (1994) (suggesting that "sociological models depicts humans as products of society whose behaviors and chances are not based on free will but depend on their socialization and position in systems of social inequality"); Michael Mitchell & Jim Sidanius, *Social Hierarchy and the Death Penalty: A Social Dominance Perspective*, 16 POL. PSYCHOL., 591, 592 (1995) (citing earlier work by Sidanius testing the "out-of-place principle" which "posits that acts of violence directed at members of dominance groups by members of subordinate groups are likely to face very severe, negative sanctions").

83. Ronald A. Farrell & Victoria Lynn Swigert, *Legal Disposition of Inter-Group and Intra-Group Homicides*, 19 SOC. Q., 565, 573-74 (1978) (examining the punishment of offenders based on occupational prestige and finding that "[f]inal convictions are most severe for low status defendants alleged to have murdered high status victims," a finding they attribute to the criminal imagery of low status individuals); *see also* Savelsberg, *supra* note 82; DEBATING THE DEATH PENALTY, *supra* note 1.

class arguments using educational attainment of the defendant and victim. I expect that crimes involving well-educated defendants will be less likely to result in capital prosecution and punishment, whereas those involving well-educated victims will be more likely to result in capital prosecution and punishment (Appendix A gives the operationalization of all my variables).

Prosecutors and juries may be more sympathetic to a certain class of defendants and victims than to others. Unfortunately, I have little information to assess which defendants or victims will elicit such sentiment. Two social background factors that seem especially appropriate are age and sex. Age has been associated with both prosecutorial and sentencing decision making in capital cases.[84] Society views older defendants as being more responsible and set in their own ways than younger defendants, who are seen as being more impulsive and immature, but more easily rehabilitated.[85] Also, younger defendants are less likely to carry a criminal history than older offenders. Therefore, I expect older defendants to be more likely to face capital prosecution and sentencing than younger defendants.[86]

Graddy's study of jury decision making in product liability awards shows that at the extremes, age has an exculpatory quality in the justice system.[87] Because of physical and mental infirmities associated with age, much older defendants (especially those over seventy-five for example) and much younger defendants (under twenty) may be perceived as being cognitively weak and, consequently, likely to invite leniency compared to middle-aged offenders.[88] This possibility suggests a curvilinear relationship between defendant's age and the probability of criminal prosecution and sentencing. I construct the exponential variable "Age" as a way to test this relationship. Similarly, society views very young and very old victims as "helpless" and, therefore, especially vulnerable to crime. On this basis, one would expect crimes against very old and very young victims to command

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84. Radelet & Pierce, *supra* note 46, at 608 tbl. 6 (examining 1017 homicide cases in Florida and finding that older defendants are less likely to have their charges upgraded by prosecutors compared to younger offenders); Songer & Unah, *supra* note 7, at 204 tbl. 7 (reporting that in South Carolina, the odds are 0.34 times lower that prosecutors will seek the death penalty against someone accused of murdering an elderly citizen compared to a younger citizen); Williams & Holcomb, *supra* note 12, at 214 (finding that the odds are 2.2 time higher that homicides with older offenders would lead to a death sentence in Ohio compared to homicides with younger offenders).

85. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 JUV. JUST. 15 (2008).

86. *See* Williams & Holcomb, *supra* note 12, at 214.

87. Elizabeth Graddy, *Juries and Unpredictability in Products Liability Damage Awards*, 23 LAW & POL'Y (2001).

88. Indeed, North Carolina and many other states exempted from capital punishment criminal defendants under eighteen, well before the Supreme Court outlawed the execution of individuals under eighteen in the case of *Roper v. Simmons*, 543 U.S. 551 (2005).

more severe punishment than those committed against middle-aged victims, leading us to expect a curvilinear relationship as well.

A mountain of empirical evidence points to a gender-gap in the criminal justice system.[89] While men are universally overrepresented in the death penalty system, women are underrepresented partly because of the arrangement of gender roles in society, but mostly because women commit fewer crimes (especially violent crimes) than men.[90] Moreover, studies suggest that women are treated more leniently than men not just in capital prosecution and sentencing, but in most other aspect of the criminal justice system. In Spohn and Spears' 1997[91] study of male and female felony defendants, females were sentenced less harshly than males for similar offenses. Evidence also suggests that violent offences against women are more likely to elicit the death penalty than offenses against men.[92] Thus, I expect less severe treatment of female offenders and more severe treatment for those who attack women.

B. Formal Legal Factors

Legal factors designated by a state's criminal statutes and judicial decisions are designed to constrain prosecutorial discretion and jury decision making. Presumably, this should lead to evenhandedness in prosecution and sentencing. Indeed, sociolegal theorists, such as Donald Black, recognize that society is based on a social contract and have conceptualized law as a

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89. Jon Hurwitz & Shannon Smithey, *Gender Differences on Crime and Punishment*, 51 POL. RES. Q. 89 (1998); *see also* Kathleen, Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 CRIME & JUST. 201 (1997); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181 (1994).

90. Darrell Steffensmeier & Emilie Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOC. 459 (1996).

91. Cassie C. Spohn & Jeffrey W. Spears, *Gender and Case Processing Decisions: A Comparison of Case Outcomes for Male and Female Defendants Charged with Violent Felonies*, 8 WOMEN & CRIM. JUST. 29 (1997).

92. BALDUS ET AL., *supra* note 7, at 73; *see also* Songer & Unah, *supra* note 7, at 194 tbl. 4. A woman facing execution is a particularly rare event, inasmuch as it is relatively rare for a woman to receive the death penalty. *See e.g.*, *id*. at 183-84; Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 427 (2000); Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002). In 2000, pre-execution media frenzy swirled around Texas death row inmate Karla Faye Tucker mostly over her sex, not over her claim of total rehabilitation or conversion to Christianity while in prison. *Karla Faye Tucker*, OFFICE OF THE CLARK COUNTY PROSECUTING ATTORNEY, http://www.clarkprosecutor.org/html/death/US/tucker437.htm (last visited Jan 20, 2012).

form of social control,[93] formulated to explain society's response to deviant behavior. Savelsberg[94] also recognizes the weight of penal law, maintaining that legal factors represent a neoclassical return to formal rationality in prosecution and punishment where the chief objective is simply to do the right thing and "be just."

Decision making based upon formal legal factors therefore functions in the Weberian sense, meaning that it reflects a systematic or analytically derived mode, whereby rational judicial officials reject extrinsic elements, such as race or ethnicity, and instead strictly adhere to criminal codes in an objective, logical, and dispassionate manner to arrive at their decisions.[95] Under this rationale, I would expect legally identified variables to emerge as a major determinant of criminal prosecution and punishment in North Carolina. Indeed studies examining unwarranted disparity in capital prosecution have shown that legal factors, including offense characteristics, have powerful effects.[96] Because punishment is predicated on offense severity, formal legal factors predict that prosecutors will likely proceed capitally and juries will likely convict and impose a death sentence if the offense surpasses a certain threshold of heinousness and if the offender has prior history of violence such as a felony conviction.[97]

North Carolina criminal statutes and those in other southern states, including Florida, Louisiana, and Tennessee, contain three elements that control whether a homicide defendant can be prosecuted for a capital crime.[98] These murder elements speak to the mental condition of the accused (*mens rea*) during the offense (i.e., the extent of premeditation involved). The first element involves one of five circumstances that have historically been seen as especially heinous when they lead to murder: poisoning, lying-in-wait,

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93. DONALD BLACK, THE BEHAVIOR OF LAW (1976); John Hagan, *The Science of Social Control*, 14 CONTEMP. SOC. 667, 667 (1985) (reviewing Black's seminal work, *Toward a General Theory of Social Control*, and noting that a basic premise of Black's theory of social control "is that law represents one form of social control").

94. Savelsberg, *supra* note 82, at 914.

95. *Max Weber on Law in Economy and Society* (Max Rheinstein, ed.), *in* LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 185 (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds., 1995).

96. Isaac Unah, *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*, 15 MICH. J. RACE & L. 135 (2009). Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119, 2144 (2010-2011).

97. Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733 (2001); *see also*, LYNN MATHER, PLEA BARGAINING OR TRIAL? (1979); Simon & Spaulding, *supra* note 6.

98. For example, in North Carolina, these murder elements are described in the General Statute, N.C. GEN STAT. 15A-2000(b)(1)-(3). *See also* FLA. STAT. § 921.141(2)(a)-(c) (2011); LA. REV. STAT. ANN. § 905.3 (2011); TENN. CODE ANN. § 39-13-204 (2011).

imprisonment, torture, or starvation.[99] The second element designates crimes that reflect a "willful, deliberate, or premeditated killing."[100] The third involves felony murders, those committed irrespective of the defendant's mental state while in the commission of another felony such as rape or armed robbery.[101] My hypothesis regarding these murder elements is informed by Justice Byron White's logic in *Gregg v. Georgia*, "Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence."[102] Thus, I expect these three enumerated legal elements to have a significant positive effect on capital prosecution and punishment.

