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ARTICLE: The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the **Death Penalty** in South Carolina

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SUMMARY:
... These decisions animate and shape the nature of capital prosecution and punishment in the United States. ... Paternoster found that the odds of a prosecutor charging a defendant with capital murder in South Carolina were 9.6 times greater in white victim cases than in black victim cases. ... Hypothesis 1: Prosecutors are more likely to seek the **death penalty** in white victim cases than in black victim cases. ... Streib's statistics demonstrate that female homicide defendants are less likely to face the **death penalty** than male defendants, but the data do not address the relative severity of crimes committed by men and women. ... The **death penalty** data file was merged with the SHR murder data to create a comprehensive database of each South Carolina homicide and its legal disposition. ... But the data suggest that the nature of the relationship between defendant and victim does impact the prosecutorial charging decision. ... Murders incident to robbery, burglary, larceny, or motor vehicle theft were combined into a single variable denoted "murder with theft." ... South Carolina prosecutors are 3 times more likely to seek the **death penalty** in white victim cases than in black victim cases. ...

TEXT:
[*162]

I. Introduction

During the past twenty-five years, approximately 2% of murders committed by known offenders in the United States resulted in death sentences. [1] Before imposing a death sentence, the prosecution and defense attorneys, judge, and jury make numerous decisions. These decisions animate and shape the nature of capital prosecution and punishment in the United States.

Contrary to normative expectations and numerous legal guidelines that have been established to channel the discretion of state officials, the administration of capital punishment remains an imperfect embodiment of the promise of governmental power. Prosecutors exercise broad discretion within a porous network of rules when deciding which murder cases merit capital punishment and which do not. In light of the exceptionality and the total irrevocability of death as a form of punishment, [2] it is especially important that citizens and policy makers understand how prosecutors exercise their discretion and how best to guide it. Understanding prosecutorial decisions to seek the **death penalty** is crucial because the legitimacy of the justice system and the amount of public esteem citizens are willing to bestow upon judicial institutions depend largely on the perception that the stewards of that system are fair. [3]

[*163] The discretionary use of the **death penalty** creates two systemic dangers: arbitrariness and discrimination. Both issues occupy widely contested, well-documented terrain in law and social sciences literature. [4] Unlike most of this literature, however, our research focuses exclusively on the decisions of prosecutors. Do state criminal prosecutors select the handful of **death penalty** cases from the large number of total homicides on the basis of legally relevant criteria, such as the severity of each murder and the vulnerability of the victim? Or is capital case selection linked in an important way to legally intolerable criteria such as race, gender, and location? We address these important questions in this Article.

Our central objective is to contextualize the prosecutor's decision to seek the **death penalty** by empirically examining the potential importance of race, gender, and location of the crime. We rely on South Carolina homicide data from 1993 to 1997. We focus on South Carolina for several reasons. First, the state is among neither the most aggressive nor the least aggressive **death penalty** states since reinstatement of capital punishment in 1976. As of April 2006, South Carolina has seventy-one inmates on death row. [5] There are no women on death row in South Carolina. [6] Based upon a recent study of death row populations, South Carolina falls [*164] near the middle of the aggressiveness scale among **death penalty** states. [7] Therefore, while we cannot claim that South Carolina is representative of other states, we do claim that South Carolina is not an outlier and that it exhibits political and legal characteristics found in most of the other thirty-seven **death penalty** states. For example, prosecutors are popularly elected in each judicial district in South Carolina [8] and face constituency pressure as in most other **death penalty** states. Because of these shared characteristics, we think that while our analysis and findings are most germane to South Carolina, the conclusions we reach are useful in informing **death penalty** debates around the country.

Section II of this Article outlines the broad discretion enjoyed by prosecutors when determining which cases merit capital punishment. The section also reviews the statutory schemes approved by the Supreme Court to guide this discretion. Section III discusses the theoretical basis for numerous factors that may affect the decision to seek the **death penalty.** A review of existing **death penalty** literature suggests that, in addition to statutory aggravating factors, extra-legal factors such as race, gender, and geographic location may influence the decision to seek the **death penalty.** Section IV details the data sources employed in this analysis and their limitations. Section V utilizes a series of statistical techniques to analyze the data. The section concludes that statutory considerations alone do not drive capital case selection in South Carolina. Case selection is inexorably linked to the location of the homicide, the race and gender of crime participants, and the relation of the victim and offender.

II. Addressing the Problem of Runaway Discretion

In the American scheme of justice, state prosecutors exercise virtually untrammeled discretion to decide which murder cases merit capital punishment. [9] Legal rules established and sanctioned by the state are intended to guide the decisions of prosecutors in potential capital cases. These rules are in many ways imprecise, and their imprecision facilitates inconsistent prosecutorial decision-making. Importantly, when prosecutors do make poor judgments by either misinterpreting the rules, [10] ignoring them, or by allowing personal professional [*165] aspirations to color their judgment, [11] voters rarely hold prosecutors accountable through electoral defeat. [12]

During the 1970s and 1980s, the United States Supreme Court grappled with the issue of discretionary decision-making in capital cases. Through its 1976 landmark decision, Gregg v. Georgia [13] the Court established contemporary guidelines that came to be known as "guided discretion." The Court intended guided discretion to create uniformity and eliminate bias in the administration of capital punishment. [14]

Four years before Gregg, in Furman v. Georgia, [15] the Court "invalidated every **death penalty** statute in the United States." [16] Although a majority of the Justices in Furman agreed that Georgia's arbitrary application of the **death penalty** violated the Eighth Amendment's prohibition on cruel and unusual punishment, they split bitterly over their reasons. Only Justices Brennan and Marshall considered the **death penalty** unconstitutional per se; [17] all five members of the majority wrote separately [18] in what remains one of the longest opinions in Supreme Court history. [19] The most tenuous support for the decision came from Justices White and Stewart. [20] Both Justices expressed the view that the **death penalty** as practiced during the early 1970s was unconstitutional because of the capricious manner of selecting capital defendants. [21] Justice White wrote that the **death penalty** "is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." [22] Justice Stewart concurred, noting that this arbitrary meting out of death sentences constituted cruel and unusual punishment under the principles of the Eighth Amendment:

[The **death penalty** is] cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible [*166] as these, the petitioners [in Furman were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed... . The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. [23]

Chief Justice Burger's opinion, dissenting from the majority and joined by Justices Blackmun, Powell, and Rehnquist, emphasized his hope that state legislatures would subsequently draft capital punishment statutes to guide the decisions of discretionary actors and prevent the kind of "freakish" application of capital punishment struck down in Furman. [24] In three 1976 cases, Gregg v. Georgia, [25] Jurek v. Texas, [26] and Proffitt v. Florida, [27] the Supreme Court upheld new **death penalty** sentencing schemes drafted by states in response to Furman. The upheld sentencing schemes required bifurcated capital trials, including a separate sentencing phase in which juries were required to make a post-conviction determination of the presence of at least one statutory aggravating factor relating to the homicide. [28] Unless a jury finds at least one statutory aggravating factor that increases the severity of the murder, the state cannot impose the **death penalty.** [29] These factors typically include (but usually are not limited to) murders incident to additional felonies, such as armed robbery, burglary, or kidnapping; the killing of multiple victims; or the defendant endangering other people besides the victim.

The Court expected these statutes to eliminate arbitrariness by directing the attention of prosecutors and juries to specified characteristics of the offense. [30] The plurality in Gregg summarized: "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." [31] The plurality believed the new standards were significantly more structured than the pre-Furman sentencing schemes. Under the new "structured" sentencing guidelines pronounced in Gregg, the plurality opined that "the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." [32] Since the Supreme Court's acceptance of Georgia's new guidelines [*167] in Gregg, nearly all of the thirty-eight states [33] adopted death-sentencing schemes similar to Georgia's model. [34]

Despite the safeguards established by the Court in Gregg, empirical research suggests that sharp racial disparities persist in capital prosecution and sentencing. Myriad post-Gregg studies indicate profoundly different sentencing rates for various racial combinations of victims and defendants. [35] Eleven years after the Gregg decision, the use of statistical evidence demonstrating discriminatory impact in capital sentencing came to the Supreme Court in McCleskey v. Kemp. [36] McCleskey, a black Georgia man convicted of killing a white police officer, presented a comprehensive study of Georgia's post-Gregg capital punishment system conducted by David Baldus and his colleagues. [37] The

Baldus study, after controlling for dozens of potentially significant homicide conditions, determined that the odds of receiving a death sentence were 4.3 times greater in white victim cases than in black victim cases. [38]

Despite the statistical documentation of racially disparate sentencing patterns, the McCleskey Court ruled that direct evidence of purposeful discrimination was necessary to overturn death sentencing schemes. [39] Writing for the five-member majority, Justice Lewis Powell noted that "even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions ... . Statistics at most may show only a likelihood that a particular factor entered into some decisions." [40] Four Justices dissented from the majority's discriminatory intent requirement and insisted that the demonstrated patterns of racial disparity, together with the long history of discrimination in Georgia, were sufficient to invalidate the sentencing statute. [41] Justice Stevens contended the following:

The studies demonstrate a strong probability that McCleskey's sentencing jury ... was influenced by the fact that McCleskey is black and his victim was white, and that this same outrage would not have been generated if he had killed a member of his own [*168] race. This sort of disparity is constitutionally intolerable. It flagrantly violates the Court's prior "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." [42]

Despite these objections, the Court's five-member majority mandated that defendants prove specific discrimination in their own cases, rendering impotent most statistical challenges to **death penalty** statutes based on racial disparities. [43] Through McCleskey, the Court affirmed its prior position, announced in Gregg, that structured sentencing schemes sufficiently limit the arbitrary and discriminatory imposition of capital punishment and comply with Furman.

