Death Sentencing in East Baton Rouge Parish, 1990–2008

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In this Article we report the results of a research project that was designed to assess if certain non-legal variables, specifically the races of the defendant or victim, are associated with the imposition of the death penalty in East Baton Rouge Parish, Louisiana. To do so we examined all cases in the Parish that at any time were charged as first-degree murders over a 19-year period from 1990 to 2008.

Although most states in the United States are divided into counties, the State of Louisiana is divided into 64 "parishes." With an estimated population in 2000 of 412,852 residents spread across 472 square miles, East Baton Rouge Parish has the third largest population of the Louisiana parishes, behind Orleans Parish and Jefferson Parish.[1] It includes the State's capital city, Baton Rouge, and two major universities, Southern University and Louisiana State University. Standing alone, the city of Baton Rouge has 230,000 people living within 75 square miles.[2]

According to the 2000 census, 56.2% of the parish population classified themselves as white, 40.1% as black or African American, 2.1% as Asian, and 1.6% as "other."[3] Hispanics or Latinos of any

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1. There is also a West Baton Rouge Parish; its population is only 21,601. Orleans Parish and Jefferson Parish encompass the city of New Orleans and most of its suburbs. *Louisiana Parishes and 2000 Census Total Population*, LA. DIVISION OF ADMIN., http://doa.louisiana.gov/census/2000/parish2000poprank.pdf (last visited Nov. 10, 2010).

2. *Our City-Parish Government*, E. BATON ROUGE CITY-PARISH GOV'T, http://brgov.com/aboutus.htm (last visited Nov. 10, 2010).

3. *East Baton Rouge Parish, Louisiana—QT-PL. Race, Hispanic or Latino, and Age: 2000*, AM. FACTFINDER, http://factfinder.census.gov/servlet/

race constituted 1.8% of the population. By 2009 the white population had fallen to 51.9% of the population, with blacks increasing to 44.4% and Hispanics increasing to 3.1%.[4]

In 2009 there were 86 homicides in the parish,[5] and as of October of that year, only half of them had not been solved.[6] In the city of Baton Rouge alone, there were 75 homicides, the highest annual number on record, surpassing the 1993 total of 74.[7] The total number of homicides in the Parish for the past six years (with the number in the city of Baton Rouge alone in parentheses) is:

2009 86 (75)
2008 85 (67)
2007 92 (72)
2006 72 (56)
2005 59 (49)
2004 60 (47)[8]

In one recent 11-year period, 1991–2001, there were 878 homicides in East Baton Rouge Parish, or an average of 79.8 homicides per year.[9] This ranged from a peak in 1993, when 99 deaths were recorded, to 2001, when 62 were recorded.[10] Males were 79.9% and blacks were 82.8% of the homicide victims over this time span.[11]

QTTable?_bm=n&_lang=en&qr_name=DEC_2000_PL_U_QTPL&ds_name=DEC_2000_PL_U&geo_id=05000US22033 (last visited Nov. 10, 2010).

4. *East Baton Rouge Parish QuickFacts*, ST. & COUNTY QUICKFACTS, http://quickfacts.census.gov/qfd/states/22/22033.html (last visited Nov. 10, 2010).

5. Kimberly Vetter, *75 Murders in '09 Sets BR Record*, ADVOCATE (Baton Rouge, La.), Jan. 9, 2010, at 1A [hereinafter Vetter, *75 Murders*], *available at* http://www.2theadvocate.com/news/81055412.html?showAll=y&c=y; Kimberly Vetter, *East Baton Rouge Parish Homicides in 2009*, ADVOCATE (Baton Rouge, La.), Jan. 24, 2010, at 6A, *available at* http://www.2theadvocate.com/news/82540347.html.

6. Chris Nakamoto, *Half of Murders in Baton Rouge are Unsolved*, WBRZ NEWS (Dec. 22, 2009, 5:41 PM), http://www.wbrz.com/news/half-of-murders-in-baton-rouge-are-unsolved/.

7. Vetter, *75 Murders*, *supra* note 5.

8. *Id.* For crime statistics for the City of Baton Rouge from 1999 to 2009, see *Baton Rouge Crime Statistics*, BATON ROUGE POLICE DEP'T, http://brgov.com/dept/brpd/csr/ (last visited Nov. 10, 2010).

9. Gina Ann Dimattia, Analysis of Death Trends in Coroner Cases in East Baton Rouge Parish from January 1, 1991, to December 31, 2001, at 71 (Aug. 2002) (unpublished M.A. thesis, Department of Geography and Anthropology, Louisiana State University), *available at* http://etd.lsu.edu/docs/available/etd-0611102-141208/unrestricted/Dimattia_thesis.pdf.

10. *Id.* at 72.

11. *Id.* at 71.

As one of 35 states in the United States that authorizes capital punishment,[12] some homicides in Louisiana and in East Baton Rouge Parish result in death sentences for the perpetrators. Between December 1983 and the end of 2010, there were 27 executions in Louisiana.[13] Eight others sentenced to death after 1972 have since been released from death row because of doubts about their guilt.[14] Of the executed, 14 were whites convicted of killing other whites (51.8%), nine were blacks convicted of killing whites (33%), and four were blacks convicted of killing other blacks (14.8%).[15] Thus, 23 out of the 27 executed prisoners (85%) were convicted of killing white victims.[16] Three of the 27 men executed in Louisiana since 1983 were sentenced to death for crimes committed in East Baton Rouge Parish: Robert Wayne Williams, December 14, 1983 (sentenced in 1979; black on black),[17] Andrew Lee Jones, July 22, 1991 (sentenced in 1985; black on black), and Feltus Taylor, June 6, 2000 (sentenced in 1992; black on white).

