

RACE, PROSECUTORS, AND JURIES: THE DEATH PENALTY IN TENNESSEE

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The behavior of prosecutors and juries with respect to the decision to impose the death penalty is examined. Using data on 968 first-degree murder convictions in Tennessee from 1977 to 2006, models of prosecutorial and jury behavior are constructed with a focus on the role of the defendant's race and the victim's race. Once significant controls are introduced, neither the race of the defendant nor that of the victim is a significant predictor of prosecutors' decisions to seek the death penalty. Nor is the race of the victim a significant predictor of the jury's decision to impose the death penalty. The defendant's race is a significant, albeit weak, predictor of jury behavior, but only because white defendants are more likely to be sentenced to death. While a number of other variables are significantly related to both prosecutorial and jury behavior, much of the variance in these decisions remains unexplained.

In *Furman v. Georgia* (1972), the United States Supreme Court held that Georgia's death penalty statute violated the Eighth Amendment's ban on "cruel and unusual punishments." Of central concern to the Court was the perceived inadequacy of procedures in capital cases and, in particular, the unfettered discretion vested in trial juries regarding the imposition of the ultimate punishment. The resulting national moratorium on the death penalty lasted until the Court approved Georgia's revised death penalty statute in *Gregg v. Georgia* (1976). The revised statute adopted new procedures designed to render the imposition of the death penalty less arbitrary and capricious. Most notable of these was the "bifurcated trial," in which the guilt/innocence phase of the trial is separated from the penalty phase.

In the wake of *Furman* and *Gregg*, a majority of states enacted new capital-punishment laws modeled after the new Georgia statute. Today, thirty-seven states and the federal government have death penalty statutes. While these laws vary somewhat procedurally, all are based on the bifurcated-trial model upheld in *Gregg v. Georgia*. All of these statutes are predicated on the notion that structuring the jury's discretion in death penalty cases reduces the potential for arbitrariness and discrimination to a constitutionally acceptable level.

In the American system of criminal justice, prosecutors are vested with enormous discretion. Subject to minimal procedural checks through grand jury proceedings, preliminary hearings, or both, prosecutors decide whether to bring criminal charges and which charges to bring. In jurisdictions that have the death penalty, prosecutors must decide whether to seek the death penalty in cases where defendants are charged with first-degree murder. Before such trials begin, prosecutors must formally notify trial courts and defendants that they intend to seek the death penalty upon conviction. *Gregg v. Georgia* and subsequent judicial decisions have done little

if anything to reduce prosecutorial discretion to seek the death penalty. We seek here to determine the case characteristics that influence prosecutors to seek the death penalty and those that lead juries to impose it.

RACE AND THE DEATH PENALTY

One of the long-standing concerns about the administration of the death penalty has been the potential for racial discrimination. Many have documented racial inequality in the administration of the death penalty (see Mangum, 1940; Garfinkel, 1949; Johnson, 1957). However, Kleck (1981) criticized these early studies for failing to utilize adequate controls. Justice William O. Douglas expressed concern for racial bias in his concurring opinion in *Furman*, where he characterized the old Georgia capital-punishment statute as “pregnant with discrimination” (408 U.S. at 257). Supporters of the death penalty were hopeful that the structured discretion model established by the new post-*Furman* statutes would lead to race-neutral application of the death penalty. However, social-science research in this area has cast doubt on this aspiration. While there is little evidence of racial discrimination in terms of the race of *defendants*, there is substantial evidence of disparity with regard to the race of *victims* (e.g., Baldus, Pulaski, and Woodworth, 1983, 1986; Lempert, 1983; Radelet and Pierce, 1985; Smith, 1987; Eklund-Olson, 1988; Vito and Keil, 1988).