While the Furman, Gregg, and McCleskey decisions focused primarily on arbitrariness in sentencing, there is an implicit assumption that the statutory schemes approved in Gregg will not only guide jury decision making, but also the prosecutor's selection of cases for the **death penalty.** The Gregg decision envisioned that prosecutors seeking the **death penalty** would emphasize only those state-sanctioned aggravating circumstances, not legally irrelevant considerations. We address in this Article whether the vision expressed in Gregg has been realized in South Carolina by analyzing the extent to which the extra-legal factors of race, gender, and location exert influence on the choices prosecutors make about who should face capital trial and who should not.

III. Independent Variables: Factors that Affect Prosecutorial Decision-Making in Capital Cases

Theoretical considerations expressed in the empirical literature guide our selection of independent variables. These considerations suggest that, in addition to enumerated

statutory factors, extra-legal variables such as race, gender, and location are potentially important independent determinants linking case facts with a prosecutor's decision to seek the **death penalty.**

A. Statutory Factors Relating to Crime Severity

Each year, the sixteen district solicitors in South Carolina must determine the course of hundreds of homicide prosecutions. Due to limited resources, prosecutors [*169] must be judicious in selecting cases, usually a small number, in which to seek the **death penalty.** To help prosecutors select capital cases and avoid arbitrary decision-making in accordance with Gregg, the South Carolina General Assembly requires the state to seek the **death penalty** only in cases of willful homicide in conjunction with at least one of eleven statutory aggravating circumstances. [44] The aggravating circumstances requirement reserves capital punishment for the most atrocious murders. Prosecutors should choose **death penalty** cases by identifying aggravating factors incident to a homicide. These factors include armed robbery, burglary, [*170] criminal sexual conduct, torture, killing a child under eleven years old, and knowingly endangering more than one person, among others. [45] We take these legal circumstances as given and use them as control variables in our analysis.

However, prosecutors must still choose only a small number of these "death eligible" cases in which to seek the **death penalty.** [46] In addition, prosecutors must define statutory factors to determine whether those factors apply in each particular case. [47] Several aggravating factors, such as whether the defendant "knowingly created a great risk of death to more than one person" [48] or whether the crime involved "physical torture" [49] may be reasonably interpreted in multiple ways for the same criminal act. This subjectivity facilitates prosecutors considering non-statutory factors when deciding which cases merit capital punishment.

In sum, it is our contention that inherently broad **prosecutorial discretion** presents opportunities for the introduction of extra-legal factors into the choice of cases in which to seek the **death penalty.** Publicly elected prosecutors may respond to political pressure from their constituents. [50] Such pressure varies according to numerous factors, including the demographic and ideological composition of the prosecutor's judicial district, the level of media attention a crime receives, the race and gender of the victim and defendant, and the victim's standing in the community, among others. Furthermore, the ideology of individual prosecutors and their natural affinities for different types of victims and defendants may influence capital charging decisions. Therefore, it is possible that legally similar crimes and criminal suspects will receive different treatment. The next three sub-sections evaluate extra-legal factors that may influence capital case selection: race, location and political culture, and gender.

B. Race

1. Racial Influences - The Literature

One recurrent and much-debated finding in the **death penalty** literature is that defendants accused of murdering white victims are more likely to receive death sentences than defendants accused of murdering black victims. [51] The higher incidence of capital punishment in white victim cases persists irrespective of the [*171] race of the defendant. [52] This finding suggests that the justice system places a higher premium on the lives of white victims than the lives of black victims. Prior analyses have reported racial disparities at the charging decision stage [53] as well as evidence of discrimination appearing at the jury decision stage. [54] In 1990, the U.S. General Accounting Office (GAO) added further assurance that race is important when it released a report analyzing twenty-eight **death penalty** studies. [55] The GAO's report found that in 82% of the studies, the race of the victim influenced the likelihood of conviction of capital murder. [56] The agency concluded that "this finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques." [57] We examine several of the most important studies finding racial effects in the application of capital punishment.

The Baldus study of Georgia's capital punishment system is widely viewed as the most comprehensive study conducted on racial effects in **death penalty** prosecution and sentencing to date. The defense presented the study's findings to the United States Supreme Court in McCleskey v. Kemp. [58] The central finding of the Baldus study is simple: racial inequality exists in Georgia's capital punishment system, and one cause of this inequality is racial bias in the death charging decisions of Georgia prosecutors. [59] Baldus and his colleagues controlled for most of the variables potentially relevant for explaining capital punishment outcomes, which is why we regard the study as exemplary. The study accounted for 230 potentially relevant nonracial variables for all homicide cases charged in Georgia between 1973 and 1979. [60] The data collected from these cases suggest a staggering disparity in death sentencing based on race. [61]

The centerpiece of the Baldus study's findings involved a race-of-the-victim multiplier, otherwise known as the odds multiplier, which Baldus and his colleagues generated by estimating a thirty-nine-variable model with a high explanatory strength.<SUPERSCRIPT>63</SUPERSCRIPT> This model included numerous potential aggravating and mitigating factors, nature and location of the crime, numerous victim and defendant characteristics, and relevant legal considerations. [62]

The race-of-the-victim odds multiplier demonstrated that defendants accused of killing a white victim had 4.3 times greater odds of receiving the **death penalty** than those accused of killing a black victim. [63] Baldus declared "the race of the [*172] victim is a potent influence in the system." [64] Baldus also suggested that racial disparities illustrated by the study resulted from racially disparate **prosecutorial discretion.** That is, defendants who kill white victims were more likely to receive the **death penalty** than were other defendants, largely because prosecutors were more likely to seek the **death penalty** in white victim cases. [65] Baldus noted the following prosecutorial death-seeking rates for murders with at least one aggravating factor:

Black defendant/white victim	70%
White defendant/white victim	32%
Black defendant/black victim	15%

White defendant/black victim 19% [68]

Controlling for myriad factors relating to the aggravation of each homicide, Baldus calculated an odds multiplier demonstrating that the odds were 3.1 times higher for prosecutors to seek the **death penalty** in white victim cases than in black victim cases ($p < .001$). [66] Baldus's statistics also demonstrated that prosecutors were more likely to seek the **death penalty** for black defendants accused of killing white victims than for any other racial combination of murder victims and defendants. [67] The data also show that prosecutors seem relatively less likely to seek capital punishment for black-on-black crime. [68] Prosecutors were nearly five times more likely to seek the **death penalty** against black defendants accused of killing whites than against black defendants accused of killing blacks. [69] Thus, prosecutors engaged in a phenomenon called "victim discounting," [70] meaning that prosecutors discounted the lives of black victims while unwittingly providing sentencing leniency for black defendants. [71]

Finally, the Baldus study concluded that racially disparate treatment was most pervasive in the middle range of homicide cases. Cases wedged between the most aggravated and least aggravated homicides showed the most dramatic evidence of [*173] racial disparities in death-seeking rates. [72] Prosecutors had the greatest discretion to seek or not seek the **death penalty** in this middle range of cases and utilized this discretion in a racially disparate manner. [73]

Michael Radelet and Glenn Pierce's examination of Florida's capital punishment system involving over 10,000 homicide cases from 1976 to 1987 also found that race influences capital prosecutions. [74] The study evaluated the potential effects of nine major factors that influenced whether or not a defendant received the **death penalty** in Florida. [75] Radelet and Pierce combined the predictor variables into one statistical model with the dependent variable consisting of a dichotomous outcome: whether or not a homicide resulted in the imposition of a death sentence. [76] Radelet and Pierce used logistic regression to calculate an odds ratio showing the effect of all statistically significant variables. [77] Controlling for all other factors, the odds of a death sentence were 3.42 times higher when the victim was white than when the victim was black. [78] Like the Baldus study, the victim's race was a stronger predictor of receiving the death sentence than the defendant's relationship to the victim or whether the crime involved multiple murders. [79]

Although Radelet and Pierce controlled for the seriousness of the crime through the level of aggravation involved in the homicides, they did not account for political pressures that could affect **death penalty** decisions, such as the political ideology of the district in which the murder occurred or the ideological proclivities of individual prosecutors. Therefore, it is possible that the racial disparities the study illuminates actually emanate from different attitudes toward the **death penalty** in those parts of Florida with strong heterogeneous racial demographics.