Prior to 1983, the last execution in Louisiana took place in 1961. Between 1722 and 1961, there were 632 known executions in the State. The victims' races are unknown, but the defendants' races were:

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12. *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last updated Jan. 14, 2011).

13. From May 10, 2002 through 2009, there were no executions in Louisiana. On January 7, 2010, Gerald Bordelon, a white man and sex offender who was convicted of killing his 12-year-old stepdaughter (also white), became the first person in Louisiana in nearly seven years to be put to death. Bordelon dropped his appeals and asked to be executed. Melinda Deslatte, *Murderer Apologizes Before His Execution at Louisiana State Penitentiary*, TIMES-PICAYUNE (New Orleans, La.), Jan. 7, 2010, *available at* http://www.nola.com/crime/index.ssf/2010/01/murderer_apologizes_before_his.html.

14. Alison Bath, *Death Row Exonerations Point to Flaws in System*, SHREVEPORT TIMES (Shreveport, La.), Jan. 24, 2010, *available at* http://www.r-a-e.org/press/death-row-exonerations-point-flaws-system.

15. *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/executions (under "State:", select "LA") (last visited Nov. 10, 2010).

16. In Louisiana history, only one white person has been executed for a crime that victimized a person of color. He was Pierre Antoine Cochenet, executed in July 1752 for the attempted murder of two female slaves, who were repeatedly stabbed with a bayonet. Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOC. Q. 529, 537 (1989).

17. Reporter Jason DeParle, now with the New York Times, witnessed this execution and attended the funeral. Jason DeParle, *Louisiana Diarist: Killing Folks*, NEW REPUBLIC, Jan. 30, 1984, at 43.

Black	446
White	132
Native American	3
Hispanic	3
Asian	1
Unknown	47

Therefore, of the 578 executions involving either white or black defendants, 77% took the lives of blacks.[18]

At the end of 2009, there were 82 males and two females under death sentences in the Louisiana.[19] East Baton Rouge Parish accounted for 16 of these death sentences, more than any other parish in the State, and *all 16 are African American males*. The inmates, their races, and the races of their victim(s) are:

1. Bell, Anthony	B-6B
2. Bowie, David	B-B
3. Broaden, Quincy	B-2B
4. Broadway, Henri	B-B
5. Brown, Gregory	B-2W
6. Brumfield, Kevan	B-B
7. Brumfield, Sanchez	B-W
8. Cosey, Frank Ford	B-B
9. Jacobs, Cedrick	B-W
10. Lee, Derrick Todd	B-3W
11. Miller, Robert Craig	B-B
12. Robertson, Allen	B-W, A
13. Tate, Antoine	B-3B
14. Wessinger, Todd	B-2W
15. Williams, Jimmy Ray	B-W
16. Williams, Shedran	B-W[20]

18. *Executions in the U.S., 1608–2002: The Espy File*, DEATH PENALTY INFO. CENTER, at 131–48, http://www.deathpenaltyinfo.org/documents/ESPY state.pdf (last visited Nov. 10, 2010) [hereinafter *Executions in the U.S.*].

19. For tallies as of September 30, 2009, see *Demographic Profiles of the Death Row Correctional Population: Fact Sheet*, LA. DEP'T PUB. SAFETY & CORRECTIONS (Sept. 30, 2009), http://www.corrections.state.la.us/Wordpress/ wp-content/uploads/2009/10/2e2.pdf. With one execution in early 2010, there were 83 inmates under death sentences in Louisiana. Michelle Krupa, *Louisiana Has Seen Dramatic Decline in Executions, in Line with National Trend*, TIMES-PICAYUNE (New Orleans, La.), Jan. 10, 2010, at 1A, *available at* http://www.nola.com/ crime/index.ssf/2010/01/louisiana_has_seen_dramatic_de.html. Through June 2010, there were still 83 inmates on death row in Louisiana. *Demographic Profiles of the Death Row Correctional Population: Fact Sheet*, LA. DEP'T PUB. SAFETY & CORRECTIONS (June 30, 2010), http://www.corrections.state.la.us/wp-content/ uploads/stats/2d.pdf.

20. *See* discussion *infra* Part III.

Nine others have been sentenced to death in East Baton Rouge Parish since 1976, but they are no longer on death row and were not executed.[21] In contrast to the fact that all 16 men currently on death row from East Baton Rouge Parish are black, only 44% (four out of nine) of those who have been removed from death row are African American.[22] The nine are:

1. Clark, Colin	W-W	Sentenced in 1979
2. Clark, Jeffrey	W-W	Sentenced in 1985
3. Craig, Dale	W-W	Sentenced in 1992
4. Frost, Jeffrey	W-W	Sentenced in 1995
5. George, Leroy	B-5B	Sentenced in 1999
6. Koon, Walter J.	W-3W	Sentenced in 1995
7. Scales, Kevin	B-B	Sentenced in 1992
8. Tilley, Donald	B-B[23]	Sentenced in 1996
9. Williams, James	B-B	Sentenced in 1978[24]

In sum, the above data show that 28 people were sentenced to death in East Baton Rouge Parish between January 1, 1977 and December 31, 2009. Their races and the races of the victims are:

White-White	5
Black-White	9
Black-Black	14[25]

Thus, 50% (14 out of 28) of those sentenced to death in East Baton Rouge from 1977 to 2009 were convicted of killing blacks.