Complicating the analysis, a North Carolina criminal statute requires that beyond conviction for first-degree murder, no defendant can be capitally sentenced unless the jury, at a separate sentencing proceeding, finds at least one aggravating circumstance described by statute.[103] The statute lists several aggravating circumstances, including killing a law enforcement or corrections officer and killing anyone while incarcerated.[104] The jury must

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99. NC CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 61 (Thomas H. Thornburg ed., 4th ed. 1995) [hereinafter NC CRIMES].

100. *Id.*

101. *Id.* The district attorney must designate either at indictment or soon thereafter which permissible legal theory of first-degree homicide he or she will attempt to prove. Then if the defendant is found guilty, a penalty phase will ensue.

102. Gregg v. Georgia, 428 U.S.153, 225 (1976).

103. NC CRIMES, *supra* note 99, at 62.

104. The full list of aggravating circumstances in N.C. GEN. STAT. § 15A-2000(e) (2011) is as follows:

> (1) The capital felony was committed by a person lawfully incarcerated.
>
> (2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.
>
> (3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.
>
> (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> (5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> (6) The capital felony was committed for pecuniary gain.
>
> (7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
>
> (8) The capital felony was committed against a law-enforcement officer, employee of the Division of Adult Correction of the Department of Public Safety, jailer,

weigh the aggravating circumstances found against a list of mitigating circumstances, factors that presumably make the defendant less culpable for the offense, such as killing under duress or under domination of another person.[105] Only when aggravating circumstances outweigh mitigating circumstances can a jury impose a death sentence.[106] I expect the presence of aggravating circumstances to increase the likelihood of capital prosecution and sentence, and I expect the presence of mitigating factors to decrease that likelihood. I also included the killing of multiple victims as a possible correlate of capital prosecution and sentencing. Premeditated killing of one victim is a clear enough indicator of depraved indifference to human life; both society and the law view killing multiple victims as a stronger indicator.

Analyses of community responses to crime indicate that criminal motives are related to punishment severity.[107] Yet, a number of studies that rely on official government data typically overlook the importance of motive and, thus, fail to explicitly account for it.[108] Part of the reason is that the data

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fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

105. *Id.* § 15A-2000(f) lists the mitigating circumstances that can be considered as follows:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

106. *Id.* § 15A-2000(b)(1)-(3).

107. Simon & Spaulding, *supra* note 6.

108. For example, Radelet and Pierce relied on data from the Uniform Crime Report consisting of 15,281 homicide suspects and supplemented these with death row data from the NC Department of Corrections. Radelet & Pierce, *supra* note 35, at 2138-39. These data do

gathering authority thinks that motive is already integrated into the sentencing guidelines. But because of the fluidity of human motivations, prosecutors and the jury can assign greater severity to a particular offense based upon the assailant's motive. In the politics of law enforcement, where criminal intent determines perceptions of culpability and punishment assignment, I think that taking account of various criminal motives can help us explain the behavior of prosecutors and juries. I examine five motives typically associated with homicide: hatred, rage, sex, money, and involvement in collateral crimes. I use rage as my comparison category. I expect the presence of these motives to enhance the probability of prosecution and sentencing.

C. Institutional Factors

Early studies of criminal punishment reached mixed findings when researchers relied on either the Durkheim intensity of punishment formulation or the Marxist linkage of unemployment, crime, and punishment severity. Since then, a growing literature on criminal punishment has turned to politics, conceptualizing punishment straightforwardly as a political response to social problems.[109] Indeed Candidate Richard M. Nixon's 1968 promise to return the nation to "law and order," his eventual appointment to the Supreme Court of law and order conservatives Warren Burger and William Rehnquist, and George H. W. Bush's 1988 use of prison furlough in a campaign advertisement featuring Willie Horton to accuse Michael Dukakis of being "soft on crime," all underscore the strong connection that exists between politics and criminal punishment, with central emphasis being placed on political processes.[110]

Within that description, institutional factors concern the manner in which the prosecutorial practice is embedded within the political process. Linking prosecutorial practice and the political process are process-oriented

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not contain explicit information on the motive for the crime. Such information is difficult to obtain without a case-by-case examination of the court records.

109. JAMES Q. WILSON, THINKING ABOUT CRIME (Vintage Books, 1985); *see also* GARLAND, *supra* note 9; KATHERINE BECKETT, MAKING CRIME PAY (1997); Thomas D. Stucky, Karen Heimer & Joseph B. Lang, *Partisan Politics, Electoral Competition, and Imprisonment: An Analysis of States Over Time*, 43 CRIMINOLOGY 211 (2005); Jacobs & Carmichael, *supra* note 45.

110. Candidate Nixon's campaign speech on law and order was reported in *The Nixon Record*, U.S. NEWS & WORLD REP., July 15, 1968, at 48, 51. Nixon's appointment of law and order justices Burger and Rehnquist is chronicled by Nixon White House insider John Dean in his book, *The Rehnquist Choice*. JOHN DEAN, THE REHNQUIST CHOICE 1-28 (2001).
The effect of the Horton commercial has been used as a template for much policy analysis by political scientists with many showing evidence that the spot was effective in Bush's win over Dukakis in 1988. *See, e.g.*, Tali Mendelberg, *Executing Hortons: Racial Crime in the 1988 Presidential Campaign*, 61 PUB. OPINION Q. 134, 137 (1997).

variables such as the temporal proximity of the case in the prosecutor's election cycle, party competition, and political ideology of the prosecutor and the county.

Research on judicial accountability suggests that elections provide an incentive structure that controls the behavior of state Supreme Court justices.[111] In controversial issues such as the death penalty, Melinda Gann Hall found that state supreme court justices act strategically by casting votes that conform to constituency preferences.[112] Fred Burnside reported that an Alabama trial judge up for reelection upgraded a jury's life sentence to a death sentence to improve his chances for reelection.[113] There is theoretical reason to believe that North Carolina prosecutors who are subject to electoral accountability will also respond to political pressure. As Sanford Gordon and Gregory Huber suggest, electoral incentives serve as instruments of political accountability.[114] Yet, elections can lead to perverse strategies including malicious prosecution. Strategic prosecutors will consider their future electoral prospects in their charging and prosecuting decisions. Evidence proffered by William Bowers and Glenn Pierce supports the contention that prosecutors facing electoral competition do succumb to political pressure to cultivate an aggressive posture by disingenuously upgrading the crimes of, and vigorously prosecuting, accused offenders deemed easily convictable.[115] These soft targets are typically the poor or minorities.[116] The payoff for prosecutors includes a high conviction rate, which they can use to win support from crime-conscious voters. I expect electoral proximity to influence prosecutorial decisions, especially in the context of electoral competition.

Another institutional factor connected to the structure of prosecutorial practice is the prosecutor's ideology, an antecedent of attitude toward capi-

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111. Carol Ann Traut & Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment*, 60 J. POL. 1166 (1998).

112. Hall, *supra* note 77.

113. Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017.

114. Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002).

115. Bowers & Pierce, *Arbitrariness and Discrimination under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980). In capital trials, all jurors must be death qualified. In addition to routine attitudinal and experiential questions, prospective capital jurors are usually asked about their capacity and willingness to impose death if the defendant is found guilty. The Supreme Court ruled in *Witherspoon v. Illinois* that potential jurors whose beliefs substantially impair their ability to impose the death sentence may be excused from jury service in capital cases. 391 U.S. 510 (1968).

116. Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 336 (1993) ("[P]ublic officials commonly inflict punishment on negatively constructed groups who have little or no power, because they need fear no electoral retaliation from the group itself and the general public approves of punishment for groups that it has constructed negatively.").

tal punishment. Opinion polls consistently indicate that conservatives support the death penalty considerably more than do liberals.[117] Conservatives believe that severe punishment is needed to deter crime, an act of individual choice.[118] Liberals believe that crimes are often the result of forces beyond the individual's direct control.[119] As Stuart A. Scheingold noted, "Whereas liberals favor the carrot, conservatives prefer the stick."[120] Studies of decision making in Congress show that ideology is the most fundamental of all the political assets that government officials possess and routinely depend upon for decisions.[121] As Jeffrey Segal, Harold Spaeth,[122] and Melinda Hall[123] have convincingly documented, ideology also operates in the judicial system, even at the state level. I use party identification of the prosecutor to capture ideological influences on prosecutorial decisions. Because conservatives have a greater orientation toward law and order and are more prone to employing punitive measures than liberals, I would expect conservative prosecutors to pursue more severe punishment than do liberal prosecutors.

Defense counsel status is another process-oriented variable. In the adversarial setting of a criminal proceeding, the experience of the defense lawyer is an important predictor of the probability of prosecution as well as sentence severity.[124] I focus on the defense counsel by using two variables: (1) expertise and (2) whether the defense attorney is retained by the accused or an assigned public defender. I use hourly rate of pay that defense attorneys receive as a measure of expertise.[125] Other institutional factors linking

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117. Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 362 (2008); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 21 (1994).

118. STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 9 (1984).

119. *Id.* at 4.

120. *Id.*

121. MELVIN J. HINICH & MICHAEL C. MUNGER, IDEOLOGY AND THE THEORY OF POLITICAL CHOICE 9 (1st ed. 1996) (noting that in day-to-day politics, the existence and maintenance of an ideology is by far the most fundamental of all political assets).

122. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

123. *See* Hall, *supra* note 77.

124. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, *in* THE DEATH PENALTY IN AMERICA (Hugo Adam Bedau ed., 1997).

125. My data do not distinguish between different subdimensions of expertise identified by Herbert Kritzer, for example, substantive expertise (substance of the law, regulation, etc. governing decision making in an issue area) versus process expertise (ability to utilize knowledge of legal process, for example, hearings/advocacy to earn the trust of judges/jury through persuasion). *See* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 15 (1998). However, my measure reasonably approximates these

prosecutorial practice to capital prosecution, but which are not necessarily process-oriented, exist, including the racial composition of the local community, where the case was tried, and the race and gender of the prosecutor. I use race and gender of the prosecutor to attempt to generalize the gender- and racial-gap hypotheses that females and nonwhites are "softer" on crime than males and whites.[126] Finally, I include a measure of the racial composition of the county of conviction. Because prosecutors have an electoral incentive to be race-neutral, I hypothesize that prosecutors are less likely to seek the death penalty if the county nonwhite population is large rather than small. However, I expect jurors who face no electoral accountability to be more likely to convict and sentence defendants to death if the nonwhite population is large rather than small. Finally, I explore a number of interactions to tease out the complex relationships between these political variables and prosecutorial and sentencing decisions.

IV. RESEARCH DESIGN

During the 1993 to 1997 period, 3990 known defendants were prosecuted for different homicides in North Carolina.[127] My data capture homicides resulting in a murder or first-degree murder charge.[128] In addition, my data include a random sample of second-degree murder cases to account for the very real possibility that, for extra-legal motivations, prosecutors may

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forms of expertise because in North Carolina during the period I examine, the hourly rate of pay is determined by the trial judge based upon the lawyer's professional experience in capital cases and sometimes upon the perceived complexity of the matter in light of case law. Telephone Conversation with Rick Kane, Administrator, Administrative Office of the Courts, in Raleigh, N.C.

126. Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are they Related to Jury Verdicts*, 64 JUDICATURE 22 (1980); Susan Welch, Michael Combs & John Gruhl, *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126 (1988); *cf.* Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163 (1999).

127. This number was determined based on a general file of homicides with known offenders generated for this project. Analyst Patrick Tamer of the Administrative Office of the Courts in Raleigh N.C. generated a data file of all homicides that occurred during the time of study.

128. In North Carolina, homicides are charged as murder, first-degree murder, second-degree murder, and manslaughter (voluntary and involuntary). A nonspecific charge of "murder" is an all-inclusive category used if the prosecutor has insufficient evidence to classify the homicide as first or second-degree murder or manslaughter. It further gives the prosecutor flexibility should a plea agreement be negotiated down the line. For detailed definitions and information about these homicide categories, see NC CRIMES, *supra* note 99, ch. 6. Also, the all inclusive "murder" category was included in the data I received from the Administrative Office of the Courts in Raleigh. Telephone Conversation with Rick Kane, Administrator, Administrative Office of the Courts, in Raleigh, N.C.

undercharge an otherwise death-eligible offense.[129] My data then consisted of the entire population of first-degree murder cases in which the defendant received a death sentence (99 cases) or life in prison without parole (303 cases). I used multistage statistical sampling to select a random sample from the remaining homicide cases designated with a "murder" charge but receiving a life sentence, a term of years in prison, or an acquittal/dismissal (118 cases). In this way my data reflect the entire population of homicides committed in North Carolina during the period examined.

Under multistage sampling, cases are selected in stages to arrive at an overall nonzero probability of inclusion in the analysis (see Appendix B). To check the representativeness of my sample, I constructed a sampling weight that reflects the probabilities of the two sampling stages used.[130] I limit my regressions to the un-weighted sample, N=520. However, I use the weighted data for reporting death-sentencing rates for various racial groups and configurations as this method imposes few demands on the data.

I decompose the capital prosecution process by estimating the two sets of models outlined in my theoretical framework, using Heckman probit[131] as a way to truly capture the sequential process of capital prosecution and punishment.[132] I added exclusion restrictions into the selection models to reduce

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129. Because of prosecutorial discretion, prosecutors can decline to file a capital charge even if a case is death eligible. Bolstering my claim is Paternoster et al., who found that in Maryland, "[k]illings involving a black offender and a black victim make up .49 of the total number of death eligible cases, but only .28 of the death notifications." Paternoster et al., *supra* note 18, at 26. In my North Carolina data, there were thirty-four death-eligible cases where the prosecutor failed to seek the death penalty; most of these had black victims. Therefore, I *define a death-eligible offense* as one in which the prosecutor files notice to seek the death penalty *or*, as stipulated under the criminal code, at least one statutory aggravating circumstance is present, and the defendant is at least eighteen years of age, the statutory minimum age for invoking the death penalty in North Carolina during the time of my study.

130. Because North Carolina counties are grouped into judicial districts with each being controlled by a single prosecutor, I first selected a random sample of judicial districts; I then derived my randomly selected cases from these judicial districts. My sampling weight, calculated to be 31.7, reflects these two sampling stages. To check the accuracy of this weight, I mapped my 520 cases back to the entire population of 3990 and received a ninety-nine percent accuracy rate (N=3956). Due to rounding of decimal fractions, such mapping hardly ever yields the exact population figure. But I think my sample weight is almost perfect.

131. James J. Heckman, *Sample Selection Bias as Specification Error*, 47 ECONOMETRICA 153 (1979).

132. Heckman probit ("Heckprob") models are suitable for analyzing the death penalty as a process because my dependent variables are binary and because cases that reach any given stage of the process are a nonrandom selection of all cases that enter the courthouse. Heckman procedure corrects for selection bias by using probit to predict selection into the sample as a function of independent variables Z, then corrects for selection bias by calculating a nonlinear selectivity index or hazard rate, λ_i. That quantity is then included in the second stage regression to compensate for the selection bias: $y_i=X'\beta+\beta_\lambda\lambda_i + \varepsilon_i$, where X is the set of independent variables that predicted the outcome. Note that because the hazard rate

any collinearity problems that might be associated with the Heckman correction index.

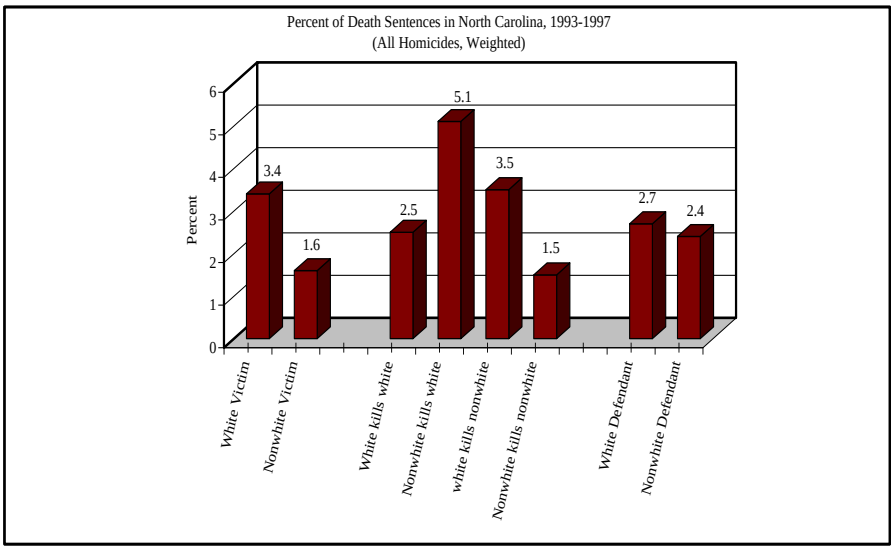
V. RESULTS

Does race *still* contribute substantially toward capital prosecution in North Carolina during the 1990s? If progressive changes in Southern racial attitude in recent decades are reflected in the application of criminal punishment in North Carolina, then little evidence of racial bias in prosecution and death sentencing should emerge. By racial bias, I mean a predictable inequity in the treatment of a racial group. Figure 2 reports simple *death-sentencing rates* grouped by racial category. Overall, the death-sentencing rate for homicides in North Carolina from 1993-1997 is 2.5 percent. Coincidentally, this rate is right in line with the national average of 2.2% reported by Blume, Eisenberg, and Wells.[133] Beyond the aggregate death sentencing rate that I report, three interesting findings emerge once I disaggregate the data and apply a weight index.