In a second study of Florida's capital punishment system, this time focusing on

prosecutors, Radelet and Pierce revealed racially disparate prosecutorial decision-making. [80] The study examined whether the defendant's race and the victim's race affect how prosecutors develop evidence in homicide cases. [81] Their data set consisted of 1,017 Florida homicide cases from the 1970s. [82] Radelet and Pierce used data from two sources: (1) the FBI's Supplemental Homicide Reports (SHR) and (2) court records. [83] Both data sources classified each homicide as a felony, [*174] possible felony, or non-felony murder. [84] Radelet and Pierce then compared how the SHR and the court record classified each case. [85]

The comparisons revealed consistency in classification between SHRs and court records in 82.9% of the cases. [86] However, prosecutors downgraded eighty-two cases from a felony in the SHR to a non-felony in the court record and upgraded ninety-two cases from the SHR to the court record. [87] Prosecutors were both most likely to upgrade and least likely to downgrade cases with a black defendant and white victim. [88] Radelet and Pierce found that the defendant's race and victim's race were significant predictors of prosecutors upgrading and downgrading cases. [89] Furthermore, the study discovered that upgraded cases in which plea-bargaining was prohibited were twice as likely to result in a death sentence compared to cases that were consistently classified from SHR to the court records as felony murder. [90] Thus, Radelet and Pierce concluded that Florida prosecutors used upgrading as a tactic to strengthen a decision to seek a death sentence, and that prosecutors used the tactic overwhelmingly in cases involving black defendants and white victims.

Samuel Gross and Robert Mauro, who conducted an extensive study of the application of the **death penalty** in Georgia, Florida, and Illinois [91] in the period immediately following the Gregg decision, found results similar to Radelet and Pierce's eleven-year Florida study. Gross and Mauro analyzed data from all homicides reported to the FBI in these states between January 1, 1976 and December 31, 1980. [92] The study analyzed the effect of eight of the same variables as Radelet and Pierce on the likelihood of a defendant receiving the death sentence. [93] In addition, Gross and Mauro compiled an "aggravation index," ranging from 0-3, which measured the overall aggravating circumstances of the crime. [94] The index was calculated by adding one point for each of three characteristics: if a stranger committed the crime, if the crime involved multiple victims, and if the homicide was a felony murder. [95]

In all three states, the study determined that the race of the victim had a significant impact on the odds of a defendant receiving the **death penalty.** In Georgia, the odds of defendants receiving the **death penalty** were 7.2 times greater in white victim cases than black victim cases. [96] Similarly, the study found a race-of- [*175] the-victim odds ratio of 4.8 in Florida [97] and 4.0 in Illinois. [98] Gross and Mauro came to a sharp conclusion:

The major factual finding of this study is simple: There has been racial discrimination in the imposition of the **death penalty** ... in the ... states that we examined. The discrimination that we found is based on the race of the victim, and it is a remarkably

stable and consistent phenomenon. Capital sentencing disparities by race of victim were found in each of the ... states, despite their diversity. [99]

Despite these suggestive findings, neither the Gross and Mauro study nor the Radelet and Pierce analysis employed multivariate regression techniques to link prosecutorial charging decisions to disparate death sentencing patterns. As a result, neither study explored whether the identified racial disparities emanated from charging decisions or from other stages of the criminal justice process. Disparate sentencing could feasibly result from biased jury decision-making or other processes besides the charging decisions of district prosecutors.

In another study undertaken in the period immediately following Gregg, Raymond Paternoster determined that disparities in South Carolina's **death penalty** system emanated from prosecutorial charging decisions. [100] Paternoster analyzed charging decisions for homicides in the state from 1977 to 1981. [101] Paternoster controlled for all statutory death-charging considerations as well as numerous potentially relevant extra-legal factors. [102] Paternoster found that the odds of a prosecutor charging a defendant with capital murder in South Carolina were 9.6 times greater in white victim cases than in black victim cases. [103] However, because Paternoster's study examined the time period immediately following the Gregg decision, it does not contain any data from the past twenty-five years. [104]

Studies of sentencing schemes in various states confirm that racial bias in capital sentencing is a widespread phenomenon. [105] Overall, the literature examining [*176] the influence of race in the application of capital punishment overwhelmingly demonstrates that racial bias infects capital sentencing. Other studies using data from Ohio, [106] Maryland, [107] and North Carolina [108] also show that black defendants accused of killing whites fare significantly worse than any other group of defendants in terms of death sentencing. [109] Although a few of these studies also suggested that unequal prosecutorial charging decisions are likely the root cause of these disparate outcomes, [110] very few recent empirical studies have sought to scrutinize the potential for racial disparity specifically at the prosecutorial charging stage of the criminal justice process. The few comprehensive examinations of prosecutors' capital charging decisions, such as the Baldus study, do not contain data from the past two decades. There is reason to believe that American society is more progressive (though not free of racism) than in times past. [111] Our study seeks to determine whether race is still a meaningful factor in contemporary South Carolina capital charging decisions. Based upon the foregoing discussion showing the historical importance of race in the application of capital punishment, we formulate the following two hypotheses predicting that race continues to be relevant in prosecutorial decision-making.

Hypothesis 1: Prosecutors are more likely to seek the **death penalty** in white victim cases than in black victim cases.

Hypothesis 2: Prosecutors are more likely to seek the **death penalty** in black defendant/white victim cases than in all other racial configuration of defendants and victims.

[*177] In the next section, we address the mechanisms through which race may influence prosecutorial decision-making.

2. The Mechanisms of Racial Influence in Prosecutorial Decision-Making

In South Carolina, fifteen of the sixteen district solicitors during the 1993 to 1997 period we investigated were white. [112] Hence, the first mechanism through which race potentially influences prosecutorial decisions is the symbolic importance of race. White prosecutors may have absorbed the cultural stereotype of African American inferiority and thus may have come to perceive African American defendants as more violent and potentially dangerous to society. [113] Similarly, a crime may seem more horrible to white prosecutors if the victim is white than if the victim is not. [114] An array of psychological studies demonstrates that people identify and empathize more closely with members of their own racial group. [115] Therefore, white solicitors may evince greater empathy toward white homicide victims than black homicide victims and may be more likely to "go for death" in white victim cases.

Nonetheless, it is important to emphasize that conscious bias by prosecutors is not necessary for charging decisions to disparately affect African Americans. A more subtle, and likely more common, second mechanism by which race affects prosecutorial decision-making is asymmetric effort in gathering incriminating evidence about the crime based on race. Like all trial attorneys, prosecutors strive to win as many cases as possible and to maximize the sentences imposed upon convicts within an environment of limited resources. Thus, prosecutors have an incentive to seek the **death penalty** in cases that show promise for a successful prosecution. This selectivity logically results in prosecutors seeking the **death penalty** in cases where they have access to or the willingness to gather abundant information about the nature, circumstances, and perpetrator of a crime.

In his article published in the Santa Clara Law Review, Stephen B. Bright discussed the differentiated police activity in predominately minority neighborhoods compared to mostly white areas. [116] Bright demonstrated that investigations in white areas receive significant police attention and resources. [117] A disappearance in a predominantly black neighborhood can result in a limited or [*178] shoddy investigation, in one case amounting to nothing beyond filing a missing persons report. [118] Because law enforcement may gather more information about the crime and its aggravating circumstances in white victim cases, [119] prosecutors may perceive white victim cases, on average, to have more compelling evidence. As a result, prosecutors may be more likely to seek the **death penalty** in these cases than in black victim cases.

The third and final mechanism facilitating the influence of race in capital case selection is impunity from judicial review. Even if prosecutors realize that their death-charging

decisions are racially disproportionate, they have little incentive to alter their practices because of the deferential standard of review the Supreme Court has applied to charging decisions. [120] In any particular case, it is easy for prosecutors to articulate nonracial justifications for seeking the **death penalty.** [121] Courts of appeal regularly defer to the judgment of prosecutors and refuse to overturn **death penalty** charging decisions that are allegedly linked to race. [122] Prosecutors who intentionally or unintentionally seek the **death penalty** in a disproportionate number of white victim cases know that their decisions are likely to survive appeal.

C. Location and Political Culture

1. Geographic Differences - The Literature

Researchers have not sufficiently tested the effect of geography and local political culture on prosecutorial charging decisions. Political pressure is perhaps more likely to affect the decisions of highly visible, publicly elected prosecutors than decisions of appointed judges or politically unaccountable juries. In that vein, location is important because local prosecutorial norms and attitudes toward criminal punishment differ from one jurisdiction to another. Furthermore, location serves as a summary variable that represents not only local norms but also a district's political outlook and ideology. [123] Few **death penalty** studies explore empirically the possible effects of a district's overall racial composition, ideology, and political affiliation of district attorneys. We contribute to the literature by testing these variables.

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Hypothesis 3: Republican prosecutors are more likely to seek the **death penalty** when the black population in the district is large rather than small.

One previously unexplored factor that may affect the political climate surrounding capital charging decisions is the racial demographics of the charging jurisdiction. Studies of urban and city dwelling reveal that the proximity of blacks to whites increases the incidence of racially intolerant attitudes. [124] Several studies indicate that whites who live in close proximity to blacks are more likely to perceive blacks as dangerous and likely to commit crimes than whites who live in homogeneous areas. [125] Similarly, the analysis by Lizotte and Bordua indicates that whites' physical proximity to blacks influences their perception of crime rates. [126] Racial prejudice significantly predicts both support for the **death penalty** and tougher crime control measures. [127] This research suggests that elected prosecutors may face greater political pressure to seek the **death penalty** in a discriminatory manner in racially diverse districts. Such pressure is especially likely to emerge in diverse districts when the prosecutor is conservative. [128] We investigate the importance of this explanation by devising a statistical model that includes an interaction of variables for Republican (indicated as "GOP") prosecutor and percentage of the county residents that are black.

Hypothesis 4: Prosecutors are more likely to seek the **death penalty** in rural districts than in urban districts.