Summarizing the thrust of research in this area, Radelet and Borg (2000:47) conclude that “the death penalty is between three and four times more likely to be imposed in cases in which the victim is white rather than black.” There is also some evidence of an interaction between the race of defendants and that of victims. Some studies have found that the greatest disparity in the rate at which the death penalty is sought or imposed exists between cases where black defendants are alleged to have killed white victims and those where black defendants are alleged to have killed black victims (see, e.g., Baldus, Pulaski, and Wordworth, 1983, 1986; Paternoster, 1983, 1984). To the extent that prosecutors and juries reflect dominant attitudes of their communities, such disparities would seem quite plausible. On the other hand, some researchers argue that apparent racial differences in the administration of the death penalty can be explained in terms of nonracial case characteristics (see, e.g., Heilbrun, Foster, and Golden, 1989; Klein and Rolph, 1991).

Prosecutorial Behavior. Prosecutors possess the discretion to “formulate charges that determine whether or not the death penalty is permitted if a conviction is obtained” and to propose a sentence of life in exchange for a guilty plea in cases where the defendant is eligible for the death penalty (Zeisel, 1981:466). Usually elected officials, prosecutors must be attentive to their constituency’s reaction to crime, which may influence the prosecutor’s decision to seek the death penalty, accept a guilty plea for a lesser sentence, or agree to a plea bargain in exchange for testimony against another defendant (Bowers, 1984). Bowers (1984:339, 345) suggests that elected prosecutors are more likely to seek the death penalty, given the legal requirements to

do so, when there is public outcry for capital punishment in a given case or when there is pressure from the police department. Therefore, he asserts that the unfettered discretion exercised by prosecutors may be a vehicle of "arbitrariness and discrimination" in the early stages of capital cases (Bowers 1984:340). In a study of death penalty cases in North Carolina, Nakell and Hardy (1987) found that a prosecutor's decision to seek the death penalty largely depended on which prosecutor was assigned to any given case, thus buttressing previously expressed concerns about arbitrariness and the potential for discrimination.

Focusing specifically on race as a determinant of prosecutorial behavior, Paternoster analyzed 300 homicide cases and found that prosecutors were four-and-a-half times more likely to seek the death penalty when black defendants have white victims. This would seem to suggest, as does other research, that "black offender/white victim homicides are treated as more aggravated killings, and black offender/black victim homicides are treated as less aggravated deaths" (Paternoster, 1984: 453). In another analysis, Paternoster found that prosecutors were forty times more likely to seek the death penalty when black defendants were accused of killing white victims than when black defendants were accused of killing other African-Americans (Paternoster, 1983: 766). Similarly, after examining data from five South Carolina counties, Johnson (2003) found the race of the victim to be a significant predictor of prosecutors' decision to file a notice to seek the death penalty.

Jury Behavior. Both prosecutors and jurors rely on their own socially conditioned views in the criminal justice system. Bowers (1984:338-39) found jurors "embody community sentiments" by having their own preconceived notions about members of society, and as a result, "jurors have difficulty replacing their socially conditioned views of victims and offenders with strictly legal considerations, especially for the crimes they find most shocking and abhorrent"; this allows "extralegal" factors to intrude on the interpretation of aggravating and mitigating factors presented at sentencing.

Gross and Mauro (1989:112) found that for jurors to sentence a defendant to death, they must be "particularly horrified by the crime and perhaps frightened by the defendant. As the jurors review the circumstances of the crime, they will inevitably consider the personal characteristics of the defendant, and the defendant's race might carry some weight." They argue that the one aspect of a trial that influences a juror's decision to sentence a defendant to death is the ability to identify with the victim, rather than seeing the victim as a stranger. In modern society, where social classes tend to be segregated and jurors tend to be Caucasian, "jurors are more likely to be horrified by the killing of a white than of a black, and more likely to act against the killer of a white than the killer of a black," which is "a natural product of the patterns of interracial relations in society" (Gross and Mauro, 1989:113).