It is also instructive to look at those sentenced to death from 1990 to 2008, the time frame of the present study. Five cases drop out: Andrew Lee Jones and Robert Williams (executed), and Colin and Jeffrey Clark and James Williams, who are no longer on death row. Of the remaining 23, all sentenced to death since 1990, 47.8% (11 out of 23) were convicted of killing blacks:

White-White	3
Black-White	9
Black-Black	11

Thus, although 82.8% of the homicide victims from 1991 to 2001 were black,[26] only 47.8% of those sentenced to death since

21. *See* discussion *infra* Part III.
22. *See* discussion *infra* Part III.
23. On January 12, 2004, Mr. Tilley died while still on death row. Email from Ashley R. Bradley, Corrections ARDC Specialist 2, La. State Police Inmate Records Office, to Author (Nov. 10, 2010, 13:13 CST) (on file with author).
24. *See* discussion *infra* Part III.
25. *See* discussion *infra* Part III.

1990 were convicted of killing blacks. This represents a substantial race-of-victim disparity that invites explanation.

Homicides in East Baton Rouge Parish are prosecuted by the Office of the District Attorney, 19th Judicial District.[27] Between January 1, 1991 and December 31, 2009, that office was headed by Doug Moreau.[28] Thus, the period covered in this research project is roughly equivalent to the period of Mr. Moreau's tenure as District Attorney.

I. PREVIOUS RESEARCH

Capital punishment in Louisiana has a long and controversial history. Edward Livingston, an ex-New Yorker, member of the Louisiana legislature (1820–1822), and Louisiana member of the U.S. House of Representatives (1822–1829) and the U.S. Senate (1829–1831), was one of the leading death penalty abolitionists in nineteenth century America. In 1822 he proposed a new criminal code for the State that eliminated capital punishment.[29] Although these reforms were not successfully implemented, Livingston articulated the argument against capital punishment in a way that influenced American debates long after his death. "The Louisiana reformer created and shaped many of the arguments against capital punishment which have been used in the past one hundred and fifty years. In a sense, all the successful reforms in that period, and in the future, owe their inspiration to Edward Livingston."[30]

The argument that the application of the death penalty in Louisiana is racially biased is an argument that also has a long history. In a study originally published in 1951, Oakley Johnson examined data on executions for rape in the State from 1900 to

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26. Dimattia, *supra* note 9, at 71.

27. *Organization of the District Attorney's Office*, E. BATON ROUGE DISTRICT ATT'Y'S OFF., http://www.ebrda.org/organization.php (last visited Nov. 10, 2010).

28. Joe Gyan, *Moore Wins DA Office*, ADVOCATE (Baton Rouge, La.), Oct. 5, 2008, at 1A, *available at* http://www.2theadvocate.com/news/30477019.html; *Doug Moreau Biography*, PERRY DAMPF DISP. SOLUTIONS, http://perrydampf.com/med_moreau-doug.asp (last visited Sept. 28, 2010).

29. "Indeed, it is probably safe to say that Livingston was the most influential and renowned opponent of the gallows in American history." Philip English Mackey, *Edward Livingston and the Origins of the Movement to Abolish Capital Punishment in the United States*, 16 LA. HIST. 145, 145 (1975).

30. *Id.* at 166.

1950.[31] He found that all but two of the 39 people executed for rape during those years were black, and that no whites had been executed for rape since 1907. Three additional black men were executed for rape in Louisiana under federal authority, leading to a final tally of 40 blacks and two whites executed for rape. Of the42, four were convicted in East Baton Rouge Parish, all of whom were black. In addition, two whites and three blacks who originally were sentenced to death for rape had their sentences commuted—half the whites sentenced to death and 7% of the blacks. After 1950, six more men were executed for rape in Louisiana, all of whom were black, but none of them were from East Baton Rouge Parish.[32]

Only two studies have examined possible relationships between race and death sentencing in Louisiana under statutes approved by the Supreme Court after the 1972 case of *Furman v. Georgia*.[33] The first was conducted by M. Dwayne Smith, now Vice Provost for Faculty and Program Development at the University of South Florida. He collected data from FBI Supplemental Homicide Reports on 504 Louisiana homicides eligible for capital punishment with an identified suspect, 53 of which involved a death sentence. The homicides occurred between October 1, 1976 (the date that the current death penalty statute in Louisiana took effect) and December 31, 1982. Whites represented 61.5% of the homicide victims, but 84.9% of the victims in death penalty cases. When extra-legal factors were controlled—i.e., number of victims, type of weapon, defendant–victim relationship, and urban or rural location of the crime—the victim's gender and race remained significantly correlated with death sentences.[34] The second study was a dissertation written at the University of New Orleans by Margaret Fae Klemm in 1986.[35] She examined 131 cases

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31. Oakley C. Johnson, *Is the Punishment of Rape Equally Administered to Negroes and Whites in the State of Louisiana?*, *in* WE CHARGE GENOCIDE 216, 216–28 (William Patterson ed., 1970).

32. Burk Foster, *Struck by Lightning: Electrocutions for Rape in Louisiana in the 1940s and 1950s*, *in* DEATH WATCH: A DEATH PENALTY ANTHOLOGY 188, 193 (Lane Nelson & Burk Foster eds., 2001). For a listing of known executions in the United States, see *Executions in the U.S.*, *supra* note 18. Espy erroneously lists one of the executed men, Donald Rufus Edwards, as white. Foster, however, lists Edwards as black, Foster, *supra*, at 193, and the decision by the Louisiana Supreme Court in the case indicates that he was black, State v. Edwards, 94 So. 2d. 674, 676 (La. 1957).

33. 408 U.S. 238 (1972).

