**THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2014**

Katherine Beckett[1]
Professor, Law, Societies and Justice Program
Department of Sociology
University of Washington

Heather Evans,
M.A., Ph.D. Candidate
Department of Sociology
University of Washington

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## Abstract

Although contemporary death penalty statutes were designed to reduce arbitrariness and discrimination in capital sentencing, researchers have nonetheless found that race and other extra-legal factors continue to play a significant role in determining which capital defendants live and which die in the post-Furman era. To date, however, no published study has examined the role of race in capital sentencing in Washington State, where the death penalty was first authorized 160 years ago. This article assesses whether race influences the administration of capital punishment in Washington State, and if so, where in the process it matters. Research on implicit racial bias suggests that unconscious stereotypes that link blacks to violence are widespread, and that these unconscious biases affect perception and decision-making even in the absence of conscious racial animus or antipathy. Moreover, experimental studies indicate that implicit racial biases matter the most at the sentencing phase of capital trials. The results of statistical regression analyses are largely consistent with these findings. Specifically, although neither the race of the defendant nor the race of the victim appear to affect prosecutorial decision-making in aggravated murder cases, jurors are more than four times more likely to impose a death sentence if the defendant is black. Moreover, several other extra-legal factors do affect both prosecutorial and jury decision-making in aggravated murder cases adjudicated in Washington State. Despite significant efforts to achieve it, it appears that race-blindness continues to elude us.

## INTRODUCTION

Although the number of executions taking place in the United States has declined considerably in recent years,[2] capital punishment remains shrouded in controversy.[3] Concerns about "the ultimate sanction" include the high cost of its administration, the apparent arbitrariness of its application, the possibility that available techniques cause considerable pain and suffering, and evidence that the system is "fraught with error."[4] The role of race in capital sentencing is also the subject of much discussion and debate.[5] Indeed, many studies indicate that race played an important role in the administration of capital punishment prior to the *Furman v. Georgia* ruling in 1972 – and that it has continued to do so in recent decades.[6]

Although contemporary death penalty statutes were designed to reduce arbitrariness and discrimination in capital sentencing, researchers have nonetheless found that race and other extra-legal factors continue to play a significant role in determining which capital defendants live and which die in the post-Furman era.[7] In particular, there is strong evidence that the race of murder victims influences the administration of the

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[2] Death Penalty Information Center, *The Death Penalty in 2013: Year End Report.* Available at http://deathpenaltyinfo.org/documents/YearEnd2013.pdf (accessed June 9, 2014).

[3] See Austin Sarat, ed, THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE (New York: Oxford University Press, 2001).

[4] James Liebman, Jeffrey Fagan and Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*. Available at http://www2.law.columbia.edu/instructionalservices/liebman/ (accessed June 9, 2014).

[5] See, for example, American Bar Foundation, *Death Penalty Assessments: Key Findings*. Available online at http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=209 (accessed December 15, 2013).

[6] For an overview, see David C. Baldus and George Woodworth, *Race Discrimination and the Death Penalty* (Chapter 16 in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF ULTIMATE PENAL SANCTION, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition), at 516.

[7] Ibid, pp. 519-526. See also U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (Washington D.C.: Report to Senate and House Committees on the Judiciary, February 1990), p. 5; Samuel Walker, Cassia Spohn and Miriam Delone, *The Color of Death* (Chapter 8 in THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA, Thomson-Wadsworth, 4th edition); Jamie L. Flexon, RACIAL DISPARITIES IN CAPITAL SENTENCING (El Paso: LFB Scholarly Publishing, 2012).

death penalty in many locales: defendants accused of killing whites are significantly more likely than similarly situated defendants accused of killing blacks to be sentenced to death.[8] Some studies also find that the race of the defendant continues to impact outcomes in capital cases.[9] Such findings suggest that the death penalty continues to play an important role in racialized systems of crime control in the United States, even as covert and intentional forms of racism decline.[10]

To date, however, no published study has examined the role of race in capital sentencing in Washington State, where the death penalty was first authorized 160 years ago. In 1854, the Territorial Legislature adopted the death penalty as an automatic penalty for anyone convicted of first-degree murder.[11] In 1909, the legislature authorized the imposition of either a sentence of death or life imprisonment for persons convicted of that crime, thus rendering the death penalty non-mandatory.[12] In the aftermath of the *Furman v. Georgia* decision, the legislature abolished the death penalty altogether in 1975, but then reinstated it in 1977 after adding additional procedures designed to reduce arbitrariness in its application.[13] This statute was eventually declared unconstitutional because it specified that defendants who pled guilty would not receive a sentence of death, while defendants who exercised their right to a trial remained vulnerable to that sanction.[14]

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[8] Ibid.
[9] Ibid.
[10] See generally Charles J. Ogletree, Jr. and Austin Sarat, eds, FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (New York University Press, 2006); Stuart Banner, THE DEATH PENALTY: AN AMERICAN HISTORY (Harvard University Press, 2009); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide* (53 DEPAUL L. REV. 1557, 159 (2004); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. Rev. 15, 18 (2002).
[11] L.G. Hellwig, *Death Penalty in Washington: An Historical Perspective*, 57 WASH LAW REV. 525 (1982).
[12] Act of March 22, 1909, ch. 249 140, 1909 Wash. Laws 890, 930 (repealed 1975).
[13] Act of June 10, 1977, ch. 206, 1977 Wash. Laws, 1st Ex. Sess. 774, 776-778.
[14] *State v. Frampton*, 95 Wn.2d 469, 627 P.2d. 922 (1981).

Washington State's current death penalty statute was enacted in 1981 and is comparatively restrictive: fewer than 350 aggravated murder cases have been adjudicated since that time. Despite its limited use, the administration of capital punishment in Washington State remains controversial, in part because federal courts have over-turned eight of eleven capital cases after defendants lost their appeals before the Washington State Supreme Court.[15]

Under RCW Ch. 10.95, the death penalty may only be imposed if the State has filed a notice of intent to seek the death penalty (often referred to as a death notice), the defendant is convicted of aggravated first-degree murder, and a judge or jury determines that there are not sufficient mitigating circumstances to merit leniency. (See Appendix A for a list of aggravating factors that differentiate aggravated homicide from non-aggravated homicide). Between December 1981 and May 2014, 330 trial reports involving defendants convicted of aggravated murder were submitted to the Washington State Supreme Court.[16] Thirty of these cases involved defendants who were under the age of 18 at the time of the offense and were therefore not eligible for the death penalty. Three adult defendants were also ineligible due to extradition agreements that precluded the imposition of a death sentence. Prosecutors sought the

[15] As of 2000, the federal courts had overturned seven of eight cases upheld by the Washington State Supreme Court. These cases included *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 122 L.Ed.2d 742, 113 S.Ct. 1363 (1993); *Harris by and through Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W. D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995); *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142, 136 L.Ed.2d 894, 117 S.Ct. 1017 (1997); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997); *Rice v. Wood*, C89-568T (W.D. Wash. 1997); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999); *Benn v. Wood*, C98-5131 FDB (W.D. Wash. 2000. The one exception was *Campbell v. Wood*, 18 F.3d 662 (9thCir. 1994) (en banc). See ACLU of Washington, *Sentenced to Death: A Report on Washington Supreme Court Rulings in Capital Cases* (August 2000), p. 2. Since 2000, the federal courts have over-turned one of three death sentences upheld by the Washington State Supreme Court. In 2002, the 9th Circuit reversed the death sentence in *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002). In 2007, however, the U.S. Supreme Court affirmed Cal Brown's sentence *(see Uttecht v. Brown*, 551 U.S. 1 (2007)). Jonathan Gentry also lost his federal appeal in the 9th Circuit (*see Gentry v. Sinclair*, 705 F.3d 884 (9th Cir. 2012)) but is still litigating.

[16] Attorneys for Mr. Allen Gregory provided the trial reports regarding these cases, which they received from the Washington State Supreme Court.

death penalty in 29% of the 297 cases involving death-eligible adults, and juries imposed it in about one-eighth (12%) of these. Some of these death sentences were over-turned on appeal. Of the 297 adults convicted of aggravated murder in Washington State between December 1981 and May 2014, five have been executed and another nine are currently on death row.[17]

This article assesses whether race influences the administration of capital punishment in Washington State, and if so, where in the process it matters. Recent studies highlight the importance of analyzing prosecutorial and jury decision-making separately in order to specify which decision-making processes are influenced by race, if race matters at all.[18] The following analyses therefore explore the impact of race on prosecutorial decisions to file death notices and, separately, on juries' decisions[19] to impose capital punishment in aggravated murder cases in which death notices have been filed. Specifically, we examine whether prosecutors are more likely to seek, and juries more likely to impose, the death penalty in cases involving black defendants. We also assess whether the race of the victim influences prosecutorial and/or jury decision-making in capital cases adjudicated in Washington State. We begin with a brief summary of research on the role of race in the contemporary administration of the death penalty.

## II. Race and the Death Penalty: Past and Present

Historically, the use of capital punishment in the United States was bound up with various racialized systems of control, including extra-legal violence. As the legal scholar Charles Ogletree puts it, "the racially disproportionate application of the death penalty

[17] See Washington State Department of Corrections, *Capital Punishment in Washington State*. Available at http://www.doc.wa.gov/offenderinfo/capitalpunishment/ (accessed August 21, 2014).

[18] See David C. Baldus and George Woodworth, *Race Discrimination and the Death Penalty* (Chapter 16 in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier (Carolina Academic Press, 2003, 2nd edition).