We believe local support for capital punishment will also fluctuate systematically according to whether the location of the crime is an urban or rural setting. Numerous surveys demonstrate that support for capital punishment is higher in rural areas, which are usually identified as conservative, than in urban areas, which are usually identified as liberal. [129] Thus, whether a crime occurs in a [*180] rural or urban area may affect **death penalty** charging decisions. Using data from the late 1970s, Paternoster reported significant geographic variation in the charging decisions of South Carolina prosecutors. [130] This research indicated that the percentage of death-eligible homicides in which prosecutors sought the **death penalty** varied from 16.7% to 86.7% across South Carolina's sixteen judicial districts. [131] Furthermore, the study also revealed that prosecutors in the state's four urban judicial districts had significantly lower rates of seeking the **death penalty** than prosecutors in its twelve rural districts. [132] However, Paternoster did not attempt to explain this geographic variation by assessing the varying political pressures prosecutors face. Additionally, Paternoster's analysis did not examine the political affiliation of the district solicitor, the district's ideology, or the district's racial composition. We contribute to the literature by addressing all three variables - prosecutor ideology, district ideology, and racial composition - in our analysis.

Nationwide statistics further suggest geographic variation in **death penalty** prosecutions. An analysis reported in USA Today reveals that fifteen counties comprise about 33% of all United States death row inmates despite containing only about 11% of the population of states with capital punishment. [133] The newspaper reported that "differences in murder rates or population do not explain all the county-by-county disparities. Instead, the willingness of the local prosecutor to seek the **death penalty** seems to play by far the most significant role in determining who will eventually be sentenced to death." [134] The study found that urban counties typically had far lower **death penalty** rates than rural and suburban counties. [135] However, these findings are only suggestive because the authors based the study on aggregate homicides and death sentences without controlling for the severity of homicides. Hence, the data do not reliably show that similar murders are treated differently based on their geographic location.

The study conducted by Blume, Eisenberg, and Wells also illuminates stark geographic differences in the application of capital punishment. [136] Of the thirty-one states with at least ten death row inmates since 1977, the study found that the state that most frequently imposed the **death penalty,** Nevada, had a **death penalty** sentencing rate fifteen times higher than the state with the lowest **death penalty** sentencing rate, Colorado. [137] Due to inherent limitations in data collection for a nationwide study, however, their regression model did not control for several potentially important independent variables (e.g., gender, type of weapon used) that [*181] describe the characteristics of individual homicides and can affect **death penalty** outcomes across states. Therefore, it is possible, though unlikely, that states with high **death penalty** rates (such as Nevada) have proportionately more aggravated homicides than states with low rates (such as Colorado).

Furthermore, some disparities in **death penalty** rates between states are expected because of different **death penalty** statutes in different states. [138] Nonetheless, the studies referenced above suggest that homicides in urban areas receive systematically different treatment than those in rural or suburban areas based on their geographic location.

2. Explaining Geographic Differences as a Source of Variation in **Death Penalty** Seek Rates

Geographic differences in **death penalty** seek rates have three antecedent mechanisms: the relative political pressures in each district, the different ideologies of individual district prosecutors, and the distribution of different types of cases across different districts.

a. Relative Political Pressures

When selecting the small minority of cases to which they will devote their limited resources, prosecutors are likely to consider the relative political pressures for seeking or not seeking the **death penalty.** The vast majority of state criminal prosecutors in the United States are publicly elected. [139] South Carolina's sixteen district solicitors are elected to four-year terms in office and face possible political rebuke if their professional choices contravene constituency preferences. [140]

Some cases engender tremendous media attention and hysterical public demands for the **death penalty,** while others do not. This reaction is to be expected, not only in South Carolina but also in other jurisdictions. In one high profile New York case, Governor George Pataki actually threatened to remove New York City prosecutor Robert Johnson and replace him with someone who would seek the **death penalty** without reservation. [141] That threat came even before Johnson had an opportunity to evaluate the evidence to determine if the offense warranted the **death penalty.** [142] In an address in September 2006, William W. Wilkins, Chief Judge of the Fourth Circuit Court of Appeals, described the impact of political pressure on candidates: ""I think politically, you're not going to find a candidate running on [*182] "Let's do away with the **death penalty**"' ... "No one (in South Carolina) can be elected to statewide office who is opposed to the **death penalty.**"' [143]

Although support for capital punishment does not fall perfectly along liberal/conservative and Democratic/Republican lines, conservatives in a district are more likely to support capital punishment than liberals in the same district. Thus, solicitors in conservative districts may face more political pressure to seek the **death penalty** than solicitors in more liberal districts.

b. Ideology

The individual proclivities of district solicitors shape the pattern of capital prosecutions across different districts. Given their extremely wide discretion, the divergent attitudes of individual prosecutors may contribute to disparate application of capital punishment. Different prosecutors, with different individual preferences, may decide to prosecute

legally similar cases in different ways. Political party identification is only a crude measure of the ideology of each district prosecutor. Much of the inter-district variation in the application of the **death penalty** may stem largely from personal beliefs of different prosecutors.

c. Unequal Distribution of Homicide Severity

Geographic disparities in the imposition of capital punishment may also result from an unequal distribution in the severity of homicides across different districts. Prosecutors in districts with higher percentages of highly aggravated murders would be expected to seek the **death penalty** more often than prosecutors in districts with lower percentages of aggravated homicides. Disparate sentencing patterns correlated with the distribution of severe homicides pose no arbitrariness problem. Geographic disparities are not arbitrary in a legal sense unless they result from different treatment of similarly situated defendants.

Very little scholarly analysis has evaluated whether legally permissible factors, such as the unequal distribution of severely aggravated murders, engender geographic disparities. However, the limited available research suggests that distribution of murder types cannot explain the geographic disparities in death sentencing patterns. Paternoster's study of South Carolina found marked discrepancies among districts even when evaluating only cases that contained at least one statutory aggravating factor. [144] The national study by John Blume and his colleagues explored whether disparate **death penalty** rates correlate to the frequency of certain murder characteristics such as multiple victim murders, the percentage of murders committed by strangers, and the urbanization of the population where [*183] the murder occurred. [145] None of these variables correlated to **death penalty** rates at a statistically significant level. [146]

D. Gender

During every presidential election cycle since the 1980 campaign between Ronald Reagan and Jimmy Carter, the media has treated the American public to a cocktail of reports about the gender gap in voting. [147] In the electoral realm, the gender gap refers to differences between men and women in candidate preference based upon candidates' issue positions. [148] But the gender gap is not relegated to presidential election politics alone. Studies suggest that a gender gap also exists in the U.S. criminal justice system, especially in the application of the **death penalty.** [149] Empirical evidence suggests widespread reluctance by prosecutors, judges, and juries to sentence female offenders to death. [150] We expect that this is the case in South Carolina as well. The state has condemned only one woman to die since the reinstatement of the **death penalty** in 1976. [151] Indeed, as of June 26, 2006, there are no women on South Carolina's death row. [152]

Hypothesis 5: Prosecutors are more likely to seek the **death penalty** against male defendants than female defendants in similar crimes.

Law professor (and Dean) Victor Streib publishes a quarterly statistical overview of women and the **death penalty.** Streib's July 2006 report reveals that from 1973 to 2001, women committed 10% of all homicides in the United States. [153] During this period, however, female defendants accounted for only 2.1% of **death penalty** verdicts at the trial level and constituted only 1.4% of all death row inmates. [154] Throughout the twentieth century and into July 2006, women account [*184] for only 0.6% of all executions (50 of the 8,634). [155] Streib's statistics demonstrate that female homicide defendants are less likely to face the **death penalty** than male defendants, but the data do not address the relative severity of crimes committed by men and women. Strieb does not base his analysis on the type of rigorous statistical methodology that is capable of demonstrating whether these disparities result from different frequencies of aggravated murders among men and women. But Streib's data are suggestive of gender disparity in capital sentencing.

Part of the disparity in punishment for male and female defendants may result from prosecutors' attitudes about different types of defendants' capacity for premeditation, likelihood of rehabilitation, and future dangerousness. Streib contends that women are more likely than men to be seen as viable candidates for rehabilitation. [156] In addition, gendered cultural stereotypes may lead prosecutors to doubt whether female defendants are capable of the cold-blooded calculations necessary to commit intentional murders. [157] As a result of these perceptions, it is expected that prosecutors disproportionately seek the **death penalty** more often against male defendants than against female defendants in similar crimes.

Hypothesis 6: Prosecutors are more likely to seek the **death penalty** in female victim cases than male victim cases.

The victim's gender may have a similar influence on charging decisions as does the defendant's gender. Due to cultural stereotypes of female weakness, prosecutors may perceive female murder victims to have been more vulnerable than males killed in a similar manner. Thus, prosecutors may perceive female victim crimes to be more severe than male victim crimes. Even among cases with similar levels of statutory aggravation, prosecutors may seek the **death penalty** more frequently in female victim cases than in male victim cases.