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

35. Margaret Fae Klemm, The Determinants of Capital Sentencing in Louisiana, 1979–1984 (1986) (unpublished Ph.D. dissertation, University of New Orleans) (on file with Louisiana State University Law Library).

reviewed by the Louisiana Supreme Court in calendar years 1979 to 1984 in which the defendant was convicted of first-degree murder.[36] Of the 114 cases where the defendant's race was known, 36.2% of the 58 whites and 39.3% of the 56 blacks were sentenced to death.[37] Larger differences are found within a victim's race: 46.8% of those with white victims were sentenced to death (37 out of 79) compared to 22.6% of those who killed blacks (7 out of 31).[38] She found that the race of the victim, offender–victim relationship, and geographical location (all but five of the death penalty cases came from southern parishes)[39] predicted who was sentenced to death, with the effects of these variables attenuated (although still significant) when the defendant's prior record and the level of aggravation is considered.[40]

II. RELEVANT LOUISIANA STATUTES

In Louisiana, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."[41] There are now 13 statutory aggravating factors in Louisiana.[42]

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36. *Id.* at 97.
37. *Id.* at 110.
38. *Id.* at 111.
39. *Id.* at 198.
40. *Id.* at 249–52.
41. LA. CODE CRIM. PROC. ANN. art. 905.3 (2008).
42. The aggravating factors are:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, cruelty to juveniles, second degree cruelty to juveniles, or terrorism.

(2) The victim was a fireman or peace officer engaged in his lawful duties.

(3) The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(6) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony.

(7) The offense was committed in an especially heinous, atrocious or cruel manner.

Many of the aggravating circumstances, however, are also defined by Louisiana statutes as elements of first-degree murder. So in effect, when juries convict defendants in Louisiana of first-degree murder, they also determine that at least one aggravating factor is present, and the defendant is eligible for the death penalty.[43] First-degree murder is defined as:

> §30. First degree murder
> A. First degree murder is the killing of a human being:
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second degree cruelty to juveniles.
> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, peace officer, or civilian employee of the Louisiana State Police Crime Laboratory or any other forensic laboratory engaged in the performance of his lawful duties, or when the specific intent to kill or to inflict great bodily harm is directly

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> (8) The victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.
> (9) The victim was a correctional officer or any employee of the Department of Public Safety and Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.
> (10) The victim was under the age of twelve years or sixty-five years of age or older.
> (11) The offender was engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedule I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.
> (12) The offender was engaged in the activities prohibited by R.S. 14:107.1(C)(1).
> (13) The offender has knowingly killed two or more persons in a series of separate incidents.

Id. art. 905.4 (Supp. 2010).

43. This process is described in more detail in *Lowenfield v. Phelps*, 484 U.S. 231, 241–46 (1988).

> related to the victim's status as a fireman, peace officer, or civilian employee.
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim who is under the age of twelve or sixty-five years of age or older.
> (6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.
> (7) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the activities prohibited by R.S. 14:107.1(C)(1).
> (8) When the offender has specific intent to kill or to inflict great bodily harm and there has been issued by a judge or magistrate any lawful order prohibiting contact between the offender and the victim in response to threats of physical violence or harm which was served on the offender and is in effect at the time of the homicide.
> (9) When the offender has specific intent to kill or to inflict great bodily harm upon a victim who was a witness to a crime or was a member of the immediate family of a witness to a crime committed on a prior occasion and:
> (a) The killing was committed for the purpose of preventing or influencing the victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced; or
> (b) The killing was committed for the purpose of exacting retribution for the victim's prior testimony.
> (10) When the offender has a specific intent to kill or inflict great bodily harm and the offender has previously acted with a specific intent to kill or inflict great bodily harm that resulted in the killing of one or more persons.[44]

Therefore, for each homicide in our data base, we attempted to ascertain which aggravating factors were present.

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44. LA. REV. STAT. ANN. § 14.30(A) (Supp. 2010).

III. DATA COLLECTION

This study began by identifying all homicides that occurred or for which prosecution began in East Baton Rouge (EBR) Parish between January 1, 1990 and December 31, 2008, and that at any time were charged as first-degree murders.[45] Data were not collected on homicides where there was no known suspect. These cases became our universe of what we call "potential death penalty cases." To begin, the EBR Clerk of Court Office's public access arm, the Criminal Records Department, generated a list of "Death Eligible Cases From 1976 to Present" that consisted of all cases that ever had the first-degree murder statute code of § 14:30 attached to them. Cases with multiple defendants under one case number were separated out so each defendant was one case, and some cases not on the original list were added from EBR criminal court minutes and from appeal records, resulting in a total of 578 potential death penalty cases.

Verification to ensure that each case had indeed been, at least temporarily, considered a first-degree murder case was done primarily in three ways: (1) case file examination; (2) review of case information reported by the leading newspaper in the Parish, the *Baton Rouge Advocate*; and (3) review of the case on the EBR Criminal Records Department's public computer intranet. Cases with no evidence of a first-degree murder charge or with no evidence of a deceased victim, or with neither, were deleted, leaving a list of 420 cases. These 420 cases were then processed through a final set of verification and fact-checking procedures.

The final verification and fact-gathering were primarily done in four ways: (1) obtaining copies of relevant police reports; (2) obtaining copies of relevant coroner's reports; (3) matching known facts to cases anonymously recorded in the FBI's Supplemental Homicide Reports (SHRs); and (4) contacting lawyers who worked on the cases. This final process reduced the list to 406 cases that we were able to verify as first-degree murder cases at some stage of their evolution.

In the end, data for this project were collected on 406 cases in which an individual was at one time accused of first-degree murder for a homicide that occurred in East Baton Rouge Parish with a case date after January 1, 1990 and a crime date before December 31, 2008. Of those, charges were reduced in 203 cases (exactly half the sample) to a non-homicide charge, leaving 203 other cases in

45. Among our cases are three homicides from the 1980s that did not receive case numbers until the 1990s. One was a 1998 prosecution for a 1985 murder, and the other two were normal delays.

which a defendant was at one time accused of first-degree murder and eventually prosecuted for negligent homicide, manslaughter, second-degree murder, or first-degree murder. Two of these cases were pending trial at the end of 2009, and ten others resulted in not guilty verdicts, leaving for analysis a sample of 191 cases that ended with homicide convictions. Of those, 23 cases resulted in death sentences.