[19] If a defendant waives his or her right to a jury trial, a judge may impose a death sentence in cases in which a death notice has been filed. As a practical matter, however, juries almost always decide whether to impose a sentence of death. We therefore link sentencing decisions to jury decision-making throughout this article.

can be seen as being in historical continuity with the long and sordid history of lynching in this country."[20] Although it is tempting to imagine this continuity solely in historical terms, numerous studies indicate that race has continued to influence the administration of capital punishment in locales across the country since its reinstatement in the late 1970s and early 1980s. Some of these studies analyze data regarding the administration of capital punishment in particular jurisdictions within the United States. Others use experimental methods to investigate how the race of hypothetical defendants and/or victims and "implicit" racial bias impact mock jurors' deliberations and sentencing decisions. In what follows, we summarize the results of these two bodies of research.

**Race and the Administration of Capital Punishment in the United States**

Numerous studies analyze whether race has impacted the (actual) administration of capital punishment since its reinstatement by the Supreme Court in the late 1970s.[21] This literature shows that race continued to permeate the capital sentencing process despite the adoption of procedures designed to eliminate that possibility. This appears to have been the case in the years immediately following the *Furman v. Georgia* decision and in more recent decades as well.

A meta-analysis of studies published prior to 1990 conducted by the U.S. General Accounting Office (GAO) found "a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the Furman decision."[22] Studies published during this period consistently reported that defendants convicted of killing whites were more likely to be sentenced to death than other defendants, over and above any differences in case characteristics. Indeed, this finding was "remarkably

[20] Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. Rev. 15, 18 (2002). See also Charles J. Ogletree, Jr. and Austin Sarat, eds, FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (New York University Press, 2006).

[21] Gregg v. Georgia 428 U.S. 153 (1976).

[22] General Accounting Office (GAO), *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, Washington D.C.: US General Accounting Office (p. 5). Available at http://www.gao.gov/assets/220/212180.pdf Accessed June 9, 2014.

consistent across data sets, states, data collection methods, and analytic techniques"; it was also found to exist at all stages of the criminal justice process.[23] Moreover, more than half of the studies reviewed by the GAO found that the race of the defendant also significantly impacted the likelihood that defendants were charged with a capital offense and sentenced to death. In three-fourths of these studies, black defendants were significantly more likely to face the death sentence than similarly situated white defendants.[24]

More recent studies report similar, though not identical, findings.[25] In particular, published studies fairly consistently report that victim-race (along with numerous other legal and extra-legal factors) continues to influence the administration of capital punishment. Specifically, defendants convicted of killing whites are significantly more likely to receive a death sentence than other defendants, even after controlling for a wide range of legal and extra-legal factors that may also influence outcomes in capital cases.[26] For example, Songer and Unah (2006) analyzed capital sentencing in South Carolina in the 1990s, and found that prosecutors were significantly more likely to seek death in cases involving white victims.[27] Similarly, Barnes, Sloss and Thaman (2008) analyzed the imposition of the death penalties adjudicated in Missouri between 1997-2001, and report that defendants accused of killing whites were significantly more likely to be sentenced to death than other defendants after controlling for other relevant

[23] Ibid.
[24] Ibid, p. 6.
[25] In a meta-analysis of the literature published in 2003, Baldus and Woodworth find that "In 83% (25/30) of the jurisdictions with relevant data, there is some evidence of race-of-victim disparities (adversely affecting defendants whose victims are white), and in 33% (10/30) of these jurisdictions, there is some evidence of race-of-defendant disparities (adversely affecting black defendants). David C. Baldus and George Woodworth, *Race Discrimination and the Death Penalty* (Chapter 16 in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF ULTIMATE PENAL SANCTION, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition), 519.
[26] Ibid.
[27] Michael J. Songer and Issac Unah, *The Effect of Race, Gender and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 SOUTH CAROLINA L. REV. 161 (2006).

factors.[28] Radelet and Pierce (2011) analyzed the factors that predict the imposition of death sentences in eligible murder cases adjudicated in North Carolina between 1980-2007, and found that defendants accused of killing whites are more likely to be sentenced to death than similarly situated others.[29] Numerous other studies have reached similar conclusions.[30]

Some, though not all, recent studies also find that the race of the defendant influences outcomes in capital cases, with black defendants more likely to be sentenced to death than similarly situated white defendants.[31] For example, Baldus et al. (1998) report that in cases adjudicated in Philadelphia between 1983-1993, black defendants and defendants accused of killing people who were not black were significantly more likely to be sentenced to death than similarly situated others.[32] Baldus et al. (2011) similarly report that black defendants are more likely to be sentenced to death than non-black defendants even after controlling for relevant legal factors.[33] Another recent study

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[28] Katherine Y. Barnes, David Sloss and Stephen Thaman, *Life and Death Decisions: Prosecutorial Discretion and Capital Punishment in Missouri*, Arizona Legal Studies, Discussion Paper No. 08-03 (2008).

[29] Michael L. Radelet and Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N. CAROLINA L. REV. 89: 2119 (2011).

[30] See David Baldus, Catherine Grosso, George Woodworth, & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005*), 101 J. OF CRIM. LAW & CRIMINOLOGY 1227 (2011); Glenn L. Pierce and Michael L. Radelet, *Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce and Michael L. Radelet, *Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1; Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUSTON L. REV 131 (2012).

[31] David C. Baldus and George Woodworth, *Race Discrimination and the Death Penalty* (Chapter 16 in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF ULTIMATE PENAL SANCTION, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition), 519.

[32] David C. Baldus, G. Woodworth, D. Zuckerman, N.A. Weiner & B. Broffitt, *Racial Discrimination and the Death Penalty in the Post- Furman era: An Empirical and Legal Overview, with Recent Findings*
*from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

[33] David Baldus, Catherine Grosso, George Woodworth, & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. OF CRIM. LAW & CRIMINOLOGY 1227 (2011).

found that black defendants with white victims are significantly more likely to be sentenced to death than both black defendants with non-white victims or white defendants.[34] Many of these studies also identify other extra-legal factors that influence the administration of capital punishment. Specifically, some researchers have found that defendants convicted of killing women or children, and those who used a knife, are more likely to receive the ultimate sanction.[35] Many studies have also found that place matters, with defendants sentenced in rural and suburban areas more likely to be sentenced to death than their urban counterparts.[36]

There is, then, substantial evidence that race has continued to impact capital sentencing processes in locales across the country: most studies report that the race of the victim has a significant impact on capital case outcomes, and some find that the race of the defendant also influences the administration of capital punishment. Evidence that race continues to matter in capital cases challenges the widespread belief that we are, in the post-Furman era, "post-racial." Although overt, conscious and intentional racism has diminished considerably in recent years, a number of studies show that both structural racism – racially unequal outcomes that flow from facially neutral institutional arrangements or practices – and implicit racial bias persist.[37]

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[34] David Baldus, Julie Brain, Neil Weiner, and George Woodworth, *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990-2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 31 U. MEM. L. REV. 823 (2000-2001).

[35] For example, Songer and Unah find that defendants accused of killing women, children, or strangers, and those who used a knife rather than a gun, are more likely to receive a death sentence (see Michael J. Songer and Issac Unah, *The Effect of Race, Gender and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 SOUTH CAROLINA L. REV. 161 (2006)).

[36] See David C. Baldus and George Woodworth, *Race Discrimination and the Death Penalty* (Chapter 16 in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF ULTIMATE PENAL SANCTION, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition, 520.

[37] Lawrence D. Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*. In S. A. Tuch & J. K. Martin, eds., RACIAL ATTITUDES IN THE 1990S. Westport, CT: Praeger (1997).

Indeed, a wide body of literature on implicit bias shows that race affects perception and decision-making even in the absence of racial animus or antipathy. Some of this research focuses specifically on the role of implicit racial bias in the administration of capital punishment, and provides additional evidence that race continues to influence the contemporary administration of capital punishment – despite the decline of more overt and conscious forms of racism.

**The Role of Implicit Racial Bias in the Administration in Capital Punishment**

Researchers refer to the unconscious impact of race as "implicit bias" in order to differentiate it from conscious racial animus.[38] Findings from this literature show that implicit biases are pervasive, even among individuals who do not openly express biased views.[39] For example, experimental studies show that stereotypes such as the association between blackness and violence are widespread: the mere (visual) presence of a black man increases the likelihood that observers will think about the concepts with which black men are stereotypically associated (e.g. violence), interpret ambiguous behavior as aggressive, and mis-categorize ambiguous objects as weapons.[40] Moreover, the association between blackness and violence is bi-directional: images of blackness bring violence and criminality to mind, while discussions of violence conjure images of blackness in the minds of many.[41] These studies provide compelling evidence that the

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[38] Lincoln Quillian, *Does Unconscious Racism Exist*, SOCIAL PSYCHOLOGY QUARTERLY 71,1: 6–11; Robert J. Sampson and Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "'Broken Windows"*, 67 SOCIAL PSYCHOLOGY QUARTERLY 319 (2004).

[39] For a recent overview, see Task Force on Race and the Criminal Justice System, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM, 2011. Available at http://www.law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report%20-%20final%20release%20march%201%202011%20for%20printer%202.pdf Accessed June 9, 2014.

[40] B.K. Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 77 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 167 (2001); J. Correll, B. Park, C.M. Judd, and B.W. Wittenbrink *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1314 (2002).