IV. Data: Sources and Limitations

Our data come from South Carolina homicide cases with known defendants committed from January 1, 1993, to December 31, 1997. The unit of analysis is a homicidal action by an independent defendant. We define homicidal actions as non-negligent killings conducted by one person. If two or more offenders killed a single victim, each defendant was evaluated as a separate case in the data set. Conversely, when one defendant was accused of killing several victims, such as in a shootout or bombing, the data set reflected

a single homicidal action. We define homicides in this manner because district solicitors in South Carolina investigate, charge, and prosecute each defendant involved in a crime; prosecutors have the discretion to [*185] charge codefendants in the same crime separately and unequally. [158] During the years from 1993 to 1997, there were 2,319 non-negligent homicides with known defendants in South Carolina. [159] Out of these 2,319, [160] we identified 130 cases, or 5.6%, in which a South Carolina district solicitor filed a notice of intent to seek the **death penalty.** [161]

The FBI's Supplemental Homicide Reports (SHRs) form the basis of our research on these homicides. Local police agencies complete the SHRs and submit them to the South Carolina Law Enforcement Division (SLED). SLED codes the reports and sends the homicide data to the FBI's Uniform Crime Report Program. [162] We requested and received from the FBI the SHRs for all South Carolina homicides from 1993 to 1997. The SHRs contain data about victim and suspect characteristics, as well as a description of the offense. For most cases, the SHR file indicates the age, sex, and race of the victim and suspect. Available information about each crime includes a description of any felony circumstances, such as rape or robbery, involved in the crime, the type of weapon used, the number of victims and offenders involved, any prior relationship between the victim(s) and defendant, and the location of the crime.

Knowing the location of each crime allowed us to collect additional information about the judicial district in which the crime occurred: its dominant political ideology (by measuring voter support for the Republican candidate for president in 1996, Senator Robert Dole), its demographic composition, its status as urban or rural, and the race and political affiliation of the district solicitor responsible for making charging decisions in capital cases. Most of the demographic information about each district was collected from South Carolina's official government web page [163] or from census data.

Despite including information on many important factors relating to the severity of each homicide and the political influences that may affect prosecutorial charging decisions, the SHR data have limitations. For instance, SHRs do not provide information on all of the potentially relevant criminal circumstances that may affect charging decisions. As an example, the SHRs contain no data on the mental capacity or emotional state of the suspect, possible provocation by the victim, whether the crime involved torture, and other potential mitigating or aggravating factors. Although the SHR data are not perfect, they are useful for purposes of our inquiry. Other well-known **death penalty** analyses, such as Radelet [*186] and Pierce's study of Florida and the multi-state analysis by Gross and Mauro, relied exclusively on SHR information. [164] Here, we go a step further and supplement the SHR data with additional variables derived from other sources.

A second limitation of the SHR is that the data do not identify the case numbers or the names of the defendants or victims involved in the homicides. As a result, it is impossible to determine from the SHR file which murders involved capital prosecutions. We looked to additional sources for collecting further data on all cases in which South Carolina prosecutors sought the **death penalty.** We obtained a list from the South Carolina Supreme Court of all cases in which district solicitors filed a notice of intent to seek the

death penalty. The state assigned a judge to 130 capital cases resulting from crimes committed between January 1, 1993, and December 31, 1997. We obtained data on these 130 capital cases by reviewing individual case files through visits to South Carolina county courthouses. We supplemented the case file data with information provided by several district solicitors and by Cornell University law professor John Blume, [165] an expert litigator of South Carolina capital cases. We combined this additional information into a second data file containing information on all South Carolina **death penalty** prosecutions of murders committed from 1993-1997.

The **death penalty** data file was merged with the SHR murder data to create a comprehensive database of each South Carolina homicide and its legal disposition. Cases from the two data files were matched using the date and location of the crime, as well as the age, sex, and race of the victim(s) and defendant, the type of weapon used, the number of victims, and the felony circumstances surrounding the homicide. The SHR file positively matched about two-thirds of the actual **death penalty** cases (84 of the 130). Only **death penalty** cases that matched the SHR homicide in every SHR-recorded characteristic were considered matches. If a **death penalty** case perfectly matched more than one SHR homicide, one of the SHR cases was considered a **death penalty** case while the remaining matches were considered "not **death penalty**" cases. For statistical purposes, knowing exactly which line of SHR data corresponds with a **death penalty** case is irrelevant as long as the information from all **death penalty** cases exactly correspond with the information of an SHR case. [166] That is, two crimes in the SHR file may have exactly the same characteristics and could have been committed in the same month and location. If the state sought the **death penalty** in only one of these cases, it is not important which line of SHR data actually corresponds to the **death penalty** case, as long as one of the cases is marked "**death penalty**" and the other case is marked "not **death penalty.**"

[*187]

V. Results and Analysis

A. Descriptive Analysis

On a statewide level, several notable patterns in South Carolina prosecutors' death charging decisions are apparent. As indicated in Table 1, between 1993 and 1998 South Carolina prosecutors processed 865 murder cases with white victims and sought the **death penalty** in 7.6% of the white victim cases. By contrast, prosecutors sought the **death penalty** in only 1.3% of the 1,416 murder cases involving black victims. The difference between the **death penalty** seek rate for black victim cases and white victim cases is statistically significant using a difference of proportions test ($p < .05$). [167] The data further suggest that non-whites are far more likely than whites to be homicide victims in the state. Non-whites accounted for about 62% of homicide victims in the study; virtually all of these victims were black. This finding is consistent with national patterns, which demonstrate that blacks and other racial minorities are significantly more likely to be homicide victims than whites. [168]

Table 1. **Death Penalty** Seek Rates by Victim's Race

Victim's Race	Homicides	**Death Penalty** Cases*	Death Penalty Seek Rate (%)
White	865	66	7.6
Black	1,416	18	1.3

* Entries are based on 84 of 130 **death penalty** cases matched with data in Supplemental Homicide Reports (SHRs).

[*188]

Table 3 provides the **death penalty** seek rates by racial configuration of victims and defendants. [169] Despite the high number of black homicide victims, South Carolina solicitors sought the **death penalty** in only 1.2% of cases in which black offenders murdered black victims. This finding indicates that black victim discounting occurred in South Carolina during the period we investigated. Black victim discounting describes the situation whereby the leniency shown to the accused murderer discounts the value of the black victim's life. [170] By contrast, prosecutors sought the **death penalty** in 9.7% of cases in which a black defendant killed a white victim and in 6.7% of cases in which a white defendant killed a white victim. To test hypothesis 2, we calculated the confidence interval comparing the **death penalty** seek rates for black defendant/white victim with that for all other configurations combined.

Table 2: **Death Penalty** Seek Rates For Black/White Victim Compared to All Other Configurations Combined

Configuration	Homicides	**Death Penalty** Cases*	Death Penalty Seek Rate (%)
Black/white	279	27	9.7
All others combined	2002	57	2.8

*Entries are based on 84 of 130 **death penalty** cases matched with data in Supplemental Homicide Reports (SHRs).

The difference between the **death penalty** seek rates is statistically significant at the .01 level and confirms hypothesis 2. Prosecutors are 3.5 times more likely to seek the **death penalty** when a black defendant kills a white victim than in all other defendant/victim combinations combined. [*189]

Table 3: **Death Penalty** Seek Rates By Defendant/Victim Racial Configuration

Defendant/ Victim	Homicides	**Death Penalty** Cases*	Death Penalty Seek Rate (%)
Black/black	1,377	17	1.2
Black/white	279	27	9.7
White/white	586	39	6.7
White/black	39	1	2.6

* Entries are based on 84 of 130 **death penalty** cases matched with data in Supplemental Homicide Reports (SHRs).

Turning to accused offenders, South Carolina prosecutors were 5.8 times more likely to seek the **death penalty** against suspected killers of whites than against suspected killers of blacks. Moreover, white murder suspects were 2.5 times more likely to face capital prosecutions than black suspects. There is reason to believe, however, that the higher **death penalty** seek rate for white offenders is not the result of animus against Caucasians. The relationship between offender race and **death penalty** seek rate results from (1) the extremely low incidence of white defendant/black victim cases, (2) the extremely low incidence of capital prosecution in black victim cases, and (3) the extremely high percentage of intra-racial homicides. Roughly 86% of homicides in South Carolina from 1993 to 1998 were committed by a defendant of the same race as the victim. Figure 1 illustrates the data contained in Table 3.

After controlling for the race of the victim, black defendants were 1.45 times as likely to face capital trials for killing white victims as white defendants. In black victim cases, white defendants were more likely to face the **death penalty** than black defendants, but this finding is less reliable due to the extremely small number of capital cases involving homicides by whites of black victims. [*190]

Figure 1: **Death Penalty** Seek Rate By Defendant/Victim Configuration

[SEE FIGURE 1 IN ORIGINAL]

Three significant nonracial variables are also associated with the charging decisions of South Carolina prosecutors: the felony circumstances incident to the murder, the relationship of the defendant to the victim, and the gender of the victim and the defendant. Only 24.7% of South Carolina homicides committed from 1993 to 1997 involved additional felonies. However, even though felony murders often lack a strong premeditation element, they account for 73.4% of South Carolina's **death penalty** cases during this period. In addition to felony-murder combinations, the relationship between the victim and defendant affects prosecutorial charging decisions. In 27.4% of homicides, the victim and defendant were reported to be complete strangers. However, these cases accounted for 38.7% of the cases in which prosecutors sought the **death penalty.** Thus,

defendants who kill strangers are significantly more likely to face capital prosecution than those who kill acquaintances, family members, or friends. Unlike the presence of additional felonies, the relationship between victim and defendant is not a statutory factor for prosecutors to consider when deciding whether to seek the **death penalty.** [171] But the data suggest that the nature of the relationship between defendant and victim does impact the prosecutorial charging decision.