In one case, the defendant's race was "other." We treated this variable in this single case as missing data, leaving 162 black defendants and 28 white defendants in the data set and one case with missing data on that variable. In 135 cases, one or more black victims died, and in the 56 others, one or more white victims died.[46]

IV. RESULTS

Our analysis proceeded by cross-classifying relevant variables with the probabilities of a death sentence. We began by examining death sentencing rates separately for the defendant's race and the victim's race. Table 1 shows that the relationship between the defendant's race and death sentencing was not statistically significant, as 12.3% of the 162 blacks and 10.7% of the 28 whites were sentenced to death.

46. In one case both a black and a white were murdered. In a second case the victims were white and Asian. We coded these cases as "white victim," so by "white victim" we mean cases in which at least one white person was killed. All defendants in our sample were either black or white, with one exception. We deleted that exception in all analyses of defendants' races.

Table 1

Race of Defendant with Death Sentencing (n=190)

	White Defendant	Black Defendant
Death		
No	25 (.893)	142 (.877)
Yes	3 (.107)	20 (.123)
N	28	162

One cell has an expected frequency of less than 5.[47]
Chi-Square equals .060; df=1; p<.807.
Fisher's Exact Test p=1.000.

The relationship between the victim's race and death sentencing, however, is very strong, and it is statistically significant.[48] The data in Table 2 show that 12 out of 56 of those

47. The Chi-Square statistic tells us whether the difference between expected values in a cell is statistically different than the observed values. For example, assume we want to see if there are gender differences in whether people are left-handed or right-handed. We know that in a population, 10 percent of the population is left-handed. We draw a sample of 200 people, half men and half women. The "expected frequency" of left-handed people in the sample would be ten women and ten men. Then, we include the "observed frequency," which, following our example, might give us five men and 15 women who are left-handed. The Chi-Square statistic would tell us the probability of getting those observed results if indeed there was no difference between genders in the population. *See, e.g.*, ALAN AGRESTI & BARBARA FINLEY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 263–68 (3d ed. 1997).

48. We present results of two tests of statistical significance, the Chi-Square test and Fisher's Exact Test. The Chi-Square test is one of the most commonly used statistical measures of significance. It is a test of statistical significance for the difference between the observed frequencies and the expected frequencies under the null hypothesis, which in this case involves the relationship between death sentence decisions and our independent variables, such as race of the victim. If the probability of obtaining the observed patterns in the data is less than five percent (p <.05), the relationship is said to be "statistically significant." A .05 level of significance indicates that the observed frequencies in table are sufficiently different from the expected frequencies that such a result could only occur by chance five times out of 100, or at a probability of .05. In this case the differences are statistically significant at the .05 level. The Chi-Square test becomes less reliable for tables that have expected frequencies of less than five. Therefore, we also employ Fisher's Exact Test. This test is used in the analysis of contingency tables where sample sizes are small. *See* DAVID J. SHESKIN, HANDBOOK OF PARAMETRIC AND NONPARAMETRIC STATISTICAL PROCEDURES 637 (4th ed. 2007). In addition, for 2x2 tables looking at the race of the victim, we provide one-

who killed whites were sentenced to death (21.4%) compared to 11 out of 135 of those convicted of killing blacks (8.1%).[49] For homicides committed between 1990 and 2008 in East Baton Rouge Parish, *those who kill whites are 2.6 times more likely to be sentenced to death than those who kill blacks* (21.4 divided by 8.1).

Table 2

Race of Victim with Death Sentencing (n=191)

	White Victim	Black Victim
Death		
No	44 (.786)	124 (.919)
Yes	12 (.214)	11 (.081)
N	56	135

Chi-Square equals 6.59; df=1; p=.010.
Fisher's Exact Test p=.015, and the 1-sided Fisher's Exact Test p=.012.

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sided Fisher's Exact Test results as well. A one-sided test is based on a directional null hypothesis. In this case we can make the reasonable research hypothesis that the killers of white victims are more likely to receive the death sentence than the killers of black victims. This is based on the results of numerous previous studies that provide the rationale for a directional null hypothesis. David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 202 (2003).

49. Racial characteristics of homicide victims vary considerably in the different empirical studies that have been conducted. In his statewide study of cases with identified homicide suspects, October 1, 1976 through December 31, 1982, Smith found that 61.5% of the victims were white. *See* Smith, *supra* note 34, at 281. In her statewide study of 114 cases in which defendants were convicted of first-degree murder, 1979–1984, Klemm found that 79 of the 110 victims were white (72%). *See* Klemm, *supra* note 35, at 111. In East Baton Rouge Parish, focusing on all homicides identified by the coroner from 1991 to 2001, Dimattia found that 148 of the 875 homicide victims were white (16.9%). *See* Dimattia, *supra* note 9, at 71–72. The data in Table 3 show that in our data set, 56 of the 191 victims were white (29.3%). These differences are no doubt a function of differences in the time periods sampled, differences in location (statewide vs. East Baton Rouge Parish), and differences in the types of homicides (all cases identified by the coroner, vs. cases with a suspect, vs. cases that at any point had a charge of first-degree murder, vs. cases that resulted in a conviction for first-degree murder).

We then ran a three-way cross classification to see if death sentencing rates were significantly associated with the combination of the defendant's race and the victim's race. Table 3 shows a statistically significant relationship between the imposition of a death sentence and the combination of the race of the defendant and the race of the victim. The data in Table 3 show that 30% of the blacks convicted of killing whites were sentenced to death, followed by 12% of the whites convicted of killing whites and 8.3% of the blacks convicted of killing blacks. None of the three whites convicted of killing blacks was sentenced to death. This relationship is statistically significant, with inter-racial homicides with white victims far more likely to end with a death sentence than intra-racial homicides.