Figure 2

depends on normally distributed errors, λ_i must be nonlinear. If λ_i is linear, the outcome equation will be unidentified. In order to achieve analytical convergence in Heckman models, the selection equation requires an "instrumental" variable or exclusion restriction that explains the dependent variable in the selection equation but not in the outcome equation. Without such identifying variable, one is relying solely on the functional form to identify the model. This would be problematic since the functional form assumption has no firm basis in theory. *See generally* CHRISTOPHER H. ACHEN, THE STATISTICAL ANALYSIS OF QUASI-EXPERIMENTS 97-100 (1986).

133. Blume et al., *supra* note 36, at 171.



A. Categorical Analysis

First, consistent with racial threat theory, there is a stark difference in death-sentencing rates between white and nonwhite victim cases.[134] The death-sentencing rate for white victim cases is 3.4 percent regardless of the race of the defendant. This is more than doubled the death-sentencing rate for nonwhite victim cases (1.6 percent, $p < .01$). Thus the aggravated murder of a white individual is 3.4 times more likely to result in a death sentence compare to the murder of a nonwhite individual.

Second, the death-sentencing rate for both white and nonwhite defendants is statistically indistinguishable if the victim's race is not taken into account. This finding is consistent with much of the post-*Gregg* literature. Finally, I examine defendant/victim racial configurations. How do capital murder defendants fare in the justice system when judged in light of their victim's race? The most striking result is in the treatment of victims killed by nonwhite defendants. When a nonwhite defendant kills a white victim, the death-sentencing rate is 5.1 percent. However, when a nonwhite defendant kills a nonwhite victim, the death-sentencing rate is only 1.5 percent. This difference is statistically significant using a difference of proportions test ($p < .01$). The highest death-sentencing rate occurs where a nonwhite kills a white; the lowest occurs where a nonwhite kills another nonwhite.

134. I define nonwhites to include blacks, Hispanics, Asians, and other racial minorities, but most individuals in this category are black. While several death-sentencing studies simply make a distinction between whites and blacks, I believe that this is under-inclusive because other racial minorities also suffer illegal discrimination in state and federal justice systems.

The sentencing of white defendants does not differ significantly in terms of their victim's race. However, as in the case of nonwhite defendants being significantly worse off when they commit interracial murders, white defendants who commit interracial murders also appear worse off, but the number of cases in that category is too small, rendering the ratio statistically meaningless.

Generally speaking, inter-racial homicides command higher death-sentencing rates than intra-racial homicides. This pattern fits in with previous findings based upon 1970s data from Florida[135] and Georgia[136] and 1990s data from Maryland.[137] One explanation is that intra-racial homicides tend to involve primary relations such as relatives, acquaintances, or friends. These kinds of homicides are generally thought to carry lower levels of aggravation than inter-racial homicides, which typically involve strangers and thus pack higher levels of aggravation. My data support that explanation. In cases where a nonwhite kills another nonwhite, twenty-one percent of those receiving death sentences involve strangers. But in cases where a nonwhite kills a white, the rate more than doubles: forty-four percent of those receiving death involve strangers.

On the basis of this descriptive analysis, I can surmise that a discernible pattern exists. On account of race alone, death penalty sentencing in North Carolina is not evenhanded. Nonwhite killers of whites are overwhelmingly more likely to receive the death penalty than any other racial configuration. The full percentages are reported in Table 1. My analysis thus far cannot fully account for the differential treatment of murder defendants and victims since I have not yet controlled for legal and political influences.

135. Radelet & Pierce, *supra* note 46.
136. BALDUS ET AL., *supra* note 7.
137. Paternoster et al., *supra* note 18, at 26.

Table 1

Percentage of Death Sentences Imposed, Grouped by Racial Characteristics and Configuration (Weighted)		
	ALL MURDER CASES	DEATH ELIGIBLE CASES
Death sentences imposed	2.5 percent (99/3958)	5.8 percent (99/1717)
Defendant		
White defendant	2.7 percent (38/1408)	5.9 percent (38/647)
Nonwhite defendant	2.4 percent (61/2550)	5.7 percent (61/1070)
Victim		
White victim	3.4 percent (67/1945)***	7.1 percent (67/938)**
Nonwhite victim	1.6 percent (32/1982)***	4.3 percent (32/747)**
Defendant/Victim Configuration		
White kills white	2.5 percent (34/1333)	5.9 percent (34/572)
Nonwhite kills white	5.1 percent (33/644)***	9.0 percent (33/365)***
White kills nonwhite	3.5 percent (5/141)	11.0 percent (5/45)

Nonwhite kills nonwhite	1.5 percent (29/1974)***	3.9 percent (29/738)***

Note: Death eligible cases are first-degree murder cases where at least one statutory aggravating circumstance was found or the prosecutor seeks the death penalty, and the defendant is more than seventeen years of age.
* p < .10 (two-tailed test); ** p < .05 (two-tailed test); *** p < .01 (two-tailed test)

Will the lack of evenhandedness disappear in my results once I subject the data to more rigorous statistical testing that accounts for linear dependencies and control for factors other than race, such as institutional rules surrounding case facts and structural conditions pertaining to case processing?

B. Heckman Probit Analysis

1. *Race and Prosecutorial Decision to "Go for Death."*

At the prosecutorial decision stage, the most important question I seek to answer is: Does race still affect the prosecutor's decision to seek the death penalty in North Carolina? Table 2 reports Heckman probit estimates explaining prosecutorial decision to reject a plea deal and to seek the death penalty. Due to space constraints, I limit my discussion to the prosecutor's decision to seek death (Model 2). Overall, the models perform quite well as indicated by the chi square test, which suggests that the results did not occur by chance. Moreover, the reported rho of .66 indicates the level of association between rejection of a plea agreement by the prosecutor and the decision to seek the death penalty. It lends credence to my analytical method, which is capable of correcting for collinearities between the different prosecuting stages. To address any variability that may not be captured by my aggregate-level predictors, standard errors are corrected for clustering on county of offense. Generally speaking, the probability that North Carolina prosecutors would seek the death penalty, conditional upon all variables being held at their mean, is twenty-eight percent. Since interpretation of probit estimates is less straightforward, I have calculated the marginal impact of each statistically significant variable based upon the conditional event probability. What do the results mean?

Using white defendants who kill white victims as the comparison category throughout, I find that North Carolina prosecutors are ten percent less likely to seek the death penalty when a nonwhite individual kills a white individual than when a white kills a white, holding all other variables constant at their mean. As I indicated earlier, white defendant/nonwhite victim cases are too few to be successfully analyzed in the regression models. The category of nonwhites-who-kill-other-nonwhites fails to reach statistical significance in this model. My key finding that racial disparity does not

reside in the prosecutorial stage would surely seem counter-intuitive to many because it contradicts the old-style racism thesis, and it contradicts conclusions reached by the Baldus Study in Georgia. However, I think my finding makes theoretical sense. The historical understanding of racial discrimination in criminal punishment in the South conjures up images of a white prosecutor vigorously pursuing capital justice against a black defendant when the victim is white. From that standpoint, my finding here indicates that North Carolina is changing fundamentally and that this is a harbinger of positive developments to come throughout the South. But further elaboration is in order.

There is both a statistical and a substantive explanation for this finding. Statistically speaking, my rigorous analytical method places more demands on the data and it uses a two-step estimation procedure designed to address the underlying issues of case selection bias and conditionality that are common in capital prosecution data. Substantively, there is a logical political explanation for my finding. As Edward Carmines, James Stimson,[138]Earl Black, and Merle Black[139] have demonstrated, electoral politics in American society, and particularly in the South, have indeed undergone fundamental change since the 1970s due to the increasing importance of race in election outcomes. Democratically elected district attorneys in the North Carolina of the 1990s must respond to a broader electoral constituency than district attorneys who served before and during the 1980s when nonwhites faced demoralizing obstacles of disenfranchisement.[140] Owing to legal and political reforms of the civil rights era, most notably the Voting Rights Act of 1965 and Supreme Court decisions invalidating discriminatory practices,[141] nonwhites have gained substantial political clout and independence, which prosecutors now ignore only at their own electoral peril. As I further explain below, a strong electoral connection exists between prosecutorial choices and voter ideology.

Table 2

Explaining Prosecutorial Decision Making in Murder Cases in North Carolina, 1993-1997

138. EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989).

139. BLACK & BLACK, *supra* note 27.

140. Techniques at the polls that the General Assembly of North Carolina employed to minimize black political participation and therefore black political power include poll taxes and literacy tests. LUEBKE, *supra* note 25, at 117.