[41] Jennifer L. Eberhardt, Phillip Atiba Goff, Valieri J. Purdie, and Paul G. Davies, *Seeing Black: Race, Crime and Visual Processing*, 87 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 876, (2004).

(unconscious) association between blackness and violence is widespread and influences how people perceive behavior, objects, and social situations.

With respect to capital sentencing, numerous studies show that implicit racial bias shapes the identification and processing of death eligible cases. For example, researchers using experimental methods to examine implicit and explicit biases among jury-eligible citizens in six leading death penalty states found that many citizens harbor implicit racial stereotypes about blacks and placed more value on the lives of whites.[42] Moreover, the more mock jurors showed implicit racial bias, the more likely they were to convict black defendants.[43] Similarly, experimental studies show that jury-eligible, death-qualified jurors who viewed a simulated California capital trial were more likely to recommend death when the video depicted a black defendant than when the video depicted the defendant as white.[44]

The association between blacks and violence appears to be mediated by an unconscious but widespread association between black human beings and animals. This de-humanizing association influences basic cognitive processes and significantly alters judgments in criminal justice contexts.[45] For example, researchers conducting an archival study of capital cases report that news stories about black defendants convicted of capital crimes are significantly more likely to contain ape-relevant language than news stories about capital defendants who are white. Moreover, defendants depicted in more ape-like ways are comparatively likely to be executed than others even after controlling for relevant legal factors.[46] In follow up studies, researchers found that the

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[42] Justin D. Levinson, Robert J. Smith and Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-eligible Citizens in Six Death Penalty States*, N.Y.U.L. REV. (forthcoming 2014).
[43] Ibid.
[44] Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005). See also Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIM. PSYCHOL. 171 (2007).
[45] See Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams and Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 292 (2008).
[46] Ibid.

degree to which black defendants have a stereotypically black appearance is an important predictor of the imposition of a death sentence in cases involving black defendants and white victims.[47]

There is, then, ample evidence that implicit racial biases are widespread and affect decision-making in general and in capital cases specifically. Studies also suggest that implicit biases matter the most at the sentencing phase of capital trials. For example, Baldus and colleagues (1991) examined capital cases in a single city, Philadelphia, and found that black defendants were significantly more likely to be sentenced to death after controlling for a host of other relevant factors.[48] Studies indicate that this racial effect stems from the fact that jurors are far less likely to give credence to mitigating evidence offered on behalf of black defendants.[49] In fact, evidence regarding mitigating circumstances that may be perceived as exculpatory for white defendants is often interpreted as incriminating when defendants are black.[50] Moreover, juror deliberation has been shown to exacerbate the tendency of mock white jurors to sentence black defendants to death more frequently than white defendants.[51]

In short, a wide body of literature shows that implicit racial biases have a powerful impact on decision-making in both real and simulated capital cases. Below, we investigate the possibility that race may also affect capital case processing in Washington State. We begin with a brief overview of our data and methods.

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[47] Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *Psychological Science* 383 (2006).

[48] David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1714 (1998).

[49] Ibid; see also Mona Lynch and Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH St. L. Rev. 573.

[50] Mona Lynch and Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH St. L. Rev. 573.

[51] Mona Lynch and Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW AND HUMAN BEHAVIOR 481 (2009).

## III. Data, Methods and Analytic Strategy

In Washington State, trial judges are required to file reports in all aggravated murder cases in order to facilitate proportionality review. Specifically, RCW 10.95.130(2)(b) mandates that the Court determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." "Similar cases" means all cases resulting in one or more convictions for aggravated murder, regardless of whether a death sentence was sought or imposed. The purpose of this review "is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish, wanton or random, and is not based on race or other suspect classifications."[52]

### Data and Analytic Strategy

This study analyzes data derived from trial reports pertaining to aggravated murder cases filed with the Washington State Supreme Court between December 1981 and May 31, 2014 for which a trial report is available, a total of 330 cases. As noted previously, however, 30 of these cases involved defendants who are known to have been under 18 years of age at the time of offense.[53] In 1993, the Washington State Supreme Court determined that juveniles are ineligible for the death penalty.[54] In this ruling, the Court also construed the statute to mean that the death penalty could *never* have been imposed upon juveniles. From a legal point of view, this means that juveniles were never eligible for the death penalty under Washington's statute. For these reasons, we have removed minors from the analyses presented here. Three other cases involved individuals who were ineligible for the death penalty by virtue of extradition agreements. After these exclusions, the sample includes 297 aggravated first-degree murder cases involving death-eligible adult defendants.

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[52] *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006).

[53] In seven other cases, the age of the defendant at the time of offense could not be determined from the trial report. Because they were not noted to be juveniles, these defendants are assumed to be adults and are included in the regression models.

[54] *State v. Furman*, 858 P.2d 1092 (1993).

The trial reports were coded according to a detailed coding protocol.[55] Two University of Washington students were trained to code the trial reports; their work was periodically audited by the authors to ensure reliability. Although the trial reports ask judges to supply information about a wide range of case, defendant and victim characteristics, we discovered through the coding process that many of the trial reports were incomplete. We were therefore unable to include a number of potentially relevant factors (such as defendant IQ and mental health status) in our analyses that may also influence the administration of capital punishment. Nevertheless, the coding process yielded a fairly comprehensive database that included information about numerous case, victim, and defendant characteristics. We also compiled data regarding several county characteristics. Measures of population density, demographic composition and voting behavior were taken from the U.S. Census Bureau. In addition, data regarding country revenue were taken from the Office of Financial Management's *Washington State Data Book*. We used the Bureau of Labor Statistics' online inflation calculator to convert revenue figures to constant (1981) dollars. Detailed information about the sources and measurement of the variables analyzed is presented in Appendix C.

In the aggravated murder cases we analyze, prosecutors may or may not have filed a death notice. If a death notice was filed and not withdrawn by either judges or prosecutors, juries may or may not have imposed a sentence of death. The analyses presented here employ regression methods to assess the role of race in the two main stages of capital sentencing in Washington State.[56] Specifically, we analyze a) prosecutorial decisions to file a death notice, and b) whether a death sentence was imposed in cases in which a death notice was filed and not subsequently withdrawn. These regression analyses allow us to ascertain whether the race of the victim and/or

[55] This coding protocol was developed and implemented in consultation with attorneys Lila Silverstein and Neil Fox.

[56] Prosecutors also exercise discretion in deciding whether to charge aggravated vs. non-aggravated murder and whether to allow a defendant to plead down from an aggravated murder charge. These decisions are also quite consequential but cannot be analyzed with data derived from trial reports.

defendant influence either prosecutorial decisions to file a death notice and/or decisions by juries to impose a sentence of death.

Part IV provides descriptive information regarding the prevalence and distribution of death sentences in Washington State. We begin by comparing the proportion of cases in which death notices were filed and death sentences imposed at the county level. Next, we compare the proportion of black, white and other defendants who were convicted of aggravated murder against whom prosecutors filed death notices, who were sentenced to death, and who have been executed or are currently on death row. Finally, we compare the proportion of cases involving a black defendant and white victim that resulted in a death sentence with the proportion of cases with different defendant-victim configurations in which a death sentence was sought or imposed.

The results of these descriptive analyses show that there is notable variation in the proportion of aggravated murder cases in which prosecutors seek, and juries impose, the death penalty at the county level. They also suggest that prosecutors filed death notices in a larger share of cases involving white than black defendants. By contrast, a comparatively large proportion of black defendants were sentenced to death. This pattern of results suggests that race may play a role in jury decision-making. It is important to note, however, that these descriptive results are suggestive rather than conclusive because they do not take into account the many case characteristics that may influence prosecutorial and jury decision-making. To remedy this, Part V presents the results of statistical regression analyses that assess whether race impacts key outcomes when a full array of case characteristics such as the number of defendants' prior convictions are taken into account.

**Statistical Methods**

Regression is a statistical technique used to estimate the degree of correlation among variables included in a given model. Regression models include an outcome or

dependent variable – in this case, a death notice or death sentence – as well as a number of factors (independent variables) that may affect the outcome. The results of the regression analysis reveal how much the outcome changes when any one of the independent variables is varied and the other independent variables are held constant. Regression analysis thus allows researchers to identify the unique impact of each independent variable – in this case, the race of the defendant and victim – *over and above any differences in case characteristics*. By convention, social scientists often identify statistical significance when there is a 5 percent or less chance of finding this result by chance (noted as p-value ≤ .05.) However, when samples are small or hypotheses are directional (e.g., the researcher expects covariates to increase and not decrease the probability of receiving the death penalty) a cut off of p-value ≤ .10 is used instead. For this reason, we report the p-values of covariates that are statistically significant at both the .05 and .10 levels.

Diagnostic tools were used to help identify the most appropriate regression models. When cases are nested in groups, such as counties, multilevel analysis is often used to isolate the statistical impact of the individual county. Fixed effects models are another common strategy to control for shared error among observations belonging to the same group. However, these methods are not appropriate in this case. In the data analyzed here, 28 counties are represented, and 21 counties have had fewer than 10 death penalty cases since December 1981. Roughly 10 percent of the cases occurred in counties with fewer than five trials. Only one capital case was heard in 12 of these 28 counties; in these counties, there is no variation in the dependent variable. Given the small sample size (and group sizes) of these data, multilevel analysis is not appropriate.[57]

Instead, we fitted logistic regression models, each with an outcome of 0 or 1, using

[57] Tom Snijders and Roel Bosker, MULTILEVEL ANALYSIS: AN INTRODUCTION TO BASIC AND ADVANCED MULTILEVEL MODELING, Sage Publications, 1999.