Finally, capital case selection varies based on the gender of both the homicide victim and defendant. As we hypothesized, prosecutors seek the **death penalty** with greater frequency in cases involving male defendants and female victims. Female defendants committed 12.1% of the homicides in our data set. However, female defendants accounted for only 4.8% of **death penalty** cases. Similarly, 24.6% of [*191] murders involved at least one female victim, but these cases comprised over 47% of capital prosecutions.

A correlation analysis of the charging decisions of South Carolina district solicitors reveals five distinct groups of murders that are likely to result in capital prosecutions: felony murders, murders committed against white victims, murders against strangers, murders against female victims, and murders by male defendants. However, these correlations alone are insufficient to conclude that there is a causal link. It is possible that the racial and gender effects we have observed result from unequal distribution of "death eligible" murders. For example, if homicides involving white victims and strangers have an increased incidence of aggravating factors, prosecutors who seek the **death penalty** in such cases may be responding to these statutory factors instead of non-legal stimuli. Multiple regression techniques, which measure the impact of certain variables while controlling for other possible influences, [172] are necessary to make a more definitive judgment about the roles of race, gender, and victim-defendant relationship in prosecutorial charging decisions.

B. Statewide Logistic Regression Analysis

The merged **death penalty** database facilitates the use of logistic regression techniques to determine the relative influence and statistical significance of numerous independent variables on the decision to seek the **death penalty.** Since the dependent variable, whether or not the state seeks the **death penalty,** is dichotomous, the ordinary least squares regression technique is inappropriate. Instead, we use logistic regression, which is a maximum likelihood estimation technique. [173] This method produces parameter estimates for the model's independent variables in terms of each variable's contribution to the probability that the dependent variable falls into one of the designated categories (either seeking or not seeking the **death penalty)**.

For each independent variable, a maximum likelihood estimate (MLE) is calculated, along with its standard error. The estimates represent the change in the logistic function that occurs from a one-unit change in each independent variable. [174] Since interpretation of the estimate is easily stated, but not so easily understood, we also present the odds ratio for each independent variable. An odds ratio is a ratio of the odds at two different values

of the independent variable. Thus, the odds ratio [*192] equals the antilogarithm (e to the power) of the MLE. The numerical values of the odds ratios can be used comparatively as a way to describe the strength of their effect on the dependent variable. [175] We assess each variable's impact using the odds ratio. [176]

1. Effect of Statutory Aggravating Factors on the Decision to Seek the **Death Penalty**

The results of the logit analysis are presented in Table 4. The model utilized nineteen independent variables, including numerous statutory factors relating to the severity of the crime and extra-legal factors such as the demographic characteristics of defendants and victims and the political circumstances surrounding the case. Several variables exerted a statistically significant influence on **death penalty** charging decisions. Murders incident to robbery, burglary, larceny, or motor vehicle theft were combined into a single variable denoted "murder with theft." That variable has an odds ratio of 10.75, a value that is statistically significant beyond the .001 level. That is, holding other variables constant, the odds were are roughly 11 times higher that state prosecutors would seek the **death penalty** if the murder involved a "theft" crime than if it did not. Results significant at or beyond the .05 level are generally considered statistically significant. [177] There is less than a one-in-one-thousand chance that this finding occurred randomly. Similarly, the analysis calculated an odds multiplier of over 10.8 for murders committed incident to rape or other criminal sexual conduct. This finding is also significant at the .001 level. Murders committed in the course of arson failed to reach statistical significance. An odds ratio of over 25 ($p < .001$) was calculated for multiple victim murders. Of all the variables in the model, multiple victim murder had the greatest impact on the decision to seek the **death penalty.** This finding highlights the utter sense of community outrage that multiple victim murders produce. The killing of a child aged eleven or younger, a statutory aggravating factor in South Carolina, [178] also greatly increases the odds of prosecutors seeking the **death penalty.** Child victim cases are 6.6 times more likely to result in capital prosecutions than killings of victims over eleven years of age ($p < .02$). These findings regarding statutory aggravating factors are consistent with other studies [179] and statutory guidelines. South Carolina prosecutors should, and do, base their charging decisions on the relative severity of murders as defined by criminal [*193] statutes. In a perfect world, that would be the end of the matter. Prosecutors would predicate all decisions only upon the law and not on personal or political factors. But the world is not perfect and neither are state prosecutors.

2. Effect of Non-statutory Factors on the Decision to Seek the **Death Penalty**

The logistic regression model reaffirms the influence of non-statutory variables on the capital prosecution process. Controlling for all available factors relating to the severity of the homicide, defendants accused of killing strangers have a calculated odds multiplier of 6.09. The impact of the stranger variable is significant beyond the .01 level, indicating a probability of less than one-in-one-hundred that the relationship occurred by chance. This may indicate that prosecutors perceive murders committed by strangers as more horrifying than crimes involving acquaintances. Nonetheless, South Carolina's criminal statutes do not differentiate between killings of intimates, acquaintances, and strangers. [180]

There is no legal basis for imposing harsher punishment on those who kill strangers than on those who kill friends or relatives, assuming the presence of criminal premeditation. [181] [*194]

Table 4: Logistic Regression Analysis of The Decision to Seek the **Death Penalty** in South Carolina

	Coefficient	Standard Error	Significance Level	Odds Ratio
Legal Factors				
Murder with theft	2.375***	.458	.000	10.75
Murder with rape/criminal sexual conduct	2.386***	.703	.001	10.87
Murder with arson	1.722	1.135	.129	5.60
Multiple victims	3.231***	1.097	.003	25.31
Child victim	1.887**	.768	.014	6.60
Weapons				
Gun	-.127	.401	.751	.880
Knife	.833*	.449	.064	2.30
Extra-Legal Factors				
White victim	1.132***	.374	.002	3.10
Black defendant	-.500	.364	.169	.61
Female victim	.786**	.331	.018	2.19
Male defendant	.899	.583	.123	2.46
Elderly victim	-.962*	.520	.064	.38
Republican (GOP) prosecutor	-2.995***	1.039	.02	.05
% Minority in district	-.044**	.019	.02	.96
GOP Prosecutor x % Minority in district	.088***	.032	.005	1.09
Rural location	1.719***	.383	.000	5.58
Intimate relation	.222	.439	.612	1.25
Stranger	1.807***	.489	.000	6.09
Stranger x Murder with theft	-1.418**	.612	.02	.24
Constant	-6.180***	.959	.000	.002

Number of cases = 2,227

% Correctly predicted = 97

% Reduction in error = 96

Significance level: * p < .10; ** p < .05; *** p < .01 all one-tailed tests

The statewide model also reveals the impact of gender on prosecutorial charging decisions. The odds were 2.19 times higher that female victim murders would lead to a capital prosecution than male victim murders, after controlling for all available factors relating to aggravation of the homicide. The female victim effect is statistically significant at a .02 level and confirms hypothesis 6. The male defendant variable does not exert a statistically significant effect in the model and fails to confirm hypothesis 5. This finding suggests that, after controlling for [*195] statutory aggravation, the sex of the defendant did not impact death charging decisions.

More importantly, the logistic analysis illustrates the impact of race on charging decisions. As we suspected, the decision to seek the **death penalty** in South Carolina was not race-neutral. While the race of the defendant has no statistically significant effect, the race of the victim did impact the prosecutor's decision to seek the **death penalty.** The analysis indicates an odds multiplier of 3.10 for white victim cases. Stated plainly, South Carolina solicitors were 3 times more likely to seek the **death penalty** against killers of whites than against killers of blacks. This finding is statistically significant beyond the .01 level and confirms hypothesis 1. The data provide strong support for the argument that legally intolerable racial effects continued to influence the charging decisions of South Carolina solicitors in the late 1990s.

Because prosecutors are elected in South Carolina, any analysis of prosecutorial decisions to seek the **death penalty** would be incomplete without examining potential connections to local politics. We captured the influence of politics with three variables: the prosecutor's ideology, the percentage of minority residents in the district, and an interaction between prosecutor ideology and the percentage of the district's population that is black. We placed particular emphasis on the interaction effect as opposed to the main effects since the main effects are nested within the interaction effect. We used an interaction of the prosecutor ideology variable and a percent black population variable to test hypothesis 3 that Republican prosecutors face especially high pressure to seek the **death penalty** in districts where a higher percent of residents are black. The data provide some support for this hypothesis. After controlling for legal and social background characteristics, the odds were slightly higher that the **death penalty** would be sought if the percent of blacks in the district was relatively high and the prosecutor was conservative. [182]

Finally, we gauged the influence of the rural versus urban setting of the offense on the likelihood of the state seeking the **death penalty.** As discussed earlier, several [*196] previous studies suggest that capital prosecutions are over-represented in rural areas compared to urban areas. [183] Our analysis of South Carolina data employs several statistical techniques to determine more precisely whether location affects the likelihood of capital prosecutions.

The composition of South Carolina's judicial districts facilitates the categorization of each district as either urban or rural. [184] The state's four major Standardized Metropolitan Statistical Areas are located in four separate judicial districts. [185] These four districts were

classified as urban while the remaining twelve districts were combined to form a rural geographical area. [186] Simple tabulation of the data suggests that prosecutors in the twelve rural judicial districts combined sought the **death penalty** in 7.5% of murder cases (102 of 1,359). Urban prosecutors sought the **death penalty** in only 2.9% of homicides (28 of 961). The difference between the urban and rural **death penalty** seek rates is statistically significant ($p<.01$). These figures alone do not prove causation; the differential urban/rural **death penalty** seek rates could emanate from different frequencies of aggravated murders. We performed two additional analytical steps to assess the possibility that capital prosecutions are more likely in rural areas because a higher percentage of "**death penalty** eligible" murders occur in these areas.