141. *Id.*

	(1) Prosecutor Rejects Plea Deal		**(2) Prosecutor Seeks Death Penalty**	
Independent Variable	Coefficient (Stnd. error)	Marginal Impact	Coefficient (Stnd. error)	Marginal Impact
Socio-Structural Factors				
Nonwhite defendant/white victim	.750** (.444)	.75	-.359** (.155)	.10
Nonwhite defendant/nonwhite victim	-.025 (.279)		-.057 (.309)	
Defendant age	-.101 (.045)		.101*** (.015)	.03
Defendant age^2	.002*** (.0006)	.0019	-.001*** (.0002)	.00028
Defendant education	.227 (.258)		-.005 (.207)	
Defendant sex	-.143 (.409)		.325 (.281)	
Victim age	.005 (.024)		-.088* (.060)	.02
Victim age^2	-.00004 (.0002)		.0008* (.0005)	.002
Victim education	-.234*** (.043)	.22	.233* (.164)	.07
Victim sex	.151 (.143)		.0008* (.0005)	.002
Institutional Factors				
Electoral proximity * County ideology (Republican)	-.874*** (.282)	.84	2.275*** (.374)	.64
Electoral proximity	.340* (.231)	.33	-.905*** (.081)	.25
County ideology	2.289* (1.627)	2.20	-18.049*** (1.934)	5.05
Electoral proximity * Party competition	.0007 (.005)		.009*** (.002)	.003

Party competition	.046***	.04	.033***	.009
	(.008)		(.013)	
County ideology * Party competition	-.099***	.09	-.132***	.04
	(.016)		(.030)	
Republican district attorney (D.A.) * County nonwhite population			10.445***	2.92
			(2.073)	
Republican D.A.	-.499		-5.233***	1.47
	(.798)		(1.095)	
County nonwhite population	1.137**	1.09	-4.337***	1.21
	(.645)		(1.347)	
Republican D.A.* county ideology * proximity	.057		-.468***	.13
	(.066)		(.103)	
Republican D.A. * proximity * county ideology * county nonwhite population	-.313**	.30	.206**	.06
	(.171)		(.156)	
Male D.A.	.645***	.62	.942***	.26
	(.068)		(.276)	
Black D.A.	-.461	.44	.885**	.25
	(.362)		(.399)	
Public defender	.545***	.52	.791***	.22
	(.110)		(.106)	
Defense attorney expertise (Log)	.542***	.52	1.300***	.36
	(.087)		(.241)	
North Carolina Piedmont	-.102			
	(.152)			
North Carolina Coast	-.291			
	(.195)			
Legal Factors				
First degree murder theory 2 (willful, deliberate, premeditated killing)			.067	
			(.177)	
First degree murder theory 3 (arson, rape or sex offense, robbery, kidnapping, burglary, etc.)			.951***	.27
			(.177)	
Prior homicide record of defendant	.187		1.085***	.30
	(.344)		(.243)	
Multiple victims	.665***	.64	1.238***	.35
	(.201)		(.412)	
Infliction of severe physical pain on victim	-.031		-.057	
	(.030)		(.092)	

Nonstatutory aggravating circumstance (victim supporting children)	1.526*** (.298)	1.46		
Post mortem abuse	-.355*** (.072)	.34	.017 (.102)	
Barroom fight	.239 (.628)		-1.674*** (.547)	.47
Offense heinousness index	.248*** (.036)	.23	.023 (.131)	
Motives				
Sex	.106*** (.032)	.10	.020 (.056)	
Money	-.164*** (.026)	.16	.026 (.118)	
Hatred	.121* (.075)	.12	-.100 (.079)	
Collateral crime	-.082 (.071)		.279* (.184)	.08
Heckman's Lambda (λ)	--	--	.790*** (.201)	--
Constant	-4.382*** (.464)	--	-6.923*** (1.309)	--
Number of observations			498	
Censored observations			118	
Uncensored observations			380	
Chi square			15.40***	
Conditional event probability (π)	.96		.28	

* indicates variable is statistically significant at p < .10 (one-tailed test);
** indicates statistical significance at p < .05 (one-tailed test);
*** indicates statistical significance at p < .01 (one-tailed test).

Table 3

Explaining Murder Trial Verdicts and Death Sentencing Outcomes in North Carolina, 1993-1997

	(3) Trial Outcome: Convict/Acquit	**(4) Penalty Phase Outcome: Death/Life**

Independent Variable	Coefficient (Std. error)	**Marginal Impact**	Coefficient (Std. error)	**Marginal Impact**
Socio-Structural Factors				
Nonwhite defendant/white victim	.377 (.742)		.138*** (.028)	.08
Nonwhite defendant/nonwhite victim	-.238 (.200)		-.059*** (.023)	.03
Defendant age	.059 (.162)		.039** (.018)	.02
Defendant age^2	-.0007 (.002)		-.0005** (.00002)	.0003
Defendant education	.453** (.240)	.42	-.190** (.083)	.11
Defendant sex	2.411*** (.861)	2.22	.035 (.184)	
Victim age	-.025 (.024)		-.014** (.006)	.008
Victim age^2	.0001 (.0002)		.0001*** (.00003)	.00006
Victim education	.463 (.683)		.014 (.031)	
Victim sex	-.485 (.829)		-.113** (.068)	.07
Institutional Factors				
Electoral proximity			-.008 (.031)	
County ideology x County nonwhite population			-2.542** (1.371)	1.47
County ideology	4.759** (2.089)	4.38	.015 (.995)	
County nonwhite population	4.329*** (1.369)	3.98	.552 (.875)	
Republican district attorney	.485** (.209)	.45	-.042** (.019)	.02
Male district attorney			-.401*** (.103)	.23
Public defender	1.658*** (.303)	1.53	-.175 (.161)	
North Carolina Piedmont	-.347 (.653)		.082*** (.012)	.05

North Carolina Coast	-.100 (.375)		.189*** (.044)	.11
Legal Factors				
First degree murder theory 2 (willful, deliberate, premeditated killing)	3.406*** (1.125)	3.13	.101*** (.026)	.06
First degree murder theory 3 (arson, rape or sex offense, robbery, kidnapping, burglary, etc.)	2.204** (1.025)	2.03	-.023 (.040)	
Statutory aggravating circumstances (e.g., law enforcement officer; HAC murder)			.183*** (.014)	.11
Statutory mitigating circumstances (e.g., victim partly culpable)			-.036*** (.008)	.02
Nonstatutory mitigating circumstances (e.g., neglected as child; poor upbringing)	3.26** (.159)	3.00	-.008** (.003)	.005
Prior homicide record of defendant			.357*** (.054)	.21
Multiple victims	-.276*** (.078)	.25	.035*** (.011)	.02
Infliction of severe physical pain on victim			-.007 (.024)	
Nonstatutory aggravating circumstance of the victim (supporting children)	.773 (.728)		-.049** (.021)	.03
Post mortem abuse	-.003 (.330)		.049* (.031)	.03
Offense heinousness index	-.105* (.069)	.10	-.028** (.014)	.02
Motives				
Sex	-.273** (.147)	.25	-.007 (.015)	
Money	.402*** (.123)	.37	-.008 (.010)	
Hatred	-.059 (.208)		.054** (.027)	.03

Collateral crime	-.249 (.221)	-.003 (.010)	
Heckman's Lambda (λ)	--	-.351*** (.006)	--
Constant	-10.602*** (2.090)	-10.602*** (2.090)	--
Number of observations		250	
Censored observations		17	
Uncensored observations		233	
Chi Square		7.67***	
Conditional Event Probability	.92	.58	

* indicates variable is statistically significant at p < .10 (one-tailed test);
** indicates statistical significance at p < .05 (one-tailed test);
*** indicates statistical significance at p < .01 (one-tailed test).

Other factors beside race are important in explaining prosecutorial decision to seek the death penalty. Among these are socio-structural factors such as age and social class status. As expected, the age of both the defendant and victim have a statistically significant impact in prosecutorial decision making. However, the effect is less than five percent in both instances. Theoretically more interesting, though, is the curvilinear nature of the age effects. These indicate that North Carolina prosecutors favor very old and very young defendants and victims for more lenient treatment compared to middle-aged individuals. My social class argument receives mixed support. Whereas the defendant's social class status, represented here by educational attainment, fails to achieve statistical significance, the victim's class status is statistically significant. Prosecutors are seven percent more likely to seek the death penalty when the victim is more educated rather than less. This finding is consistent with my social threat argument that individuals with "value" would typically command more severe punishment for their assailants.

Strategic political behavior is always an option for political actors, including those in the judiciary, who may seek to advance public policy or even their own narrow political objectives.[142] It is well known that in the United States politicians including local prosecutors often resort to aggressive anti-crime appeals in order to improve their chances for electoral success.[143] Accordingly, I include in my analysis variables designed to capture the importance of the political process in prosecutorial choices. Tapping

142. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

143. Isaac Unah & K. Elizabeth Coggins, Punishment Politics: Gubernatorial Rhetoric, Political Conflict, and the Instrumental Explanation of Mass Incarceration in the American States (June 22, 2011), *available at* SSRN: http://ssrn.com/abstract=1870385.

into potential electoral and constituency connections in prosecutorial decision making are variables such as electoral proximity, partisan competition, and political ideology. Hall's[144] study of capital punishment decision making by judges in four states, including North Carolina, shows that justices who face electoral competition and accountability are strongly influenced in their decision making by their prospect for reelection.