Maximum Likelihood Estimate (MLE) procedures to estimate the probability of receiving a death notice or death sentence given a number of covariates. In general, MLE estimates should be interpreted with caution for samples with fewer than 100 cases.[58] As a precaution, we conducted careful analyses of our models, including and excluding case county characteristics to gauge their impact on the overall results. We present models that include theoretically and substantively important variables and findings that ensure across various model specifications.

As in similar studies conducted in other venues, two types of variables were included in the regression models: case characteristics, some of which we would expect to impact case outcomes, and extra-legal or social factors (such as race), which ideally would not. In the analysis of prosecutorial decision-making, we included case characteristics that would have been known to prosecutors early in the criminal process: the number of prior convictions possessed by the defendant; the number of victims; the number of aggravators alleged by prosecutors to exist; whether the defendant was suspected of also committing a sex crime in the course of the homicide; and whether the victim was a law enforcement officer. After assessing the role of case characteristics, we added several extra-legal (i.e. social) factors to the models. In the analysis of prosecutorial discretion, these included: race of the defendant and the victim(s); whether the victim was female, a child, or a stranger; whether the defendant used a gun; and whether there was extensive publicity about the case. We also tested four distinct county-level measures: the population density of the county in which the conviction occurred; the percentage of the county population that is black; per capita county revenue; and the share of the county population that voted Republican in the most proximate Presidential election.

In the analysis of jury decision-making, we included case characteristics that would likely

[58] See Scott J. Long, and Jeremy Freese, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA, 2nd Ed. College Station, Texas: StataCorp LP, 2006.

have been known by judges and jurors. These include: the number of prior convictions possessed by the defendant; whether there were multiple victims; the nature of the defendant's plea (guilty vs. not guilty)[59]; the number of aggravating circumstances found by the judge or jury; the number of mitigating circumstances identified; the number of defenses offered; and whether the victim was held hostage.[60] We also tested the significance of a number of social factors. Unfortunately, not all of these factors could be included simultaneously in the analysis of jury decision-making because the smaller sample size reduces the number of variables that can be included in the models. Model testing suggested that the only social factor that was consistently relevant to the outcome is the race of the defendant. For this reason, defendant race is the only social factor included in the analysis of sentencing decisions models presented here.

For each set of regression analyses, we first report the results obtained when only case characteristics are included in the model. This allows us to identify which case characteristics influence decision-making in death-eligible cases; it also allows us to assess the proportion of the variation in outcomes that is explained by case characteristics as a group. Next, we present the results of a more complete model that also includes social factors. These results allow us to assess the degree to which outcomes in aggravated murder cases are influenced by race and other social factors over and above any differences in case characteristics.

In this case, diagnostic tests indicated that a handful of cases are outliers with respect to the number of victims. We therefore measured the number of victims in terms of three categories: one victim; two-four victims; or five or more victims. Diagnostics also

[59] In the majority of cases, the same judge or jury served during both the guilt phase and the sentencing phase of the trial. In such cases, the judge or jury would have known whether the defendant pled guilty. In the small number of cases in which different decision-makers deliberated during the guilt and sentencing phases of the process, the nature of the defendant's plea may not have been known to the jurors serving in the sentencing phase.

[60] In these analyses, we treat evidence that the victim was held hostage as a measure of victim suffering.

showed that three variables were heavily skewed. These included: number of prior convictions, number of mitigating circumstances, and per capita revenue. Logging these variables normalized their distribution. The number of defenses and aggravators also showed some signs of skew, but after testing, the model fit was better (assessed by comparing pseudo $R^2$ scores) when these variables were not logged. (See Appendix C for detailed about detailed information about variable measurement and transformation).

## IV. Preliminary Findings: Descriptive Statistics

The descriptive statistics presented below provide an initial overview of the distribution of efforts to obtain and decisions to impose death sentences by county and across various groups of defendants. Table 1 shows the proportion of aggravated murder cases involving adult defendants in which prosecutors filed a death notice and in which a death sentence was imposed across Washington State counties. All counties in which five or more aggravated murder cases occurred between December 1981 and May 2014 are identified individually. We also include information about the average number of victims and aggravators present in the cases adjudicated in each county.

As Table 1 makes evident, the proportion of aggravated murder cases for which prosecutors seek death varies notably. In Thurston County, prosecutors sought the death penalty in 67% of the aggravated murder cases; prosecutors in Okanogan County did not seek the death penalty in any of the eight aggravated murder cases that took place there. In larger counties with more aggravated murder cases, the proportion of cases in which prosecutors sought death also varied markedly, from a high of 48% in Kitsap County to a low of 0% in Yakima County. The proportion of cases in which juries imposed a sentence of death also varies notably, from a high of 30% in Clallam and Thurston Counties to 0% in several counties. Moreover, it does not appear that these differences are a function of the number of victims or aggravating circumstances involved in the relevant cases.

| Table 1. Proportion of Aggravated Murder Cases with Death-Eligible Defendants in which Death was Sought and Imposed, by County, December 1981 - May 2014 | | | | |
|---|---|---|---|---|
| County | Proportion of Aggravated Murder Cases in which Death Notices were Filed | Proportion of Aggravated Murder Cases in which Death Penalty was Imposed | Average Number of Victims | Average Number of Affirmed Aggravators |
| Thurston | 67% (4/6) | 33% (2/6) | 1 | 2 |
| Clallam | 50% (3/6) | 33% (2/6) | 2 | 2 |
| Kitsap | 48% (10/21) | 10% (2/21) | 1 | 2 |
| Pierce | 45% (24/53) | 21% (11/53) | 3 | 2 |
| Spokane | 40% (8/20) | 5% (1/20) | 1 | 2 |
| Snohomish | 23% (7/31) | 16% (5/31) | 1 | 2 |
| King | 22% (16/72) | 8% (6/72) | 3 | 2 |
| Clark | 18% (4/22) | 14% (3/22) | 1 | 3 |
| Benton | 13% (1/8) | 13% (1/8) | 2 | 2 |
| Whatcom | 17% (1/6) | 17% (1/6) | 1 | 2 |
| Cowlitz | 13% (1/8) | 0% (0/8) | 1 | 1 |
| Skagit | 0% (0/5) | 0% (0/5) | 1 | 2 |
| Okanogan | 0% (0/8) | 0% (0/8) | 1 | 1 |
| Yakima | 0% (0/9) | 0% (0/9) | 2 | 1 |
| All Washington State Counties | 29% (86/297) | 12% (35/297) | 2 | 2 |

Note: Counties with five or more aggravated murder cases are individually identified.

The figures shown in Table 1 thus suggest that the likelihood that prosecutors will seek and juries will impose death for a given aggravated murder defendant depends in part on the place in which county the case is adjudicated.

Below, Table 2 compares the proportion of black, white and other death-eligible defendants against whom prosecutors filed a death notice and who received a death sentence. This table also shows the proportion of cases in which the death sentences imposed survived the appeals process. The results indicate that prosecutors sought death sentences in a larger proportion (32%) of aggravated murder cases involving white defendants than they did in cases involving black (25%) or other (22%) defendants. However, juries imposed death in a larger share (16%) of cases involving black defendants than they did in cases involving white defendants (12%) or other defendants (8%). Interestingly, the death penalty has been retained in a larger proportion of cases involving black defendants (7%) than it has in cases involving white (4%) or other (2%) defendants (see Table 2).[61]

**Table 2. Capital Sentence Outcomes among Death-Eligible Washington State Aggravated Murder Defendants, December 1981 – May 2014, by Race of Defendant**

| Defendant Race | Death Notice Filed | Death Penalty Imposed | Death Penalty Retained |
|---|---|---|---|
| White | 32% (60/188) | 12% (22/188) | 4% (8/188) |
| Black | 25% (14/57) | 16% (9/57) | 7% (4/57) |
| Other Race | 22% (11/51) | 8% (4/51) | 2% (1/51) |
| All | 29% (86/296) | 12% (35/296) | 4% (13/296) |

Note: Defendant race is unknown in one case.

The over-representation of black defendants among those sentenced to death is especially striking given that prosecutors were more likely to seek death in cases involving white defendants. Based on these figures, we can calculate that juries imposed death in 37% of the cases involving white defendants, but 64% of the cases involving black defendants, in which prosecutors filed a death notice.

[61] "Retained" in this context means that the death sentence was not reversed by a higher court or was re-imposed after reversal of the original death sentence.

In light of research indicating that the race of victims often influences the likelihood that defendants receive the death penalty, Table 3 compares outcomes for black and white defendants convicted of killing a single white victim versus a single black victim. The results show that prosecutors sought death in a slightly larger share of cases involving white victims and black or white defendants (28%) than in cases involving a black defendant and black victim (20%). However, a death sentence was imposed in a larger proportion of cases involving black defendants than it was in cases involving white defendants – regardless of the race of the victim. Interestingly, the death penalty has been retained in a notably larger share (8%) of cases involving a black defendant and white victim than in cases involving other racial configurations.