In terms of the race of the defendant, racial stereotypes become relevant in the sentencing phase of capital jury trials. In many states, juries are "allowed or required to determine whether the defendant will be dangerous in the future, even in states where future dangerousness is not formally part of the sentencing process" (Johnson

2003:136), and, according to a 1990 National Opinion Research Center survey, a majority of whites feel African-Americans are more “prone to violence than whites” (Johnson 2003:136). Given these survey results, Johnson (2003:137) suggests that many Caucasian jurors think blacks are more likely to be involved in violent behavior, and as a result, these jurors are more likely to impose a death sentence. Johnson also believes that mitigating factors, specifically good character, are less likely to be given significant weight in the sentencing phase for blacks because jurors “attribute fewer positive traits to people of color, see them as less intelligent, less hard-working and less good” than whites. Therefore, there is support for the conclusion that “jurors are more likely to perceive the presence of aggravating factors in black defendant cases than they do in white defendant cases with equal evidence of aggravation, and they are less likely to give weight to mitigating factors” (Johnson, 2003:137).

THE TENNESSEE STUDY

Clearly, the two loci of potential bias in the imposition of death sentences are 1) the prosecutor’s decision to seek the death penalty, which triggers the special death penalty procedures, and 2) the jury’s decision to sentence a convicted murderer to death. Prior research has tended to focus on one or the other, but it is important to examine both together. Our study focuses on Tennessee, where in fall 2006 the Administrative Office of the Courts released data on 986 first-degree murder convictions dating from 1977, when Tennessee reformed its death penalty law, to early 2006. The data were taken from reports submitted by trial judges across the state in compliance with Tennessee Supreme Court Rule 12, which requires judges to complete detailed reports on cases in which defendants are convicted of first-degree murder.

While the Tennessee data set is far from perfect, it is a useful tool with which to analyze prosecutorial and jury behavior. The data set is quite comprehensive in terms of the variables included, allowing us to utilize a variety of controls. Specifically, we have data on demographic characteristics of perpetrators and victims. We also have information about the nature and location of the homicide, the means by which death was inflicted, and the perpetrator’s motive, relationship to the victim, and criminal history. The data set also contains the nature of the evidence before the jury, including whether the defendant confessed to the homicide. Finally, it also includes records of the statutory aggravating and mitigating factors found by juries.

The Rule 12 database has been criticized as being incomplete because trial judges were not always careful or diligent in filling out questionnaires. Indeed, it has been suggested that as many as 20 percent of first-degree murder cases may be missing from the data set (see *State of Tennessee v. Godsey* [2001], Birch, J., dissenting). At the present time, we have no way of assessing how extensive are the missing data; for present purposes, we assume any missing data to be randomly distributed across variables and cases.

Death Sentences and Race in Tennessee: A First Look. Ninety-eight percent of defendants in these cases were either black (45.5 percent) or white (52.5 percent).

Table 1
Prosecutorial and Jury Behavior by Race of Defendant and Victim

	Defendant		Victim		All
	Black	White	Black	White	
Sentenced to death (% of all cases)	11.5%	19.2%	9.8%	18.5%	15.8%
Prosecutor seeks death penalty (% of all cases)	30.3	39.4	24.7	39.9	35.3
Death sentence imposed by jury (% of cases where death penalty is sought)	37.3	48.1	39.7	46.0	44.2

The 2 percent who were Hispanic, Asian, Native American, or “other” have been excluded from the analysis. Similarly, 97.5 percent of victims were either black (33.6 percent) or white (63.9 percent); the remaining 2.5 percent have been excluded. Looking first at the race of defendants, we note that 19.2 percent of white defendants are sentenced to death as compared with only 11.5 percent of black defendants (see Table 1). Clearly, there is a racial discrepancy, but in the direction opposite from what many might expect. However, with respect to the race of victims, the opposite is true: 18.5 percent of cases involving white victims led to the death penalty, whereas only 9.8 percent of cases involving black victims resulted in death sentences. Prosecutors were actually more likely to seek the death penalty in cases involving white defendants, but they were also more likely to seek the death penalty when victims were white. Juries were more likely to impose the death penalty both in cases involving white defendants and in cases involving white victims.