Table 3

Race of Defendant and Victim with Death Sentencing (n=190)

	BkB[50]	BkW	WkB	WkW
Death				
No	121 (.917)	21 (.700)	3 (100)	22 (.880)
Yes	11 (.083)	9 (.300)	0 (0.0)	3 (.120)
N	132	30	3	25

Four table cells have an expected frequency of less than 5.
Chi-Square equals 11.21; df=3; p=.011.
Fisher's Exact Test p=.013.

In addition, when the results are examined for the race of offender within categories of race of victim, the results of this analysis (not presented in tabular form) were not statistically significant for race of the defendant and the death penalty. This means that the relationship between the victim's race and death sentencing is not further explained by the concomitant consideration of the defendant's race. Given either a white or black victim, there are no significant differences in death sentencing rates between white and black defendants. Thus, in further analyses we zero in on the effects of the victim's race.

50. In this table, "BkB" stands for "Black kills Black," "BkW" stands for "Black kills White," "WkB" stands for "White kills Black," and "WkW" stands for "White kills White."

Table 4 shows that the more aggravating factors that are present, the higher the probability of a death sentence. This is not surprising, as the death penalty is designed to be a punishment that is more likely to be imposed as the level of aggravation increases. The data in Table 4 show that 2.1% of those with no aggravators were sentenced to death, 18.9% of those with one, and 100% (n=13) of those with two or more. This relationship is strong and statistically significant.

Table 4

Number of Aggravating Circumstances and Death Sentencing (n=191)

	Number of Aggravators		
	0	1	2+
Death			
No	138 (.979)	30 (.811)	0 (0.0)
Yes	3 (.021)	7 (.189)	13 (1.00)
N	141	37	13

Two cells have an expected frequency of less than 5.
Chi-Square equals 109.69; df=2; p<.001.
Fisher's Exact Test p<.001.

Why is the probability of a death sentence for those convicted of killing whites higher than for those convicted of killing blacks? One hypothesis we can deduce from the results in Table 4 is that homicides with white victims may be more aggravated than homicides with black victims. Table 5, however, shows that the relationship between the race of the victim and death sentencing is not explained by this possibility. In cases where no aggravating circumstances are present, one percent of those who kill blacks are sentenced to death compared to 4.9% of those who kill whites. In cases where at least one aggravator is present, 28.6% of those convicted of killing blacks are sentenced to death compared to 66.7% of those who kill whites. These results are statistically significant at or below the .01 level (Fisher's Exact Test, p=.025). Thus, even in homicides where aggravating factors are present, those who kill whites are still more than twice as likely to be sentenced to death as those who kill blacks.

Table 5

Victim's Race by Death Sentencing by
Number of Aggravating Circumstances Present (n=191)

Victim's Race	White	Black
Aggravators		
No Aggravators Present		
Not Death	39 (.951)	99 (.990)
Death	2 (.049)	1 (.010)
N	41	100
At Least One Aggravator Present		
Not Death	5 (.333)	25 (.714)
Death	10 (.667)	10 (.286)
N	35	15

Among cases where no aggravating factors are present, two cells have an expected frequency of less than 5, the Chi-Square equals 2.1, 1 df, p=.147, Fisher's Exact Test p=.203, and the 1-sided Fisher's Exact Test p=.203.
Among cases where there is at least one aggravator, Chi-Square equals 6.35; df=1; p=.01, Fisher's Exact Test p=.025, and the 1-sided Fisher's Exact Test p=.014.

Like with aggravating circumstances, the higher the number of additional felonies that accompanied the murder, the higher the probability of a death sentence.[51] In the case of both additional felonies and aggravating factors, the results are in line with the design and proper application of the statute. The data in Table 6 shows that 2.7% of those with no additional felonies were sentenced to death compared to 16.2% of those with one additional felony and 29.4% of those with two or more felonies. This relationship is statistically significant (p<.001).

Table 6

Number of Felony Circumstances and Death Sentencing (n=191)

	Number of Additional Felonies		
	0	1	2+
Death			
No	73 (.973)	83 (.838)	12 (.706)
Yes	2 (.027)	16 (.162)	5 (.294)
N	75	99	17

Chi-Square equals 12.65; df=2; p=.002.
Fisher's Exact Test p<.001.
One cell has an expected frequency of less than 5.

51. In Louisiana, one of the possible components of first-degree murder is: When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second degree cruelty to juveniles.
LA. REV. STAT. ANN. § 14.30(A)(1) (Supp. 2010).

Table 7 examines the possibility that the reason why those who kill whites are more likely to be sentenced to death than those who kill blacks is that the former cases are more likely to involve additional felonies. The data presented in Table 7 force us to reject this hypothesis, although the numbers in each cell are small and so the differences are not statistically significant. Among cases where no additional felony circumstances are present, 1.7% of those who kill blacks are sentenced to death compared to 6.3% of those who kill whites. Among cases where one or more felony circumstances are found, 13.2% of those convicted of killing blacks are sentenced to death, but the probability of a death sentence among these cases doubles if the victim is white, where 27.5% are sentenced to death. Where one or more felonies are present, the significance level is .057 (for a two-sided Fisher's Exact Test is p<.075), but for a one-sided Fisher's test p=.051, very close to the accepted .05 level of significance.