**Table 3. Capital Case Outcomes among Death-Eligible Washington State Aggravated Murder Defendants, December 1981 - May 2014, by Race of Defendant and Race of Victim**

| Defendant/Victim Race | Death Notice Filed | Death Penalty Imposed | Death Penalty Retained |
|---|---|---|---|
| Black Defendant/ White Victim | 28% (7/25) | 20% (5/25) | 8% (2/25) |
| Black Defendant/ Black Victim | 20% (1/5) | 20% (1/5) | 0% (0/5) |
| White Defendant/ White Victim | 28% (33/117) | 7% (8/117) | 3% (3/117) |
| White Defendant/ Black Victim | 0% (0/0) | 0% (0/0) | 0% (0/0) |

Note: Figures include only black and white "death eligible" defendants with one white or black victim.

In summary, the preliminary findings presented above suggest that counties vary notably in their propensity to seek and impose death in aggravated murder cases. They also provide support for the hypothesis that the race of the defendant influenced decisions to impose (but not seek) the death penalty in aggravated murder cases adjudicated in Washington State from December 1981 – May 2014.

However, it is conceivable that the racial differences described above are a function of case characteristics rather than of race itself. For example, if cases involving black defendants have, on average, more aggravating circumstances or fewer mitigating circumstances than cases involving white defendants, this could explain why juries sentence black defendants to death more frequently than they do white defendants. Below, we present the results of regression analyses that control for these and other characteristics and isolate the unique impact of race on case outcomes.

## PART V. REGRESSION RESULTS

Below, we present two sets of regression analyses. The first set analyzes the impact of case characteristics and social factors on prosecutors' decisions to file a death notice.[62] The second set identifies the case characteristics and social factors that influence sentencing decisions in capital cases in which prosecutors a death notice was filed and not withdrawn.

As noted previously, multivariate regression analysis identifies significant relationships between the independent variables included in the model and the outcome variable. The regression results provide a measure of the direction and strength of the correlation between each potential explanatory variable and the outcome being analyzed. The direction of the association (i.e. whether the coefficient has a negative or positive value) indicates whether the variable causes a decrease or an increase the likelihood of receiving a death notice or the death penalty. The strength (statistical significance) of the association indicates how likely it is that the correlation is due to chance. Estimates resulting from a logistic MLE model are presented as log-odds. In order to facilitate interpretation, we convert these to odds and provide a general interpretation of each coefficient.

[62] In three of these cases, death notices filed but were withdrawn at a later stage in the process by judges. In the analyses of prosecutorial decision-making, we include all cases in which prosecutors filed a death notice and the death notice was not subsequently withdrawn *by prosecutors*. However, in the analyses of jury decision-making, we include only cases in which a death notice was filed and not withdrawn by either prosecutors or judges.

It is important to note that the results of this analysis identify which of the explanatory variables included in the model are significantly associated with the dependent variable *holding all other variables included the model constant*. That is, regression analysis simultaneously takes a number of factors into consideration and identifies the unique impact of each variable on the outcome. If the regression results indicate that being black is positively and significantly associated with being sentenced to death, this would mean that defendants who are black are more likely to be sentenced to death *after taking all other variables in the model into account*.

**Factors Influencing Prosecutorial Discretion in Aggravated Murder Cases**

Prosecutors may or may not seek the death penalty in aggravated murder cases. The regression models presented below assess the extent to which a variety of case characteristics predict whether prosecutors filed a death notice in aggravated murder cases involving eligible adult defendants. These models include case characteristics that are evident in the early stages of criminal processing: the number of prior convictions; the number of victims; whether the defendant was also suspected of committing a sex crime; whether the victim was a law enforcement officer; and the number of aggravating circumstances alleged by prosecutors.[63] We included the number of aggravating circumstances alleged by prosecutors because this measure best captures prosecutors' view of the case and because prosecutors do not yet know how many of these aggravating circumstances will be affirmed by the judge or jury. Because the defendant's plea is sometimes entered after prosecutors have decided whether to seek death, it is not included as a potential predictor in this analysis.

[63] We also assessed whether prosecutors were more likely to file a death notice if the victim has been held hostage. The regression results indicated that this case characteristic did not have a significant impact on prosecutorial discretion. Because this information was missing in 21 cases, including this variable in the model would have significantly reduced the number of cases analyzed (from 284 to 263). We therefore elected not to include it in the models presented here.

Table 4 shows the results that are obtained when only the case characteristics identified above are included in the model. (For a more complete presentation of the regression results, see Appendix D). Note that the coefficients are log-odds ratios. Negative values indicate that the predictor reduces the probability that prosecutors filed a death notice; positive coefficients indicate that the variable in question increased the probability that prosecutors filed a death notice. There are missing data on at least one of the variables included in the model for 13 cases (4.4%); these cases were dropped from the analysis.

**Table 4. Impact of Case Characteristics on Prosecutorial Decisions to File Death Notices in Eligible Aggravated Murder Cases, December 1981 - May 2014**

| N= 284 | Death Notice Filed | | | $R^2$ = 0.0914 |
|---|---|---|---|---|
| Variable | Coefficient | Statistical Significance | Odds Ratio | Referent (Compared to) |
| Prior Convictions | 0.118 | ** | 1.1 | |
| One Victim | -0.493 | | 0.7 | Five or more victims |
| Two-Four Victims | -0.112 | | 0.9 | Five or more victims |
| Alleged Aggravators | 0.258 | *** | 1.3 | |
| Sex Crime | 0.740 | ** | 2.1 | Not indicated |
| Law Enforcement Officer | 1.486 | *** | 4.4 | Non-police victims |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

These results show that the case characteristics included in the model explain a small proportion (just 9%) of the variation in whether prosecutors file a death notice. In other words, most of the variation in prosecutorial decisions regarding whether to seek the death penalty is *not* a function of the case characteristics included in this model. However, four case characteristics are statistically significant predictors of prosecutorial decisions to seek the death penalty. Specifically, prosecutors were 2.1 times more likely to file a death notice if there were allegations that a sex crime occurred in conjunction with the homicide, and 4.4 times more likely to seek death if the victim was a law enforcement officer.[64] The number of alleged aggravators and prior convictions (of any

[64] Although this is a victim characteristic, it is also a case characteristic/legal factor: murder of a law enforcement officer is an aggravator under RCW 10.95.020 (see Appendix A). One case involved the murder of a correctional officer who was considered to be a law enforcement officer in this analysis per RCW 10.95.020.

type) also significantly impacted prosecutorial decision-making. (In a separate analysis, we found that the number of prior violent convictions similarly increases the likelihood that prosecutors will seek death[65]). By contrast, the results indicate that the number of victims does not impact prosecutorial decision-making in aggravated murder cases.

The next model includes social factors as well as case characteristics in order to identify significant extra-legal predictors of prosecutorial discretion. There are missing data on some of these variables; 32 cases (10.8%) were therefore dropped from this analysis. In this model, cases are categorized as having either one or more than one victim.[66] Table 5 shows the results obtained when social characteristics are included in the model. (For a more complete presentation of the regression results, see Appendix D).

[65] Although the results indicate that the total number of prior convictions and number of violent prior convictions are significant predictors of prosecutorial efforts to seek death, we found in separate analyses that the number of prior homicide convictions and the number of prior sex offense convictions were not.

[66] To present the most parsimonious model, we compare the effect of having one victim versus multiple victims in the second regression analysis.

| **Table 5. Impact of Case Characteristics and Social Factors on Prosecutorial Decisions to File Death Notices in Eligible Aggravated Murder Cases, December 1981 – May 2014** | | | | |
|---|---|---|---|---|
| N= 265 | Death Notice Filed | | | $R^2$ = 0.2063 |
| Variable | Coefficient | Statistical Significance | Odds Ratio | Referent (Compared to) |
| *Case Characteristics* | | | | |
| Prior Convictions | 0.182 | *** | 1.2 | |
| 1 Victim | -0.106 | | 0.9 | Multiple victims |
| Alleged Aggravators | 0.271 | ** | 1.3 | |
| Sex Crime | 0.901 | * | 2.5 | |
| Law Enforcement Officer | 1.540 | ** | 4.7 | Non-police victim(s) |
| *Social Factors* | | | | |
| Black Defendant | -0.549 | | 0.6 | Non-black defendants |
| Extensive Publicity | 1.356 | *** | 3.9 | No extensive publicity |
| *Victim Characteristics* | | | | |
| White Victim(s) | 0.596 | | 1.8 | Non-white victims |
| Female Victim(s) | -0.192 | | 0.8 | Males/both sexes |
| Stranger Victim(s) | -0.437 | | 0.6 | White defendants |
| Child Victim(s) | 0.482 | | 1.6 | Adult victim(s) |
| *County Characteristics* | | | | |
| Percent Republican | 0.019 | | 1.0 | |
| Population Density | 0.606 | | 1.8 | |
| Percent Black | 0.222 | *** | 1.2 | |
| Per Capita Revenue | -0.401 | | 0.7 | |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

Notably, adding social factors to the model more than doubles the proportion of variation in outcomes explained (to 20%). The results shown in Table 5 indicate that the number of prior convictions, aggravators, sex crime allegations, and law enforcement victims remain significant after controlling for a variety of social factors. These results further indicate that neither the race of the defendant nor the race of the victim(s) impact prosecutorial decision-making; victim-gender and age also appear to be irrelevant at this stage of the criminal process. In addition, whether a case received extensive publicity significantly impacts prosecutors' decisions: prosecutors were nearly four (3.9) times more likely to seek death in cases characterized by extensive publicity than they were in cases that were not highly publicized. In addition, the size of the black population

in the county in which the case was adjudicated significantly impacts the likelihood that prosecutors will file a death notice in aggravated murder cases generally. The latter two findings are significant at a p-value ≤ 0.01. The finding that prosecutors in counties with relatively large black populations are significantly more likely to file death notices than other prosecutors is consistent with a significant body of evidence indicating that demographic factors generally, and the size of the black population specifically, have an important impact on criminal justice outcomes.[67]

Overall, these results indicate that case characteristics alone explain a very small proportion of the variation that characterizes prosecutorial decisions about whether to seek the death penalty, although four case characteristics – the number of alleged aggravators, the number of defendant prior convictions, evidence of a sex crime, and whether a victim was a law enforcement officer – were found to be significant predictors of these decisions. The results also indicate that neither the race of the victim nor the race of the defendant had a significant impact on prosecutorial decision-making. However, several other extra-legal factors - whether there was extensive publicity about the case and the size of the black population at the time of arrest in the county in which the case is adjudicated – do influence prosecutorial decisions regarding death notices.