I find that electoral incentives *do* strongly shape prosecutorial strategy in the decision to seek the death penalty. North Carolina prosecutors are sixty-four percent more likely to seek the death penalty if their election is only a year away and the district is Republican. I further examine the sensitivity of this conditional relationship by exploring interaction with additional predictors, including the partisanship of the district attorney (D.A.).

I find that this conditional probability attenuates by thirteen percent if the D.A. is Republican as indicated by the three-way interaction of Republican D.A., county ideology, and electoral proximity. Furthermore, the probability is increased by six percent if the county has a high population of nonwhite residents. The main effects of county nonwhite population and Republican D.A. suggest that these predictors are negatively associated with the probability of seeking the death penalty. But of all the political predictors analyzed, the prosecutor is most likely to seek the death penalty when the county nonwhite population is high and the prosecutor is Republican. Under these conditions, the probability is 292% higher that a North Carolina Rule 24 hearing would be held, formally signaling prosecutorial intent to pursue the death penalty.

My analysis further shows that electoral proximity and the intensity of two-party competition in the prosecuting counties also evince codependent explanations. On average, the probability is slightly higher (three percent) that a prosecutor facing a competitive election in the next year will seek the death penalty than one who is not facing electoral pressure in the near future. Overall, this analysis demonstrates the importance of the political process in the low visibility decisions that criminal prosecutors must make.

I examine the extent to which there is a racial or gender gap among prosecutors themselves in seeking the death penalty. This is important in light of research showing that woman and minorities exhibit "softer" or more compassionate attitudes toward crime and punishment than white males.[145] I find that white male prosecutors are twenty-six percent more likely to seek the death penalty than female prosecutors. This finding should be understood in the general context of gender identity among North Carolina prosecutors. For the period covered in my study, over ninety-five per-

144. Hall, *supra* note 77.
145. Nagel & Johnson, *supra* note 89; Hurwitz & Smithey, *supra* note 89.

cent of district attorneys in the state were men. Only two women were serving as district attorneys statewide.

Black prosecutors are also rare in North Carolina; there are only two prosecutors statewide during the period I study. Interestingly, black prosecutors are actually twenty-five percent more likely to seek the death penalty than white prosecutors, even after controlling for electoral proximity. I think this is because black prosecutors must be particularly and credibly tough on crime and enjoy cross-racial appeal in order to win popular local elections, especially in majority white districts such as Orange and Chatham Counties in North Carolina, where a "tough as nails" black prosecutor, Carl Fox, served for twenty-five years (including the years of this study) before being appointed a superior court judge by Governor Mike Easley in 2005.[146]

Resource asymmetry is an endemic problem in local criminal prosecution. The state's attorney typically commands greater financial resources than the defendant's attorney, especially if the defendant is indigent and requires a public defender. Meanwhile, rich defendants are able to hire private lawyers for their own defense. Does resource asymmetry have a material impact on prosecutorial choices? I find that it does. Defendants represented by public defenders are twenty-two percent more likely to face capital prosecution than those who retain their own private criminal defense lawyer. Contrary to expectation, the prosecutor is significantly more likely to seek the death penalty when the defendant's attorney is experienced. This finding is perhaps an artifact of the measure itself, which is the log of how much money was paid to the attorney for this service. Under this measure, truly complicated murder cases, such as serial murders, will command higher payout and therefore indicate greater attorney experience. But such cases are highly likely to be prosecuted capitally in the first place. The Heckman selection index is statistically significant, giving credence to my analytical method, which accounts for all cases "expected" to be prosecuted capitally but may not have been because of an existing plea arrangement.

Deciding whether to seek the death penalty is a difficult choice for most prosecutors and likely one of the most agonizing. Because it is a solemn choice of obvious and overwhelming finality, legal requirements exist to guide and constrain that choice. I find that at the death-seeking stage of the process, legal factors do play an important role as I expected. In particular, felony murders are twenty-seven percent more likely to precipitate a capital prosecution. Also, the prosecutor is thirty percent more likely to seek the death penalty if the defendant has a prior homicide conviction and thirty-five percent more likely to seek the death penalty if the defendant murdered multiple victims. Most of the motives I examine fail to reach statisti-

146. *Superior Court Judges for District 15B*, THE NORTH CAROLINA COURT SYSTEM, http://www.nccourts.org/County/Orange/Staff/SCJudges/crfox.asp (last visited Jan. 16, 2012).

cal significance in this model with the only exception being the motive related to involvement in a collateral offense. In the next section of the article, I focus on the penalty phase.

2. *The Decision to Impose Capital Punishment*

For crime victims and defendants along with their families, the most important part of the criminal process is sentencing because it carries the most vivid material consequences for the crime. Table 3 reports the results for the jury verdict on guilt or innocence. However, I focus my discussion on the results for the penalty phase (Model 4). The results strongly support my theoretical framework, showing that socio-structural factors, including racial threat, carry important weight in the decision to impose the death penalty once a conviction has been obtained.

A. The Effects of Race and Other Socio-structural Factors on Capital Punishment

I find a strong linkage between race and the capital punishment in North Carolina. The configuration of nonwhite defendant and white victim is particularly strong and it authenticates my earlier reported finding in Figure 2. Nonwhite defendants who murder white victims fare particularly poorly; they are eight percent *more likely* to receive the death penalty than white defendants who murder white victims, even after controlling for aggravating and mitigating circumstances sanctioned by the North Carolina General Assembly. Conversely, nonwhite defendants who murder nonwhite victims are three percent *less likely* to receive the death penalty than white defendants who murder white victims. Thus, nonwhite victims suffer a *race penalty*, while nonwhite defendants receive a race-based leniency in the punishment for this category of intra-racial homicides. Putting these findings into proper perspective is the fact that in theory, race is not supposed to matter at all in capital sentencing. Insufficient cases in the white defendant/nonwhite victim configuration preclude us from including that variable in the regression analysis.

How do my findings compare with other death sentencing studies? I can transform the probit coefficient of .138 for the nonwhite defendant white victim configuration into a logistic estimate and then derive an odds ratio, which I can then use to compare my findings to the Baldus Study. Such a comparison is crude, but useful because it allows us to derive suggestive indications of either change or continuity in criminal punishment over time and across space. The transformation leads to an odds ratio of

1.28.[147] Thus, race effects on sentencing are less pronounced in North Carolina than in Georgia, where based upon data from the 1970s, the Baldus Study placed the odds of receiving death at 4.3 for black defendants convicted of killing whites. In Maryland, Paternoster and his colleagues reported their findings in terms of probability rather than odds ratio.[148] They find that the probability of a death sentence for black-on-white killings is .14, which is higher than the probability of .08 that I report for North Carolina.[149] I conclude that despite reforms designed to purge race from capital sentencing, race continues to endure as an illegitimate factor in capital sentencing even in the 1990s.

Numerous other structural factors associated with both defendants and victims also prove important in capital sentencing in North Carolina. In particular, very old defendants tend to receive the benefit of the doubt, whereas very young victims are slightly more likely to produce death sentences for their assailants. Whereas I find that males are more likely to be convicted at the trial level, being a convicted male offender actually fails to evince a statistically significant relationship with capital sentencing. But the story is slightly different for male victims whose killing I find is seven percent less likely to lead to a death sentence than female victims.

A recurrent sociopolitical question regarding the death penalty is the extent to which outcomes in capital cases are explained by race versus class. One thesis expressed by Carl Degler is that "[r]ace in the South, as in the nation, has always overwhelmed class."[150] Opponents of the racial impact thesis, however, insist that the linkage between race and capital punishment is preposterous, reasoning that insofar as there is any racial effect, such effect is actually social class bias masquerading as a racial effect.[151] My test of this claim reveals no evidence that social class status of the victim as measured by educational attainment plays a statistically significant role in capital sentencing. However, I do find strong evidence that the defendant's social class status plays a sizeable role. More educated convicts are eleven percent less likely to be sentenced to death even after controlling for legal and insti-

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147. The Heckman probit coefficient .138 can be easily transformed into a logistic coefficient by simply multiplying it by a normalization factor of 1.8138. JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS 44 (Sage Publications Ser. No. 07-045, 1984). The result is a logistic coefficient of .250. The odds ratio of this logistic coefficient is simply its exponent, i.e., $e^{.250} = 1.28$. *See generally id.*; *see also* ALFRED DEMARIS, LOGIT MODELING: PRACTICAL APPLICATIONS 45 (1992).

148. Paternoster et al., *supra* note 18, at 27.

149. *Id.*, at 27-28.