Approximately 26% of homicides in urban areas were felony murders, while 24% of rural homicides were committed incident to at least one felony. These findings suggest that disparate **death penalty** seek rates do not result from unequal distribution of "**death penalty** eligible" murders. Nonetheless, while these findings are suggestive, more definitive evidence is necessary to demonstrate that rural and urban prosecutors respond differently to cases with comparable levels of legal aggravation. To test the differential urban/rural hypothesis, each crime in the **death penalty** database was classified as occurring in either an urban or rural district. The urban/rural variable was then included in the overall logistic regression model for a more rigorous test of hypothesis 4. This model, controlling for nineteen variables related to the aggravation of each homicide and victim and defendant characteristics, reveals that murders committed in rural areas are 5.58 times more likely to result in capital prosecutions than urban homicides. These results are statistically significant ($p < .001$).

Thus, there is little doubt that geographic location influences capital case selection in South Carolina. In addition to systematic urban/rural variation, capital case selection may also vary according to specific characteristics unique to [*197] individual districts. Categorizing location into a single urban/rural variable may mask important variation in local attitudes toward the **death penalty.** Therefore, in the next section we shall test district-level variation by creating several variables to represent districts that have a sufficient number of cases to be included in the regression model.

C. Comparative District-Level Analysis

To probe the effect of local attitudes on the decision to seek the **death penalty,** we broke down the 130 capital cases by judicial district. Then, using the location of each homicide included in the SHR data file, we determined the number of non-negligent homicides in each district from 1993 to1997. Using these data, a **death penalty** seek rate was calculated for each district by dividing the number of capital prosecutions in the district by the total number of non-negligent homicides in that district.

The calculated **death penalty** seek rates reveal marked disparities in the frequency with which different district solicitors sought the **death penalty.** Table 5 lists the **death penalty** seek rates by district. The table includes a column that identifies the counties comprising each district. We find that defendants in District Eight have the highest

probability of facing a capital prosecution. That district has a **death penalty** seek rate of 14.9% compared to District Nine, which has the lowest **death penalty** seek rate, only 1.9%. Prosecutors in four districts sought the **death penalty** in over 12.9% of all homicides, while six other districts have **death penalty** seek rates below 3.9%. Thus, there is strong district-level variation in the likelihood of prosecutors to seek the **death penalty.** [*198]

Table 5: **Death Penalty** Seek Rates Grouped by South Carolina Judicial District

Judicial District	Counties in District	1993-1997 Homicides	Capital Prosecutions	Death Seek Rate (%)
1	Calhoun, Dorchester, Orangeburg	130	18	13.8
2	Aiken, Bamberg, Barnwell	125	10	8.0
3	Clarendon, Lee, Sumter, Williamsburg	142	9	6.3
4	Chesterfield, Darlington, Dillon, Marlboro	183	11	6.0
5	Kershaw, Richland	260	10	3.8
6	Chester, Fairfield, Lancaster	72	2	2.8
7	Cherokee, Spartanburg	181	5	2.8
8	Abbeville, Greenwood, Laurens, Newberry	94	14	14.9
9	Berkeley, Charleston	316	6	1.9
10	Anderson, Oconee	110	5	4.5
11	Edgefield, Lexington, McCormick, Saluda	76	10	13.2
12	Florence, Marion	117	5	4.3
13	Greenville, Pickens	204	7	3.4
14	Allendale, Beaufort, Colleton, Hampton, Jasper	91	6	6.6
15	Georgetown, Horry	154	4	2.6
16	York, Union	62	8	12.9

[*199]

Figure 2 illustrates the dramatic inter-district variation in prosecutors' charging decisions. Districts One, Eight, Eleven, and Sixteen stand out as the districts with high **death penalty** prosecution rates, although these districts do not necessarily have the highest

homicide rates. The probability of a **death penalty** prosecution in any given district is not a function of the number of homicides that occurred in that district.

Figure 2: **Death Penalty** Seek Rates Grouped By South Carolina Judicial District

[SEE FIGURE 2 IN ORIGINAL]

These observations suggest that the willingness of solicitors to seek the **death penalty** varies tremendously across districts. However, these findings do not account for the possibility that "death worthy" murders are unequally distributed across districts; prosecutors in districts with high **death penalty** seek rates may be responding to higher levels of "death worthy" crimes. To test this hypothesis, the percentage of murders in each district involving certain characteristics was recorded. For each district, the database reflects the percentage of homicides involving rape or other sex crimes, burglary, robbery, larceny, and arson. Table 6 indicates that the percentage of murders incident to at least one of these felonies varies by district from a low of 13.4% in District Ten to a high of 33.8% in District Six. [*200]

Table 6: **Death Penalty** Seek Rates and Felony Murder Rates Grouped by South Carolina Judicial District

Judicial District	Counties in District	**Death Penalty** Seek Rate (%)	Felony Murders (%)
1	Calhoun, Dorchester, Orangeburg	13.8	23.6
2	Aiken, Bamberg, Barnwell	8.0	22.2
3	Clarendon, Lee, Sumter, Williamsburg	6.3	25.0
4	Chesterfield, Darlington, Dillon, Marlboro	6.0	22.1
5	Kershaw, Richland	3.8	19.4
6	Chester, Fairfield, Lancaster	2.8	33.8
7	Cherokee, Spartanburg	2.8	18.0
8	Abbeville, Greenwood, Laurens, Newberry	14.9	21.2
9	Berkeley, Charleston	1.9	28.9
10	Anderson, Oconee	4.5	13.4
11	Edgefield, Lexington, McCormick, Saluda	13.2	25.6
12	Florence, Marion	4.3	23.4
13	Greenville, Pickens	3.4	26.9
14	Allendale, Beaufort,	6.6	13.9

	Colleton, Hampton, Jasper		
15	Georgetown, Horry	2.6	22.6
16	York, Union	12.9	29.0

[*201]

Figure 3 is a scatter plot with data points corresponding to the percentage of murders involving felonies in each district and each district's **death penalty** seek rate. The scatter plot reveals no discernable correlation pattern. Two of four districts with a **death penalty** seek rate over 12.9% have only a moderate felony murder rate, while District Six, which has the highest felony murder rate, carries a remarkably low **death penalty** seek rate of only 2.8%. To gauge more precisely the possible effects of unequal felony murder distribution across districts, we performed a T-test of the correlation between the percentage of felony murders and capital prosecutions. The T-test reveals that no statistically significant correlation exists between the percentage of aggravated murders and a district's **death penalty** seek rate.

Figure 3: Relationship Between Felony Murders and the Death Charging Rate in South Carolina, 1993-1997

[SEE FIGURE 3 IN ORIGINAL]

The percentage of felony murders in a district has a simple correlation of .032 with the district's **death penalty** seek rate. Two other aggravating factors, the presence of a child victim and the killing of multiple victims, also have no statistically significant correlation with **death penalty** seek rate. Finally, these three variables and each county's **death penalty** seek rate were combined into a single correlation model. The adjusted R-square value for this model is only .0099, indicating that these legal aggravating factors explain only 1% of the variance in **death penalty** seek rates across districts. Generally speaking, the results of the correlation analysis suggest that **death penalty** seek rates are not correlated with differences in the frequency of aggravated murders. Instead, the disparities [*202] apparently emanate from the relative willingness of district prosecutors to seek the **death penalty.**

Although the lack of significant correlations between each district's **death penalty** seek rate and its frequency of aggravating factors strongly suggest that prosecutors in these districts apply differential standards to similarly situated defendants, more conclusive proof is necessary. To make a more definitive judgment that prosecutors in different districts apply different standards to death charging decisions, we conducted a second logistic regression.

Data for this model was drawn from the **death penalty** database of all 2,319 homicides. Due to missing information in some of the variables, 2,227 cases were used in the regression. Data from seven districts were virtually all successfully matched with the list of **death penalty** cases in the FBI homicide file. [187] Therefore, information in the **death penalty** database represents the true **death penalty** seek rate for these districts. [188] This

second logistic model employed all nineteen variables relating to the crime, victim, defendant, and location used in the overall model of **death penalty** charging decisions reported earlier. To these, we added dummy variables for six of the seven districts to capture district-specific influences that could sway prosecutorial decision to seek the **death penalty.** [189] The results are reported in Table 7.

The estimates of the non-district variables are virtually identical when compared to the regression results reported earlier (see Table 6). Most of the variables return statistically significant effects and are in the expected direction. Even after controlling for district-level influences, race and gender continue to evince statistically meaningful effects on prosecutorial decisions to seek the **death penalty.** But in this section, we focus on the district-level effects.

The results confirm the existence of death-charging disparities by district. District Ten was excluded from the model to provide a basis of comparison with those districts that are included in the model. After controlling for nineteen other potentially explanatory variables, the three districts with high **death penalty** seek rates were significantly different from the excluded district. Murders in District Eight were 5.47 times more likely to result in capital trials than murders in the excluded district (District Ten) ($p < .002$). District Eleven prosecutors were 6.44 times more likely to seek the **death penalty** ($p < .10$). District Sixteen prosecutors were 6.89 times more likely to see the **death penalty** ($p < .05$). The three included districts with low seek rates (Districts Twelve, Thirteen, and Fifteen) were not significantly different from the excluded district.