**Factors Influencing the Imposition of Death Sentences in Aggravated Murder Cases**

Death notices were filed and not withdrawn in 86 cases involving adults charged with aggravating murder. It was imposed in 35 (40.6%) of these cases. The next set of regression analyses identifies the factors that influence the decision to

[67] Many studies have found that the racial composition of the population is a significant predictor of enhanced penality. See, for example, Katherine Beckett and Bruce Western, *Governing Social Marginality: Welfare, Incarceration and the Transformation of State Policy*, 3 *PUNISHMENT & SOCIETY* 43 (2001); George S. Bridges and Robert D. Crutchfield, *Law, Social Standing and Racial Disparities in Imprisonment*, 66 *SOCIAL FORCES* 699; Clay Mosher, *Predicting Drug Arrest Rates: Conflict and Social Disorganization Perspectives*, 47 *CRIME & DELINQUENCY* 1 (2001); Cassia Spohn and David Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 281 (2001); Darrell Steffensmeier and Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanics-Black-White Comparisons*, 39 CRIMINOLOGY 145.

impose a sentence of death in these cases. Because these analyses only include cases in which prosecutors filed a death notice and it was not subsequently withdrawn, the sample size is notably smaller than it was in the previous analyses. As a result, the number of predictors that can be included in the models is limited. (For a more complete presentation of the regression results, including those obtained under various model specifications, see Appendix E).

The model presented in Table 6 includes only case characteristics that would have been known by judges and jurors: the number of prior convictions; the number of victims (included here as a binary variable for one victim/multiple victims); the nature of the defendant's plea; the number of applied aggravators (as determined by the judge or jury); the number of mitigating circumstances identified; the number of defenses offered; and whether the victim was held hostage. (We also tested the significance of a concomitant sex crime and whether the victim was a law enforcement officer; neither of these factors was found to be a significant predictor of sentencing outcomes and are not included in the model shown below). In this model, 9 cases (10.5%) were missing data and were therefore dropped from the analysis.

The results shown in Table 6 indicate that case characteristics explain 21% percent of the variation in decisions to impose the death penalty. Neither the number of victims, nor the number of the defendants' prior convictions, nor the nature of the defendants' plea influenced decisions to impose the death penalty. However, several other case characteristics were significant predictors of the imposition of a death sentence. Specifically, each additional aggravating circumstance increased the odds that a defendant was sentenced to death by 1.5. Each additional mitigating circumstance and defense offered significantly reduced the odds that a death sentence was imposed (by .7 and .4 respectively). Evidence that a victim was held hostage also had a significant impact on

decisions to impose a death sentence: defendants believed to have held their victim hostage were more than three times more likely to be sentenced to death than defendants who did not.

**Table 6. Impact of Case Characteristics on Capital Sentencing Outcomes in Death Eligible Cases, December 1981 – May 2014**

| N= 77 | Death Penalty Imposed | | | $R^2$ = 0.2117 |
|---|---|---|---|---|
| Variable | Coefficient | Statistical Significance | Odds | Referent (compared to) |
| Prior Convictions | -0.049 | | 1.0 | |
| 1 Victim | -0.711 | | 0.5 | Multiple victims |
| Pled Guilty | -0.382 | | 0.7 | Pled not guilty |
| Applied Aggravators | 0.406 | * | 1.5 | |
| Mitigating Circumstances | -0.312 | ** | 0.7 | |
| Defenses | -0.874 | ** | 0.4 | |
| Victim Held Hostage | 1.122 | * | 3.1 | Not held hostage |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

The results obtained when both case characteristics and defendant race are included in the model are shown in Table 7. (In order to accommodate the addition of defendant-race, we did not include the nature of the defendants' plea in this model). Adding data regarding defendant-race notably improves the model: the amount of variation explained increases from 21 to 25 percent. After controlling for defendant-race, the number of aggravators, defenses and whether the victim was held hostage continue to have a significant impact on sentencing decisions. Specifically, each additional aggravator increased the odds that a jury would impose death by 1.6 and defendants who held a victim hostage were 2.7 times more likely to be sentenced to death. Each additional defense offered reduced the odds that a jury would impose death by .4. Interestingly, after controlling for race of defendant, the number of mitigating circumstances is no longer a significant predictor of decisions to impose death. Most notably, the results indicate that *black defendants are four and one half times more likely than similarly situated non-black defendants to be sentenced to death, after controlling for all other variables included in the model*.

| Table 7. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Death Eligible Cases, December 1981 - May 2014 | | | | |
|---|---|---|---|---|
| N= 76 | Death Penalty Imposed | | | Pseudo $R^2$ = .2473 |
| Variable | Coefficient | Statistical Significance | Odds | Referent (Compared to) |
| Prior Convictions | -0.085 | | 0.9 | |
| 1 Victim | -0.812 | | 0.4 | Multiple victims |
| Applied Aggravators | 0.494 | * | 1.6 | |
| Mitigating Circumstances | -0.257 | | 0.7 | |
| Defenses | -0.967 | ** | 0.4 | |
| Victim Held Hostage | 0.999 | * | 2.7 | Not held hostage |
| Black Defendant | 1.499 | * | 4.5 | Non-black |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

**CONCLUSION**

The results of the analyses presented above support three main conclusions. The first pertains to intra-state variation in the propensity of prosecutors to seek, and juries to impose, death sentences. The descriptive statistics presented in Table 1 show that there is significant variation in efforts to obtain death sentences and in decisions to impose them across Washington state counties. Indeed, the proportion of cases in which prosecutors sought the death penalty in aggravated murder cases involving death-eligible adult defendants varies notably by county, from a high of 67% in Thurston County to a low of 0% in Okanogan County. The proportion of cases in which prosecutors sought death also varies markedly across larger counties with more aggravated murder cases, from a high of 48% in Kitsap County and 45% in Pierce County to a low of 0% in Yakima County. Moreover, the regression results indicate that a portion of this county-level variation is a function of the size of the black population: prosecutors were significantly more likely to file a death notice when the case was adjudicated in a county with a relatively large black population. This demographic effect does not appear to stem from differences in population density, political orientation, or fiscal capacity, as these factors were included in the regression analysis and found to be non-significant predictors of prosecutorial decisions to seek death (see Appendix E for model results).

Second, the regression results indicate that case characteristics explain only a small proportion of the variation in the case outcomes analyzed here. Specifically, case characteristics alone explain only 9% of the variation in prosecutorial decisions regarding whether to seek death and 20% of the variation in juries' sentencing decisions. Four case characteristics were significant predictors of prosecutorial decisions to file death notices: the number of prior convictions possessed by the defendant, the number of aggravating circumstances alleged by prosecutors, evidence that the defendant was suspected of committing a sex crime in the course of the homicide, and the involvement of law enforcement officer victims. Neither the number of victims nor evidence that the victim was held hostage were found to be significant predictors of prosecutorial decisions to file a death notice. Several case characteristics were also significant predictors of the decision to impose a sentence of death: the number of applied aggravating circumstances, the number of mitigating circumstances, the number of defenses, and whether the victim was held hostage. Overall, however, the case characteristics for which data are available and which are presumed to be the primary drivers of decision-making in capital cases actually explain a small proportion of the variance in case outcomes in aggravated murder cases. Unexplained variation documented in the results presented here suggest that other extra-legal and social factors –not captured by our statistical models – are playing an important role in death penalty case dynamics.

Third, the findings indicate that a number of extra-legal factors *do* impact decision-making in capital cases adjudicated in Washington State. Specifically, prosecutorial decisions regarding whether to file death notices were significantly impacted by two extra-legal factors: whether there was significant publicity about the case and the size of the black population in the county in which the case was adjudicated. The findings regarding the impact of extra-legal factors on sentencing decisions are even more striking: juries imposed a death sentence in a notably larger share of cases involving

black defendants than they did in cases involving white or other defendants. Specifically, the regression results indicate that *juries were four and one half times more likely to impose a sentence of death when the defendant was black than in they were in cases involving similarly situated white defendants.* Although these results are based on analysis of a relatively small sample, they nonetheless indicate that the race of the defendant has had a marked impact on sentencing in aggravated murder cases in Washington State since the adoption of the existing statutory framework. These results are also consistent with the idea that race matters most at the sentencing stage of the administration of capital cases.[68]

Evidence that race matters, both directly and indirectly, in the administration of capital punishment in Washington State may be surprising to some. However, these findings are consistent with an extensive body of research showing that implicit racial biases continue to impact perception and decision-making – even in the Obama era. Despite significant efforts to achieve it, it appears that race-blindness continues to elude us.

[68] See Mona Lynch and Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH St. L. Rev. 573 (2011); Mona Lynch and Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW AND HUMAN BEHAVIOR 481 (2009).