150. Carl N. Degler, *Racism in the United States: An Essay Review*, 38 J. S. HIST. 101, 102 (1972).

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

tutional factors. Therefore, on the question of race versus class, Degler's observation is only partially confirmed. Race definitely matters in capital sentencing. But while the defendant's social class status also matters, the victim's does not.

In the late 1990s, media coverage of several bias-motivated killings brought the issue of hate-crime to the national agenda. The dragging death of a black man, James Byrd Jr., by three white supremacists in Jasper, Texas in 1998 and the killing of a gay college student, Matthew Shepard, in Wyoming the same year are just two of many examples of hate crimes in the United States. To demonstrate society's revulsion toward such crimes, Congress and states such as North Carolina and Wisconsin responded by enacting punishment enhancement laws for hate-motivated crimes. I tested the importance of hatred and other criminal motives in death sentencing. Of the five motives examined, only hate-motivated killings evinced statistically significant impact, suggesting an expression of low tolerance among North Carolinians for hate-motivated offenses during the 1990s.

Finally, I consider the importance of multiple killings in capital sentencing. A convict who kills multiple victims is two percent more likely to receive the death penalty than one who kills a single victim. But surprisingly, killing multiple victims is relatively less important than one might suspect. The analysis suggests that the effect on capital sentencing for a convict killing multiple victims is far less than that for the situation in which a nonwhite kills one white victim. In North Carolina, it appears that killing multiple victims is less important in capital sentencing than when a nonwhite kills one white person.

B. Effects of Institutional Factors on Capital Punishment

Because the decision to impose capital punishment is carried out by an unelected jury, institutional variables associated with the political process are not expected to play a particularly strong role, except where community ideology and values are concerned. According to the results, only a few mainstream institutional factors are important in explaining death sentencing decisions, including predictors associated with the district attorney and the local community where the crime occurred. I find that Republican prosecutors are two percent less likely to win a death sentence than Democratic prosecutors. In other words, during the sentencing phase, convicts are actually better off facing a Republican prosecutor than a Democratic one. Apparently, Democratic prosecutors are more convincing in terms of their advocacy than Republican ones. Male prosecutors are even less successful compared to their female counterparts, again indicating that juries find female advocates more convincing at the sentencing phase. Male prosecutors are twenty-three percent less likely to win a death sentence compare to female prosecutors. In highly conservative counties, an increase in the

nonwhite population reduces the chances of a death sentence by 1.47 times as indicated by the interaction of county ideology and county nonwhite population. This finding conflicts with the racial threat hypothesis, but conforms to the political change explanation. I created three dummy variables to represent the mountain, piedmont, and coastal regions of North Carolina to test for differences in political attitude toward capital punishment across the state. The mountain region serves as the comparison category. It appears that V.O. Key is correct when he posited significant cultural variation within different sections of North Carolina. Region does make an important difference in the sentencing phase. Convicts in the piedmont, the most urbanized region of the state, including large cities such as Charlotte, Durham, and Raleigh, are five percent more likely to receive the death penalty compared to convicts in the mountain region. Importantly, the effects more than double in the coastal sand hills, traditionally the most conservative region of the state.

C. The Effects of Legal Factors on Capital Punishment

Is the capital sentencing system functioning as intended? According to legal theory, homicide prosecution and sentencing should follow exacting standards prescribed by statute. Therefore, only legal factors associated with the case should have statistically significant impact on the disposition of capital cases. Unfortunately, the empirical literature and my results here suggest otherwise; the system is far from ideal. Nevertheless, I do highlight several legal factors that emerge as important correlates of capital sentencing.

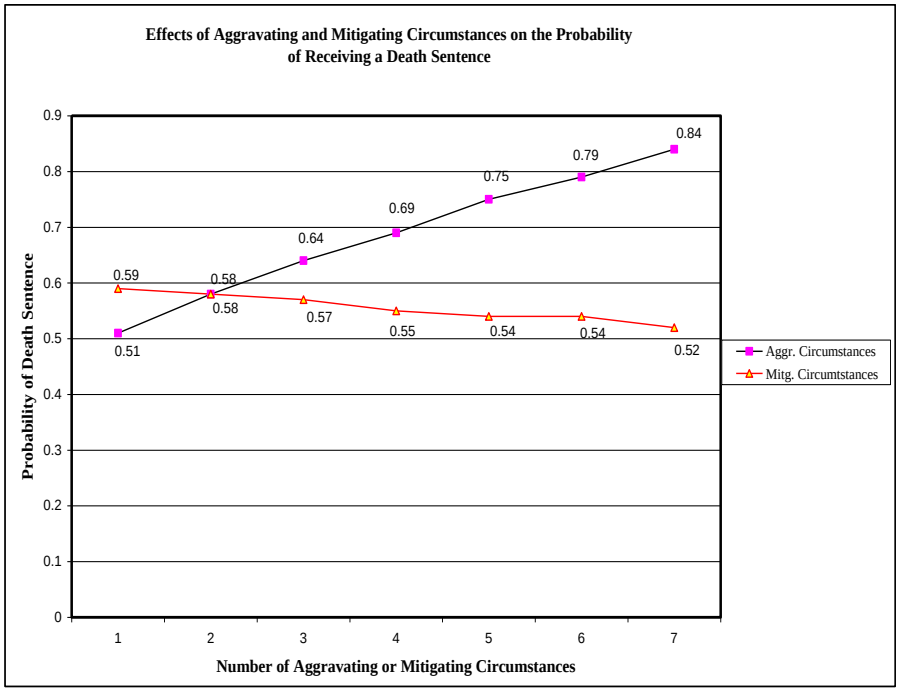
Statutory aggravating and mitigating circumstances constitute the cornerstone of capital punishment in North Carolina. Thus, it comes as no surprise that statutory aggravating factors, such as the killing of a peace officer, increase the probability of a death sentence by eleven percent after controlling for other legal, institutional, and structural conditions. Statutory mitigating circumstances decrease a defendant's criminal culpability and the risk of a death sentence. I find that the effect of statutory mitigating factors is also consistent with my theoretical expectation. But this raises an important question.

How truly mitigating are statutory mitigating circumstances? Mitigating evidence is not intended to excuse or justify the crime for which a defendant stands convicted, but to help explain it in order to avoid a death sentence. Thus, mitigation is not a matter of equivalence with statutory aggravating factors, but a matter of impact. The impact of three statutory mitigating factors in lessening the probability of a death sentence need not be equivalent to the impact of three statutory aggravating factors in increasing the likelihood of a death sentence, but as the Supreme Court stated in *Eddings v. Oklahoma*, the importance of mitigating circumstances should

"be duly considered in sentencing."[152] How much credence do juries place on mitigating evidence? My findings indicate that statutory mitigating factors (such as killing under duress or deplorable childhood) do attenuate the likelihood of being sentenced to death, but there is significant discounting of mitigating evidence by the jury, making its effect quite anemic indeed (only two percent) compared to the effect of aggravating factors on the death sentencing decision (eleven percent).

Figure 3 presents a comparative assessment of the effects of aggravating and mitigating circumstances on the probability of receiving a death sentence. It shows that mitigating factors are only weakly associated with lowering the chances of receiving a death sentence. Whereas the slope for the effects of aggravating circumstances is fairly steep, the slope for the effects of mitigating circumstances is virtually flat, raising concerns about the efficacy of mitigating factors. I conclude that mitigating factors are not very mitigating. Aggravating factors have a far more dramatic effect in leading to a death sentence than do mitigating factors in lessening the chances of a death sentence. A jury would need to find six mitigating factors present in a case to effectively counteract the effect of a single aggravating factor in capital sentencing.

Figure 3



152. 455 U.S. 104, 116 (1982).

Of all the legal predictors examined, none has stronger effect on the probability of a death sentence than prior homicide record. Defendants with a history of violence, such as parolees or fugitives who commit another murder, are twenty-one percent more likely to receive the death penalty than convicts without a prior felony record. First-degree murder involving willful, deliberate, or premeditated killing is six percent more likely to lead to a death sentence. However, felony murders which typically lack a strong element of premeditation fail to achieve statistical significance. I conclude that legal factors are a strong component of the application of capital punishment.

CONCLUSIONS

Justice Anthony Kennedy and other members of the Supreme Court agree that racial bias undermines the integrity of the United States justice system. Under the United States Constitution and under several state death penalty statutes, only legal factors associated with a crime should influence capital prosecution and sentencing. After analyzing a rich set of capital prosecution and sentencing data from North Carolina, the inescapable conclusion is that this ideal is far from reality. Beyond legitimate aggravating and mitigating circumstances, several illegitimate factors ***do*** indeed influence the decision to sentence defendants to death. Among these illegitimate factors is race.