If we intersect the race of the victim with the race of the defendant (see Table 2), we find that black defendants accused of killing black victims receive the death penalty about 10 percent of the time, while black defendants accused of killing white persons are sentenced to death 15 percent of the time. Similarly, white defendants accused of murdering blacks get the death penalty about 12 percent of the time, while whites accused of killing other whites are sentenced to death 19 percent of the time. However, when we separate the prosecutorial function from the jury function, we see that the disparity in terms of the victim’s race exists in the decisions of prosecutors to seek the death penalty, not in juries’ decisions to impose it. The data show that blacks accused of killing black victims were just about as likely—actually, slightly more likely—to be sentenced to death by juries as blacks who killed whites. Similarly, whites who killed blacks were slightly more likely to be sentenced to death by juries than whites who killed whites. On the other hand, when blacks are accused of killing blacks, prosecutors seek the death penalty only about 25 percent of the time; when blacks are accused of killing whites, the rate jumps to 39 percent. Likewise, when whites are accused of killing blacks, prosecutors seek death only about 24 percent of

Table 2
Prosecutorial and Jury Behavior by Race of Defendant by Race of Victim

	Black Def. /Black Victim	Black Def. /White Victim	White Def. /White Victim	White Def. /White Victim	All
Sentenced to death (% of all cases)	9.7%	15.0%	11.8%	19.0%	15.8%
Prosecutor seeks death penalty (% of all cases)	24.7	39.0	23.5	39.7	35.3
Death sentence imposed by jury (% of cases where d.p. is sought)	39.4	38.5	50.0	47.2	44.2

the time; when whites are charged with killing other whites, the rate increases to nearly 40 percent. Thus, it would appear that, if there is racial discrimination with respect to victims, it occurs more in the prosecutorial office than at the jury stage. This significant difference between prosecutors and juries would make sense given the enormous discretion vested in prosecutors, as contrasted with the much more structured decision making of juries under current death penalty law.

Introducing Controls. Before concluding that Tennessee prosecutors engage in racial discrimination with respect to the administration of capital punishment, we need to look at other factors that might explain the apparent disparities noted above. Therefore, we constructed more complex statistical models incorporating the data on defendant characteristics, victim characteristics, crime characteristics, and case characteristics as controls with the goal of generating the most parsimonious model, that is, one that maximizes explanatory power with a minimal number of additional variables.¹ We wished to see whether the racial variables remain significant when incorporated into such a model. We find that, once appropriate controls are introduced, including the place, method, motive of the homicide, the nature of the evidence, whether there are multiple victims, and the defendant's criminal history, *the race of the defendant and the race of the victim are not significant predictors of a death penalty outcome* (see Table 3).²

With the exception of the defendant's race and the victim's race, all variables in the model are significant at the .05 level, which means that the probability of the observed relationship occurring randomly is less than 5 percent (see Table 3). Among

¹ Details about the statistical tests performed, and statistical results, are available from the authors on request.

² Specifically, the other independent variables are 1) whether the defendant confessed to murder; 2) whether the defendant had three or more prior felonies; 3) whether the defendant made incriminating statements; 4) whether the method of killing was drowning; 5) whether the method of killing was throat slashing; 6) whether the murder was committed for pecuniary or other gain; 7) whether the murder was committed for sexual or other gratification; 8) whether the murder was committed to escape apprehension or punishment; 9) whether there were three or more victims of the murder; 10) whether the victim was killed at place of business or employment; and 11) whether the victim was killed in a field, woods, or rural area.