Table 7

Victim's Race by Death Sentencing by
Number of Additional Felony Circumstances Present (n=191)

Victim's Race	White	Black
Felony Circumstances		
None		
Not Death	15 (.938)	58 (.983)
Death	1 (.063)	1 (.017)
N	16	59
At Least One Felony Circumstance		
Not Death	29 (.725)	66 (.868)
Death	11 (.275)	10 (.132)
N	40	76

Among cases where no felony circumstances are present, two cells have an expected frequency of less than 5, the Chi-Square equals 1.01, df=1, p=.316, Fisher's Exact Test p=.383, and for the 1-sided Fisher's Exact Test, p=.383.
Among cases where one or more felony circumstances are present, Chi-Square equals 3.64, df=1, p=.057, Fisher's Exact Test p=.076, and for 1-sided Fisher's Exact Test p=.051.

Table 8 shows that the probability of a death sentence is greater in cases involving multiple victims. Among the cases with one homicide victim, 8.5% ended with a death sentence. But among the multiple victim cases, 33.3% resulted in the imposition of the death penalty. Again, this makes sense: the death penalty is designed for the worst types of homicides, and multiple murders are worse than murders that take only one life.

Table 8

Number of Homicide Victims by Death Sentencing (n=191)

Number of Victims	1	2+
Sentence		
Not Death	150 (.915)	18 (.667)
Death	14 (.085)	9 (.333)
N	164	27

One cell has an expected value of less than 5.
Chi-Square equals 13.46; df=1; p<.001.
Fisher's Exact Test p<.001, and the 1-sided Fisher's Exact Test, p<.001.

Table 9, however, shows that the reason that those who kill whites are more likely to be sentenced to death than those who kill blacks is not that those who kill whites have more victims. Among cases with one homicide victim, 5.9% of the cases with black victims ended in a death sentence compared to 15.2% of those with white victims. This is marginally statistically significant at .056, with a one-tailed Fisher's Exact Test at .059. Among cases with two or more victims, 23.5% of those with black victims resulted in a death sentence compared to 50% of those with white victims. This difference, however, is not statistically significant, because although the strength of these differences is substantial, there are only 27 cases in our data set with multiple victims.

Table 9

Victim's Race by Death Sentencing by Number of Victims (n=191)

Victim's Race	White	Black
Number of Victims		
One		
Not Death	39 (.848)	111 (.941)
Death	7 (.152)	7 (.059)
N	46	118
Two or More		
Not Death	5 (.500)	13 (.765)
Death	5 (.500)	4 (.235)
N	10	17

With 1 victim one cell has an expected frequency of less than 5, the Chi-Square=3.655, df=1, p=.056, and Fisher's Exact Test p=.067, and for the 1-sided Fisher's Exact Test, p=.059. With 2 or more victims one cell has an expected frequency of less than 5, Chi-Square=1.985, df=1; p=.159, for Fisher's Exact Test p=.219, and for the 1-sided Fisher's Exact Test, p=.159.

The above data show that several factors are associated with who is sentenced to death for murders in East Baton Rouge Parish: the race of the victim, the presence of aggravating circumstances, the presence of additional felony circumstances, and the number of victims. To construct a model that simultaneously considers the effects of all these variables, we used logistic regression, which is the appropriate statistical tool for the analysis of dichotomous dependent variables (such as death sentence vs. no death sentence).[52] We constructed several different models in a "stepwise" fashion to determine if the addition of more variables added to the predictive ability of the equation.

The first model we constructed (not reported in tabular form) predicts death sentencing with three variables: the number of victims (one, two, or more), the number of aggravating circumstances (zero, one, two, or more), and the number of felony circumstances (zero, one, two, or more). Each of the variables exerts statistically significant predictive power, and the complete model results in a -2 Log likelihood Chi Square of 57.918.

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52. As we have explained elsewhere:

> Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and;
>
> (1) $\ln(y) = \hat{a}_0 + X\hat{a} + \hat{i}_i$
>
> where $\hat{a}_0$ is an intercept, $\hat{a}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and $\hat{i}_i$ is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the [multiplicative] increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 59 (2002).

The second model used the above variables and the race variables (the defendant's and the victim's race, measured as white or black). The results are displayed in Table 10.

Table 10

Logistic Regression Analysis of Victim's and Defendant's Race, Number of Victims, Number of Aggravators and Number of Felonies on the Imposition of a Death Sentence*

Independent Variables	β	Sig.	Exp (β)
Victim Race**	-3.60	.003	.027
Agg. Count***	4.30	.000	73.70
Felony Count***	2.02	.010	7.53
No. of Victims****	3.13	.003	22.845
Defendant's Race**	1.94	.113	6.98
Constant	-10.385	.000	.000

* Death Sentence is coded:
0=no death sentence, 1=death sentence.
** 0=White or White/Asian; 1=Black
*** 0, 1, 2 or more
**** 1=1; 2=2 or more

Number of Cases: 190
-2 Log Likelihood=45.89.

The resulting model does a good job in modeling who is and who is not sentenced to death, and the overall fit of the model is statistically significant. The -2 Log Likelihood Chi Square decreases from 57.918 (in the model that does not include the race variables) to 45.886, showing a statistically significant increase in the overall fit of the model when the race variables are added. In Table 10, all the variables exert unique predictive value except the defendant's race.

The results indicate that in East Baton Rouge Parish, the data do not support the argument that there is disparate treatment between white and black defendants in the decisions to impose the death penalty at trial. On the other hand, the Exp (β) for the race of the victim reveals a very strong effect. This shows that the odds of

receiving a death sentence for killing one or more black victims decrease by a factor of .027, controlling for the other four independent variables in the equation. As noted, .027 (the Exp (β) value for black victims) is the odds ratio for an offender who killed a black victim being sentenced to death. An odds ratio of exactly 1.0 would mean that the likelihood of receiving a death sentence changed by a factor of 1, or not at all. Here, the results indicate that the odds of receiving a death sentence in a black victim case are on average 97.3% lower than are the odds of a death sentence in a white victim case (i.e., 1-.027 or 97.3%), controlling for the other variables in the analysis.