## APPENDIX A. AGGRAVATING FACTORS

Under RCW 10.95.020, aggravating factors include the following: (1) The victim was a law enforcement officer, corrections officer, or a fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing; (2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes; (3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony; (4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder; (5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder; (6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group; (7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge; (8) The victim was: (a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and (b) The murder was related to the exercise of official duties performed or to be performed by the victim; (9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030; (10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person; (11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes: (a) Robbery in the first or second degree; (b) Rape in the first or second degree; (c) Burglary in the first or second degree or residential burglary; (d) Kidnapping in the first degree; or (e) Arson in the first degree; (12) The victim was regularly employed or self-employed as a news-reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim; (13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had

knowledge of the existence of that order; (14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted: (a) Harassment as defined in RCW 9A.46.020; or (b) Any criminal assault. In addition, the following conditions must be met: 1) The jury affirmatively answers whether “having in mind the crime of which the defendant has been found guilty, are convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency” at the conclusion of the special sentencing proceeding; and 2) The Washington Supreme Court conducts a proportionality review of a death sentence to determine: (a) whether there was sufficient evidence to justify the death sentence; (b) whether the defendant was mentally retarded; (c) whether it was brought on by passion or prejudice; and (d) whether the sentence was excessive or disproportionate. See RCW 10.95.60, RCW 10.95.70, and RCW 10.95.100.

## APPENDIX B. SPECIAL SENTENCING TRIAL REPORTS EXCLUDED FROM THE ANALYSES

Cases described in trial reports numbers 1-331 were included in the analyses with the following exceptions:

- One case was not included in the analysis because the defendant was not convicted of aggravated murder (TR No. 292).
- Three cases were not included in the analysis because defendants were ineligible for the death penalty due to extradition agreements (TR Nos. 258, 286, 319).
- Thirty cases were not included because defendants were juveniles when they committed aggravated murder (TR Nos. 61, 67, 70, 73, 100, 110, 111, 122, 134, 139, 145, 149, 161, 170, 171, 189, 195, 196, 205, 206, 208, 209, 222, 223, 246, 267, 270, 323).

## APPENDIX C. MEASUREMENT OF VARIABLES

| Appendix Table C. Variables and Measurement | | |
|---|---|---|
| | Indicators | Measures Included |
| ***Outcomes*** | | |
| Death Penalty Sought | Death Notice Filed and Not Withdrawn by Prosecutors | Coded: 1=DP Sought; 0= DP Not Sought |
| Death Penalty Imposed by Judge/Jury | Sentenced entered as Death | Coded: 1= Death; 0= Life Without Parole |
| ***Predictors – Case Characteristics*** | | |
| Number of Prior Convictions | Total Number of Prior Convictions | Number (logged) |
| Number of Prior Violent Convictions | Total Number of Prior Violent Convictions | Number (logged) |
| Number of Prior Homicide Convictions | Total Number of Prior Homicide Convictions | Number (logged) |
| Number of Prior Sex Crime Convictions | Total Number of Prior Sex Crime Convictions | Number (logged) |
| Number of Alleged Aggravators | Total Number of Alleged Aggravators | Number |
| Number of Applied Aggravators | Total Number of Applied Aggravators | Number |
| Mitigating Circumstances | Total Number of Mitigating Circumstances | Number (logged) |
| Number of Defenses Offered | Total Number of Defenses | Number |
| Plea | Plea entered | Coded: 1=Plead Guilty; 0= Plead Not Guilty |
| Number of Victims | Total Number of Victims | 3 Coding Categories: 1 Victim; 2-4 Victims; 5 or more Victims; coded as 0/1 |
| Victim Held Hostage | If Victim was held hostage | Coded: 1=Yes; 0= No |
| Prolonged Suffering | If judge indicated there was prolonged suffering | Coded: 1=Yes; 0= No |
| Sex Crime | If sex crime also suspected to have occurred | Coded: 1=Yes; 0= No |
| Gun | If weapon was a gun | Coded: 1=Yes; 0= No |
| Victim Law Enforcement Officer | Any victim a law enforcement officer | Coded: 1=Yes; 0= No |
| ***Predictors – Defendant Characteristics*** | | |
| Defendant Race | Defendant's Race | 3 Coding Categories: White; Black; Other Race Each coded as 0/1 |
| Dyad | Black Defendant with White Victim | Coded: 1=Yes; 0= No |

| | | |
|---|---|---|
| ***Predictors – Victim Characteristics*** | | |
| Victim Race | Victims' Race | 4 Coding Categories: All Victims White; All Victims Black; All Victims Other Race; Victims of Multiple Races. Each coded as 0/1 |
| Victim Sex | Victims' Sex | 3 Coding Categories: All Victims Female; All Victims Male; Victims Mixed Sexes. Each coded as 0/1 |
| Victim Stranger | If defendant knew victim | Coded: 1=Yes; 0= No |
| Victim Child^ | Any victim under age 18 | Coded: 1=Yes; 0= No |
| ***Predictors - County Characteristic*** | | |
| Publicity | Extensive publicity about the trial | Coded: 1=Yes; 0= No |
| Population Density* | Population density of at sentencing | Number |
| Densely Populated County* | Population Density > 150 people per square mile at year of sentencing | Coded: 1=Yes; 0= No |
| Percent Black in County at time of Arrest* | Share of county population that is black at arrest | Proportion |
| Percent Black in County at time of Sentencing* | Share of county population that is black at sentencing | Proportion |
| Percent White in County at time of Arrest* | Share of county population that is white at arrest | Proportion |
| % White in County at time of Sentencing* | Share of county population that is white at sentencing | Proportion |
| % Latino in County at time of Arrest* | Share of county population that is Latino at arrest | Proportion |
| % Latino in County at time of Sentencing* | Share of county population that is Latino at sentencing | Proportion |
| % Vote Republican* | Percent of county population that voted Republican in most proximate Presidential election | Proportion |
| Per Capita Revenue at Year of Sentencing* | Per capita revenue of county in Real Dollars (1981) | Number (logged) |

Note: All indicators were taken from trial reports unless marked with an asterisk.
^These data were taken from both trial reports and newspaper reports of case.

## APPENDIX D. MODELING PROSECUTORIAL DISCRETION IN SEEKING DEATH PENALTY

**Appendix Table D1. Descriptive Statistics for Regression Model of Prosecutorial Discretion in Eligible Aggravated Murder Cases, December 1981 - May 2014**

| | N | Min | Max | Mean/ Proportion | Std. Deviation | Missing | Percent Missing |
|---|---|---|---|---|---|---|---|
| Death Penalty Notice Filed and Not Withdrawn | 297 | 0 | 1 | .29 | .454 | 0 | 0.0% |
| Death Penalty Notice Filed | 297 | 0 | 1 | .30 | .460 | 0 | 0.0% |
| Number of priors | 284 | 0 | 68 | 4.08 | 6.588 | 13 | 4.4% |
| 1 Victim | 297 | 0 | 1 | .64 | .480 | 0 | 0.0% |
| 2-4 Victims | 297 | 0 | 1 | .33 | .471 | 0 | 0.0% |
| 5+ Victims | 297 | 0 | 1 | .03 | .162 | 0 | 0.0% |
| Alleged Aggravators | 297 | 1 | 17 | 2.19 | 1.662 | 0 | 0.0% |
| Defendant White | 296 | 0 | 1 | .64 | .482 | 1 | 0.3% |
| Defendant Black | 296 | 0 | 1 | .19 | .395 | 1 | 0.3% |
| Defendant Other Race | 296 | 0 | 1 | .17 | .378 | 1 | 0.3% |
| All Victims White | 290 | 0 | 1 | .74 | .437 | 7 | 2.4% |
| All Victims Black | 290 | 0 | 1 | .05 | .215 | 7 | 2.4% |
| All Victims Other Race(s) | 290 | 0 | 1 | .18 | .384 | 7 | 2.4% |
| Victims of Multiple Races | 290 | 0 | 1 | .03 | .164 | 7 | 2.4% |
| All Victims Female | 297 | 0 | 1 | .41 | .493 | 0 | 0.0% |
| All Victims Male | 297 | 0 | 1 | .40 | .491 | 0 | 0.0% |
| Victims of Both Sexes | 297 | 0 | 1 | .19 | .389 | 0 | 0.0% |
| All Victims Unknown to Defendant | 293 | 0 | 1 | .32 | .466 | 4 | 1.3% |
| Any Victim was Under Age 18 | 297 | 0 | 1 | .17 | .375 | 0 | 0.0% |
| Victim Law Enforcement Officer | 297 | 0 | 1 | .05 | .219 | 0 | 0.0% |
| Sex Crime | 297 | 0 | 1 | .19 | .394 | 0 | 0.0% |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Extensive Publicity of Case | 285 | 0 | 1 | .74 | .439 | 12 | 4.0% |
| % of County Voted Republican in Most Proximal Presidential Election | 297 | 27.4 | 69.3 | 44.839 | 8.987 | 0 | 0.0% |
| County Densely Populated Year of Arrest | 297 | 0.00 | 1.00 | .7609 | .427 | 0 | 0.0% |
| % White in the County the Year of Arrest | 295 | 47.1 | 97.3 | 84.596 | 8.528 | 2 | 0.7% |
| % Black in the County the Year of Arrest | 295 | .1 | 7.5 | 3.285 | 2.496 | 2 | 0.7% |
| % Latino in the County the Year of Arrest | 295 | 1.3 | 47.7 | 5.729 | 6.756 | 2 | 0.7% |
| County Revenue Per Capita in 1981 Dollars at Year of Arrest | 295 | $140 | $1395 | $329 | 166.16 | 2 | 0.7% |