Table 3
Multivariate Model: Whether Death Penalty is Imposed (n=968)

A priori Observed	Predicted		Percent Correct
	Not Sentenced to Death	Sentenced to Death	
Not sentenced to death	815	0	100.0
Sentenced to death	153	0	.0
Overall	968	0	84.2

Model Observed	Predicted		Percent Correct
	Not Sentenced to Death	Sentenced to Death	
Not sentenced to death	792	23	97.2
Sentenced to death	100	53	34.6
Overall	892	77	87.3

Table 4
Multivariate Model: Prosecutors' Decisions to Seek the Death Penalty (n=968)

A priori Observed	Predicted		Percent Correct
	Does not seek DP	Seeks DP	
Does not seek DP	626	0	100.0
Seeks DP	342	0	.0
Overall	968	0	64.7

Model Observed	Predicted		Percent Correct
	Does not seek DP	Seeks DP	
Does not seek DP	574	52	91.7
Seeks DP	213	129	37.7
Overall	787	181	72.6

the significant predictors, all of the effects are in the expected direction; that is, all these factors increase the probability that a death sentence will be imposed. A nontechnical way of gauging the overall explanatory power of the model is to look at the improvement in the ability to “predict” correctly the number of cases in which the defendant receives the death penalty. In the absence of the model, we are able to correctly predict individual cases 84 percent of the time simply on the basis that we know that 84 percent of defendants did receive the death penalty; that is, if we predict that no defendants receive the death penalty, we are correct 84 percent of the time. The model improves our ability to predict correctly to 87 percent, a marginal improvement at best.

But what of the prosecutor’s decision to seek the death penalty? Here we should note that the rate at which prosecutors seek the death penalty varies by county from 6 percent to 100 percent. Of course, at the extremes are counties with very small

Table 5
Multivariate Model: Jury Imposition of Death Penalty (n=342)

A priori Observed	Predicted		Percent Correct
	Does not impose DP	Imposes DP	
Does not impose DP	191	0	100.0
Imposes DP	151	0	.0
Overall	342	0	55.8

Model Observed	Predicted		Percent Correct
	Does not impose DP	Imposes DP	
Does not impose DP	156	35	81.7
Imposes DP	49	102	67.5
Overall	205	137	75.4

numbers of cases. But looking at the counties with the most cases, one still sees tremendous variation. In Shelby County, which contains Memphis, prosecutors sought the death penalty 52 percent of the time, while in Davidson County (Nashville) prosecutors pursued capital punishment only 12 percent of the time. To some extent, this variance may be attributed to varying prosecutorial philosophies, but it likely also represents political factors that vary from county to county.

When we take into account the other controls used in the overall model, the defendant's race and the victim's race become nonsignificant (see Table 4). This model performs better in terms of predictiveness. In the absence of the model, we are able to make correct predictions about 65 percent of the time, but the model improves the rate of correct predictions to roughly 73 percent.

The results are similar for a jury's decision to impose the death penalty (see Table 5). When we examine only the subsample of cases (35 percent) where prosecutors actually sought capital punishment, we find, as we did with the model of prosecutor behavior, that the race of the victim is an insignificant predictor of jury behavior once the other variables are taken into account. The race of the defendant is significant, although the relationship is weak, but the effect is opposite of what some might expect in that being an African-American defendant actually reduces the chances of being sentenced to death. The model performs reasonably well, improving our ability to correctly predict who will get the death penalty from 56 percent to 75 percent. Thus, it would seem that juries are more predictable than prosecutors.

CONCLUSION

Few topics have generated as much concern as has the death penalty. Even if one accepts the legitimacy of capital punishment, any systematic bias in its application erodes claims that it has a role in furthering justice. Despite conventional wisdom to

the contrary, our study of a large population of first-degree murder convictions in a southern state produced no evidence that race is a significant factor in either prosecutors' decisions to seek the death penalty or juries' decisions to impose it at sentencing. This is in no way an argument for the legitimacy of the death penalty. Indeed, our data suggest that, despite reforms, application of the death penalty in Tennessee remains quite unpredictable, and this in itself may well be cause for concern. **jsj**

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