V. SUMMARY AND CONCLUSIONS

This study examined 191 homicides in East Baton Rouge Parish between January 1, 1990 and December 21, 2008 that, at least at one point, involved a charge for first-degree murder. We began by finding that the race of the defendant had no value in predicting who is sentenced to death (Table 1), but that the odds of a death sentence were 2.6 times higher for those who were charged with killing whites than for those charged with killing blacks. The remainder of the Article focused on explaining this race-of-victim disparity.

The data reported in Table 5 show that the reason that those who kill whites are more likely to be sentenced to death than those who kill blacks is not because the former crimes are more aggravated than the latter. Even in cases where at least one aggravator is present, the odds of a death sentence for those who kill whites (.667) are 2.3 times higher than the odds of a death sentence for those who kill blacks. Nor is the disparity explained by the possibility that homicides with white victims involve more contemporaneous felonies than cases with black victims. The data in Table 7 show that the odds of a death sentence in cases with one or more additional felony circumstances are still two times higher for those who kill whites than those who kill blacks (.275/.132). Similarly, Table 9 shows that in multiple murders, those who kill white victims are more likely to be sentenced to death than those who kill black victims.

When all the variables used in the study are combined into one model, as done in Table 10, the effect of the victim's race continues to exert a strong impact on who is sentenced to death. Here we found that even after we statistically control for the other variables in the study—i.e., number of aggravating circumstances, number of concurrent felonies, and number of homicide victims—the odds of a death sentence are still 97% higher for those who kill

whites than for those who kill blacks. These results are remarkably consistent with general findings from previous research across a multitude of jurisdictions in the United States over the last 30 years.[53]

Why would the victim's race be such an important factor in determining who is sentenced to death? One possibility is that prosecutors' offices, jurors, judges, investigating police officers, and others involved in constructing a death penalty case are (consciously or unconsciously) not as outraged or energized, on average, when a black is murdered as when a white is murdered. Death penalty cases are expensive,[54] and choices need to be made on how often the death penalty can be sought and in which cases. Today, the death penalty is increasingly justified as a means to help the family of the victim and less often justified on grounds of deterrence, religious principles, or as a way to save money.[55] As a method to help victims, prosecutors and other decision makers have to arrange families of homicide victims on a vertical hierarchy, making decisions about which is most "deserving" of a death sentence. In this sense, the social status of the victim and the family of the victim, including his or her race, increases in importance. The result is a racial bias that can very well be unintended and not recognized by the individual decision makers themselves.[56]

We still have much to learn about the dynamics that explain exactly how the racial bias in death sentencing in EBR works. Additional clues would be found by any of the following:

- We need to examine cases in which the death penalty was sought by prosecutors but not imposed by sentencing jurors. Additional data from these cases might either attenuate or enlarge the racial disparities uncovered herein.
- We know little about who the decision makers are in the prosecutor's office, other than the elected prosecutors themselves, who have input into the decision to seek the death penalty. Are these decision makers primarily white? What factors would they identify as impacting their decision making?

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53. The most recent thorough review of this research is found in Baldus & Woodworth, *supra* note 48.

54. *Costs of the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/costs-death-penalty (last visited Nov. 10, 2010).

55. *See* Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 44 (2000).

56. *See generally* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (discussing the possible causes of the "blindspot" of unconscious racism).

- We need to learn more about plea bargaining in death-eligible cases. Are prosecutors more likely to offer prison terms to those who kill blacks than to those who kill whites? Did any defendants sentenced to death have a plea bargain offered that they refused, or did any refuse to seek a plea offer that could have kept them off death row? To answer these questions, we would need to identify not only cases where the death penalty was sought, but also cases where the death penalty was threatened.
- What are the racial characteristics of the jurors and judges involved in death penalty cases?[57]
- Do those who are accused of killing whites have a longer record of prior felony convictions than those accused of killing blacks? This is unlikely, given that most homicides are intra-racial, and more encompassing research studies have failed to find that racial disparities in death sentencing are explained by the defendant's prior criminal record.[58] If so, however, at least some of the racial bias in the imposition of the death penalty could be explained by legally relevant variables.

In the end, the data reveal a very strong pattern in East Baton Rouge Parish to treat homicides differently depending on the race of the victim.

Warren McCleskey presented similar statistical evidence of racial bias in death sentencing to the United States Supreme Court in 1987. In *McCleskey v. Kemp*, a 5–4 decision written by Justice Powell, the Court ruled that statistical evidence of racial bias, standing alone, was insufficient to challenge the death penalty under either the Eighth Amendment or the Fourteenth Amendment.[59] Four years later, Powell's biographer asked the retired justice if he wished he could change his vote in any single case. "Yes," Powell replied. "*McCleskey v. Kemp*." Powell, who dissented in *Furman* and in his tenure on the Court remained among the justices who regularly voted to sustain death sentences, had changed his mind. "I have come to think that capital punishment should be abolished . . . [because] it serves no useful

57. One recent project that examined jury selection in eight southern states found substantial racial bias in the selection of jurors. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), *available at* http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf.

58. *See, e.g.*, Pierce & Radelet, *supra* note 52.

59. 481 U.S. 279 (1987).

purpose."[60] Had Powell had this realization a few years earlier, it is quite likely that the death penalty would have been, at least temporarily, abolished.

This makes the dissenting comments of Justice Brennan (joined by Justices Marshall, Blackmun, and Stevens) even more fitting as a conclusion to this Article:

> Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present. . . . [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.[61]

60. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451–52 (1994).

61. *McCleskey*, 481 U.S. at 344.