The central question of this Article was straightforward: To what extent does race *still* matter in capital prosecution and sentencing in North Carolina, a state that prides itself, in the words of V.O. Key, as a "progressive plutocracy"? It is inadequate to address this important question simply by examining distributive outcomes as many previous researchers have done. Instead, I have argued in favor of analyzing capital punishment as a *process*, a political process that is infused with highly conditional decision-making procedures. I formulated a theoretical model encompassing legal, institutional, and socio-structural conditions. My analytical framework and data suggest that the answer to the above question is more nuanced and that it depends upon which aspect of the capital prosecution process I examine. If we focus on the jury's decision at the penalty phase, we find evidence of continuity in that race remains in essence a non-statutory aggravating factor for the death penalty. The impact of race in sentencing is present and non-trivial. In particular, the race of the victim *still* exerts a significant amount of influence in determining which homicide defendant lives or dies.

If, on the other hand, we turn our attention to earlier stages of prosecutorial decision making as cases are funneled through the system, my core findings contradict the prevailing empirical literature.

In that vein, the most surprising finding is that prosecutors are not exhibiting racially conscious tendencies in their decision to seek the death

penalty. This represents a change from the traditional view of North Carolina prosecutors. Of course individual districts might not exhibit the same tendencies as I report, but overall, I am confident that North Carolina prosecutors as a whole are exhibiting signs of change. My decomposition of the death penalty system permits me to account for the inter-linkages between different stages of the capital punishment decision-making process, and to arrive at an important new insight toward our understanding of prosecutorial decision making in the processing of society's most violent offenders.

I think my findings reflect the latent effects of decades of aggressive political action involving institutional reforms such as the Voting Rights Act of 1965 and numerous Supreme Court decisions in cases such as *Furman v. Georgia*,[153] *Woodson v. North Carolina*,[154] and *Reynolds v. Sims*,[155] which substantially expanded defendants' rights and political representation for formerly disenfranchised citizens. It appears that the political effects of these reforms have matured among government officials. Elected politicians are responding to the presence of a significantly diversified and attentive electoral constituency of nonwhites to safeguard public policy and to preserve their jobs.

This conclusion comes into sharper focus when contrasted with the behavior of jurors who are not politically accountable. While elected prosecutors have become race-neutral in their decision to seek the death penalty, sentencing jurors remain race-conscious in determining which convicts will live and which will die, thus confirming the racial threat theory. The problem of racial disparity in capital sentencing is therefore most acute at the sentencing stage, where ordinary citizens are the key deciders. It suggests that racial attitudes are hard to change at the individual level and judicial officials must be proactive in educating jurors about hidden sources of bias in their decision making.

APPENDIX A: DATA SOURCES AND MEASUREMENTS

In Appendixes A and B, I provide detailed information about my research design and measurements for purposes of future replication. I will also make my data available to all interested parties after this paper is published.

My data came from numerous sources. I list these sources below, along with the variable coding scheme. For most variables, I relied on multiple sources to gather my information. This allows us to cross check the validity of official records. For example, I use briefs filed by defendants and prosecutors to construct case facts. But I also relied on the medical examin-

153. 408 U.S. 238 (1972).
154. 428 U.S. 280 (1976).
155. 377 U.S. 533 (1964).

er's autopsy notes to verify crime facts for consistency. I reconcile any differences through police reports of the offense.

Legal Factors

North Carolina criminal statutes list both aggravating and mitigating circumstances, which I coded as follows:

Statutory aggravating circumstances = count of statutory aggravating factors found by jury

Statutory mitigating circumstances = count of statutory mitigating factors found by jury

Poisoning, lying-in-wait, imprisonment, torture, starvation = 1 if present; 0 otherwise

Willful, deliberate, and premeditated killing = 1 if present; 0 otherwise

Felony murder (homicide accompanied by another felony) = 1 if present; 0 otherwise

Multiple victims = 1 if 2 or more victims; 0 if 1 victim

Motives

I used trial briefs, police reports, arrest warrants, and oral interviews with prosecutors and defense attorneys to determine criminal motive. Each of the following motives: hatred, financial, sexual, rage, and motive "related to other crimes" was measured as follows:

0 = no evidence of this item exists

1 = some evidence of this item exists

2 = evidence of this item exist beyond reasonable doubt

3 = strong evidence of this item exists

Hatred involves long-term hatred of victim; retaliation or revenge for prior harm done to defendant or another; avenging the role played by judicial officer in the exercise of his/her duty; avenging the role played by police officer; racial animosity; animosity toward victim because of victim's sexual orientation. ***Money*** involves killing to obtain money or item of monetary value; contract killing for money; collecting insurance proceeds; obtaining inheritance or property transfer as a result of the victim's death. ***Rage*** involves immediate rage or frustration (e.g., over victim's conduct during an illegal activity); killing to experience gratification or thrill; demonstrating physical or psychological prowess; no rage apparent indicating complete indifference to value of human life. **Sex** involves desire for sexual gratification, retaliation for sexual refusal, and retaliation for sexual rivalry (jealousy). ***Collateral and other crimes*** involve facilitating commission of another crime; panic (e.g., defendant became frightened when surprised by crime victim in the course of a burglary); shootout with crime victim; crime victim resisted (e.g., pushed silent alarm); silencing a witness

to another crime; escaping apprehension, trial, or punishment; retaliation for unpaid drug debt or dispute related to drug trade.

Sources include: North Carolina Office of the Chief Medical Examiner (OCME). Files from these offices contain useful information about the victim, including demographic factors such as race, sex, and age and information about probable cause of death and a narrative summary of the circumstances surrounding the death and the nature of the wounds sustained by the victim. Each victim has an OCME case number, which makes it relatively easy to track information throughout the data collection process. The Department of Corrections website was used to verify defendant demographic characteristics and prior criminal record.

Race:	1 = white; 0 = nonwhite
Age:	actual chronological age
Sex:	1 = male; 0 = female
Education:	0 = high school dropout or currently in grade school 1 = high school graduate or some higher education 2 = college graduate or higher
Stranger:	1; 0 otherwise
Post-mortem abuse:	1; 0 otherwise

Defendant's Criminal History

I examined court records, including indictments sheets; records on appeal; superior court files; jury instructions and verdict sheets for both guilt and penalty phases; defendants' briefs; state's briefs; trial court issues and recommendations forms; and opinions from the North Carolina Court of Appeals and the North Carolina Supreme Court. I also examined police information network records of previous arrests and convictions; newspaper/journalistic accounts of the homicide; and North Carolina Department of Corrections' website. Finally, I interviewed prosecuting and defense attorneys to obtain more information about their cases.

Prior criminal record = actual number of prior felony convictions

Institutional Factors

Electoral proximity: 0 = four years before prosecutor's next election
1 = three years before prosecutor's next election
2 = two years before prosecutor's next election
3 = one year before prosecutor's next election.

Electoral competition: 100%-[% vote for winner + % margin of victory + 1 (if uncontested seat, 0 otherwise) + 1 (if safe seat, 0 otherwise)]/4. A

safe seat is one where the winner won by at least 30% of the vote. By this measure electoral competition is zero if there is absolutely no competition in the district.

***County ideology*:** Percent vote for Republican candidate for Senate in 1992 and 1996

Prosecutor's party affiliation: 1 = Republican; 0 = Democrat

Prosecutor's race: 1 = black; 0 = white

Prosecutor's sex: 1 = male; 0 = female

Public defender: 1 if public defender or court appointed attorney; 0 = attorney retained privately

Defense lawyer expertise: Ratio of total dollar amount paid to total hours billed

County nonwhite population: Proportion of county of offense that is nonwhite

Location: Dummy variables representing Mountain, Piedmont, and Coastal regions of the state.

APPENDIX B: MULTI-STAGE STATISTICAL SAMPLING

Stage 1: selecting judicial districts. There are forty-four judicial districts in North Carolina representing a total of one hundred counties. Each judicial district is headed by one district attorney who manages the prosecution of cases in the counties within that district. This explains why I selected cases by judicial districts. In order to obtain a broad geographic representation of the state, I randomly selected twenty-six judicial districts.

Stage 2: selecting cases from selected districts. Overall, 3990 known defendants were charged with homicide from January 1, 1993, to December 31, 1997. Cases from unselected districts were removed to meet budgetary constraints, leaving 2504 cases from which I generated my analytical sample. In it, ninety-nine defendants were sentenced to death and 303 were sentenced to life in prison based upon a first-degree murder conviction. Defendants in 181 second-degree murder cases also received life sentences. I randomly selected 10% of these for analysis (eighteen cases) because prosecutors have been known to undercharge otherwise death eligible offenses (see note 11). Similarly, I randomly selected an additional one hundred cases (5.2%) from the remaining 1921 cases with acquittals and term sentences of less than life in prison. My core analysis is, therefore, based upon 520 cases, representing 520 individual defendants who form my unit of analysis. Overall, the cases represent eighty of the one hundred counties of North Carolina. I created sampling weights to reflect the differing sampling probabilities in the two sampling stages and were able to map the sample back to the population. Since regression analysis assumes the use of observed rather than weighted data, I restricted my use of weighted data to descriptive analyses.