**Appendix Table D2. MLE Logistic Regression Results: Impact of Case Characteristics on Prosecutorial Decisions to Seek the Death Penalty in Eligible Aggravated Murder Cases, December 1981 - May 2014**

| N= 284 | Death Penalty Sought | | | $R^2$ = 0.0914 |
|---|---|---|---|---|
| | Coef. | Std. Error | P-value | Reference Category (compared to) |
| *Case Characteristics* | | | | |
| Priors(logged) | 0.118** | 0.057 | 0.039 | |
| 1 Victim | -0.493 | 0.868 | 0.570 | 5 or more Victims |
| 2-4 Victims | -0.112 | 0.877 | 0.899 | 5 or more Victims |
| Alleged Aggravators | 0.258*** | 0.100 | 0.010 | |
| Sex Crime | 0.740** | 0.351 | 0.035 | Not a Sex Crime |
| Police Officer Victim(s) | 1.486*** | 0.566 | 0.009 | |
| Intercept | -1.351 | 0.861 | 0.1117 | Non-police victim(s) |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

^ 13 cases or 4.4% dropped from the analysis due to missing data

| **Table D3. Impact of Case Characteristics and Social Factors on Prosecutorial Decisions to Seek the Death Penalty in Eligible Aggravated Murder Cases, 1981-2014** | | | | |
|---|---|---|---|---|
| N= 265 | Death Penalty Sought | | | $R^2$ = 0.2063 |
| Variable | Coefficient | Std. Error | P-value | Referent (Compared to) |
| ***Case Characteristics*** | | | | |
| Prior Convictions | 0.182*** | 0.069 | 0.008 | |
| 1 Victim | -0.106 | 0.380 | 0.780 | Multiple victims |
| Alleged Aggravators | 0.271** | 0.121 | 0.026 | |
| Sex Crime | 0.901* | 0.473 | 0.057 | |
| ***Social Factors*** | | | | |
| Black Defendant | -0.549 | -0.549 | 0.221 | Non-Black defendants |
| Extensive Publicity | 1.356*** | 1.356 | 0.001 | No extensive publicity |
| *Victim Characteristics* | | | | |
| White Victim(s) | 0.596 | 0.596 | 0.172 | Non-White victims |
| Female Victim(s) | -0.192 | -0.092 | 0.813 | Males/both sexes |
| Stranger Victim(s) | -0.437 | -0.437 | 0.222 | White defendants |
| Child Victim(s) | 0.482 | 0.482 | 0.261 | Adult victim(s) |
| Police Officer Victim(s) | 1.540** | 1.540 | 0.022 | Non-police victim(s) |
| *County Characteristics* | | | | |
| Percent Republican | 0.019 | 0.019 | 0.350 | |
| County Densely Populated | 0.606 | 0.606 | 0.243 | |
| Percent Black | 0.222*** | 0.222 | 0.007 | |
| Per Capita Revenue | -0.401 | -0.401 | 0.375 | |
| Intercept | -2.932 | 3.090 | 0.343 | |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

^ 32 cases or 10.8% dropped from the analysis due to missing data

+When replaced with number of priors, number of violent priors was also statistically significant. However, including number of priors resulted in a slightly better model fit. We therefore present the model including the total number of priors.

## APPENDIX E. MODELING JURY/JUDICIAL DISCRETION IN CAPITAL SENTENCING

**Appendix Table E1. Descriptive Statistics for Regarding Jury/Judicial Discretion in Capital Sentencing, December 1981- May 2014**

| | N | Min | Max | Mean/ Proportion | Std. Deviation | Missing | Percent Missing |
|---|---|---|---|---|---|---|---|
| Death Imposed | 81 | 0 | 1 | .43 | .498 | 0 | 0.0% |
| Number of priors | 79 | 0 | 23 | 4.28 | 4.203 | 2 | 2.5% |
| 1 Victim | 81 | 0 | 1 | .60 | .492 | 0 | 0.0% |
| 2-4 Victims | 81 | 0 | 1 | .37 | .486 | 0 | 0.0% |
| 5+ Victims | 81 | 0 | 1 | .02 | .156 | 0 | 0.0% |
| Plead Guilty | 81 | 0 | 1 | .20 | .401 | 0 | 0.0% |
| Applied Aggravators | 81 | 1 | 12 | 2.30 | 1.900 | 0 | 0.0% |
| Total Mitigating Circumstances | 81 | 0 | 11 | 2.43 | 2.115 | 0 | 0.0% |
| Number of Defenses | 80 | 0 | 4 | .83 | .938 | 1 | 1.2% |
| Any Victim Held Hostage | 80 | 0 | 1 | .34 | .476 | 1 | 1.2% |
| Black Defendant | 80 | 0 | 1 | .18 | .382 | 1 | 1.2% |

**Appendix Table E2. Impact of Case Characteristics on Capital Case Sentencing Decisions in Eligible Aggravated Murder Cases, December 1981- May 2014**

| N= 77 | Death Penalty Imposed | | | $R^2$ = 0.2117 |
|---|---|---|---|---|
| | Coef. | Std. Error | P-value | Reference Category (compared to) |
| ***Case Characteristics*** | | | | |
| Number of Priors | -0.049 | 0.139 | 0.724 | |
| 1 Victim | -0.711 | 0.579 | 0.220 | Multiple Victims |
| Pled Guilty | -0.382 | 0.757 | 0.613 | Pled Not Guilty |
| Applied Aggravators | 0.406* | 0.230 | 0.078 | |
| Total Mitigating Circumstances | -0.312** | 0.147 | 0.034 | |
| Defenses | -0.874** | 0.392 | 0.026 | |
| Victim Held Hostage | 1.122* | 0.579 | 0.053 | Not Held Hostage |
| Intercept | -0.403 | 0.752 | 0.592 | |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

^ 9 cases or 10.5% dropped from the analysis due to missing data

**Appendix Table E3. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Eligible Aggravated Murder Cases, December 1981- May 2014**

| N= 76 | Death Penalty Imposed | | | $R^2$ = 0.2473 |
|---|---|---|---|---|
| | Coef. | Std. Error | P-value | Reference Category (compared to) |
| ***Case Characteristics*** | | | | |
| Number of Priors | -0.085 | 0.139 | 0.544 | |
| 1 Victim | -0.812 | 0.598 | 0.175 | Multiple Victims |
| Applied Aggravators | 0.494* | 0.253 | 0.051 | |
| Total Mitigating Circumstances | -0.257 | 0.158 | 0.104 | |
| Defenses | -0.967** | 0.408 | 0.018 | |
| Victim Held Hostage | 0.999* | 0.595 | 0.093 | Not Held Hostage |
| ***Social Factors*** | | | | |
| Black Defendant | 1.499* | 0.779 | 0.055 | Non Black Defendant |
| Intercept | -0.737 | 0.767 | 0.336 | |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

^ 10 cases or 11.6% dropped from the analysis due to missing data

**Appendix Table E4. Impact of Victim Characteristics on Capital Sentencing Outcomes in Eligible Aggravated Murder Cases, December 1981- May 2014**

| N= 76 | Death Penalty Imposed | | | $R^2$ = 0.1778 |
|---|---|---|---|---|
| | Coef. | Std. Error | P-value | Reference Category (compared to) |
| ***Case Characteristics*** | | | | |
| Applied Aggravators | 0.433** | 0.218 | 0.0485 | |
| Total Mitigating Circumstances | -0.249* | 0.137 | 0.069 | |
| Defenses | -0.764** | 0.352 | 0.030 | |
| ***Victim Characteristics*** | | | | |
| White Victim(s) | -0.399 | 0.752 | 0.595 | Non White Victims |
| Female Victim(s) | -0.142 | 0.544 | 0.794 | Male Victim or Mixed Sex Group |
| Child Victim(s) | 0.355 | 0.659 | 0.591 | Victims over age 18 |
| Stranger Victim(s) | -0.245 | 0.601 | 0.683 | Victims Known by Defendant |
| Intercept | -0.271 | 0.792 | 0.733 | |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

| **Appendix Table E5. Impact of County Characteristics on Capital Case Sentencing Outcomes in Eligible Aggravated Murder Cases, December 1981- May 2014** | | | | |
|---|---|---|---|---|
| N= 79 | Death Penalty Imposed | | | $R^2$ = 0.2144 |
| | Coef. | Std. Error | P-value | Reference Category (compared to) |
| ***Case Characteristics*** | | | | |
| Applied Aggravators | 0.491 | 0.28 | 0.031 | |
| Total Mitigating Circumstances | -0.169 | 0.137 | 0.217 | |
| Defenses | -0.930 | 0.398 | 0.020 | |
| Black Defendant | 1.514 | 0.789 | 0.055 | Non Black Defendant |
| ***County Characteristics*** | | | | |
| % Black in County at Year of Sentencing | -0.017 | 0.133 | 0.896 | |
| % Vote Republican in County | -0.045 | 0.033 | 0.175 | |
| Densely Populated at Year of Sentence | 0.044 | 0.853 | 0.959 | |
| Intercept | 1.044 | 1.797 | 0.561 | |

* significant at α = .10 ** significant at α = .05 *** significant at α = .01