[*203] The results of this regression analysis highlight the arbitrariness inherent in South Carolina's capital punishment system by suggesting the importance of the individual proclivities of the local prosecutors who decide whether to seek the **death penalty.** A defendant's odds of facing the **death penalty** may vary based on which solicitor has jurisdiction to charge the defendant's case. South Carolina's Eleventh District illustrates this point. The regression model calculated that murder defendants in District Eleven were nearly 6.5 times as likely to face a capital prosecution as defendants in the excluded district. [190] This disparity is surely attributable, at least in part, to the district solicitor's individual willingness to pursue the **death penalty.** District Eleven solicitor Donnie Myers, who has sought the **death penalty** in over thirty cases, [191] has sent more defendants to death row than any solicitor in South Carolina history. [192]

In 1997, Myers told a South Carolina newspaper that **death penalty** cases "just keep coming and coming. I don't ever see an end to it." [193] It is not surprising that the statistical model reveals that murder prosecutions in Myers's district are treated differently compared to cases in other districts.

Regardless of the analytical techniques employed, results indicate that location profoundly affects whether South Carolina prosecutors seek the **death penalty.** Overall, **death penalty** seek rates in the state's sixteen judicial districts vary from a low of 1.9% to a high of 14.9%. Statistical tests reveal that these differential **death penalty** seek rates are not explained by the frequency of statutory considerations. [*204]

Table 7: Logistic Regression with Disaggregated District Variables

	Coefficient	Standard Error	Significance Level	Odds Ratio
Legal Factors				
Murder with theft	2.273***	.474	.000	9.71
Murder with rape/criminal sexual conduct	2.151***	.736	.003	8.59
Murder with arson	1.722	1.187	.147	5.59
Multiple victims	2.712**	1.128	.016	15.06
Child victim	2.141***	.780	.006	8.50
Weapons				
Gun	-.061	.418	.884	.94
Knife	.858*	.472	.069	2.36
Extra-Legal Factors				
white victim	1.151***	.387	.003	3.16
black defendant	-.422	.379	.265	.655
Female victim	.927***	.351	.008	2.53
Male defendant	.983*	.606	.105	2.67
Elderly victim	-1.070**	.548	.050	.34
Republican (GOP) prosecutor	-4.004*	2.235	.073	.02
% Minority in district	-.009	.039	.822	.99
GOP Prosecutor x % Minority in district	.117**	.057	.04	1.12
Rural location	1.578***	.543	.004	4.85
Intimate relation	.021	.461	.963	1.02
Stranger	1.883***	.502	.000	6.57
Stranger x Theft	-1.482**	.632	.019	.227
District 8	1.700***	.653	.009	5.47
District 11	1.863*	1.036	.072	6.44
District 12	-1.022	1.062	.336	.36
District 13	1.300	1.025	.205	3.67
District 15	.233	.911	.798	.792
District 16	1.930**	.848	.023	6.89
Constant	-7.767***	1.706	.000	- -
Number of cases = 2227				
% Correctly predicted = 97				

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% Reduction in error = 96
Significance levels: *p < .10; **p < .05; ***p < .01 all one-tailed
tests
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[*205]

VI. Conclusion

In 1984, Raymond Patterson fatally shot an elderly man in the parking lot of a South Carolina motel. [194] The line dividing District Eleven and District Five runs through that parking lot. [195] Authorities eventually determined that Patterson was several feet within District Eleven at the moment of the shooting, and a jury eventually sentenced him to death. [196] District Five, which has sent only one person to death row in the past ten years, [197] has a death seek rate of only 3.8%. By contrast, District Eleven has sent twelve people to death row during the same period [198] and has a death seek rate of 13.2%. If Patterson had committed his crime only three or four parking spaces away, he almost certainly would not have been charged with the **death penalty.** [199] Patterson's case epitomizes the freakish nature of capital punishment that led Justice Stewart to declare in Furman v. Georgia that capital punishments "are cruel and unusual in the same way that being struck by lightning is cruel and unusual." [200] The new "guided discretion" rules established by the Court in Gregg and affirmed in McCleskey were designed to eliminate or significantly reduce the arbitrary nature of capital punishment. [201]

In the thirty years since the Gregg decision, the thirty-eight states with capital punishment have all implemented variations of Georgia's bifurcated capital trial process, which requires prosecutors and juries to identify at least one statutory aggravating factor before imposing a death sentence. [202] Despite these efforts, we find that arbitrariness and discrimination are still present in South Carolina's capital punishment system. The willingness of prosecutors to seek the **death penalty** varies profoundly across different judicial districts. Defendants in South Carolina's most **death-penalty**-prone district are nearly 8 times more likely to have the **death penalty** sought against them than defendants in the district with the lowest **death penalty** seek rate. Moreover, prosecutors in rural districts are 5 times more likely to seek the **death penalty** than their urban counterparts.

Legally impermissible factors such as victim and defendant characteristics also affect capital case selection. Defendants accused of killing strangers are 6 times more likely to face capital prosecutions as offenders who kill friends or family members in an identical manner. Cases involving female victims are 2.5 times more likely to result in capital prosecutions than cases with male victims. Perhaps most [*206] distressingly, the study confirms that insidious racial disparities still haunt South Carolina's **death penalty** system. South Carolina prosecutors are 3 times more likely to seek the **death penalty** in white victim cases than in black victim cases. All of these results are statistically significant at or beyond conventional significance levels.

The central finding of this study is simple: South Carolina's capital punishment scheme is not uniformly administered and has not eliminated arbitrariness and discrimination. The

attitudes of local solicitors shape the administration of capital punishment. These solicitors exercise virtually unfettered discretion to select **death penalty** cases within their districts. From 1993 to 1997, South Carolina solicitors utilized this discretion in an arbitrary and discriminatory manner. It is worth emphasizing that the disparities revealed by our analysis emanate solely from the charging decisions of district solicitors. Potentially arbitrary jury decision-making cannot account for the racial and geographic disparities illuminated by the data.

A state justice system that continues to seek the **death penalty** based in part on geographic location, gender, and skin color is inexcusable in a nation that champions its multiculturalism and egalitarian political culture, including a color-blind Constitution that "neither knows nor tolerates classes among citizens." [203] Despite this enlightened tradition, South Carolina murder defendants receive systematically different treatment based on the geographic location and the race and gender of the parties involved. Although our specific findings are limited to South Carolina, we suspect that replicating this analysis would reveal arbitrary capital case selection in many other jurisdictions. Policymakers must confront this persistently wanton and racially discriminatory application of capital punishment that the sentencing schemes approved by the Supreme Court in Gregg and McCleskey have not eradicated. The current application of the **death penalty** violates the Court's admonition that capital punishment "be imposed fairly, and with reasonable consistency, or not at all." [204] The importance of just application of capital punishment cannot be overstated. In his dissent from the Supreme Court's 5-4 decision in McCleskey, the landmark case discarding evidence of group-based racial bias as a factor in **death penalty** appeals, Justice Brennan articulated a sage warning:

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined ... The way in which we choose those who will die reveals the depth of moral commitment among the living. [205]

[*207]

Appendix I
Variable Measurements for Logistic Regression Model

Dependent variable: Prosecutor seeks **death penalty:** coded 1 if yes; coded 0 if no.

Independent variables:

Murder with theft: Any murder incident to any of the property crimes of armed robbery, burglary, larceny or automobile theft was classified as "murder with theft" and was coded 1; any case not including any one of these theft characteristics was coded 0.

Murder with rape/criminal sexual conduct: Murders accompanied by rape or any other criminal sexual conducts were coded 1; all others were coded 0.

Arson: Murders committed in the course of arson were coded 1; all others were coded 0.

Gun: Shooting deaths (regardless of gun type) were coded 1; all others were coded 0.

Knife: Killings with a knife or sharp object were coded 1; all others were coded 0.

Child victim: Victims eleven years old or younger were coded 1; all others were coded 0.

Elderly victim: Victims sixty-five years old or older were coded 1; all others were coded 0.

Intimate relations: Cases in which the defendant and victim were married, divorced, dating, or members of the same family were coded 1; all others were coded 0.

Stranger: Cases in which the defendant and victim had no prior relationship were coded 1; all others were coded 0.

Multiple victims: Cases involving more than one victim were coded 1; all single-victim cases were coded 0.

White victim: Cases involving at least one white victim were coded 1; cases without a white victim were coded 0.

Female victim: Murders with at least one female victim were coded 1; all others were coded 0.

[*208] Black defendant: Black or other nonwhite defendants were coded 1; white defendants were coded 0.

Male defendant: Male defendants were coded 1; female defendants were coded 0.

Rural location: Homicides committed in any of South Carolina's twelve rural judicial districts were coded 1; those committed in any of the four urban districts of South Carolina were coded 0.

District ideology: Percent of the vote in each South Carolina judicial district garnered by GOP Senator Robert Dole during the 1996 presidential election.

Prosecutor ideology: GOP prosecutors were coded 1; Democratic prosecutors were coded 0.

Percent minority: The percent of the population of each district that is nonwhite. [*209]

Appendix II

Death Row Population of States with Capital Punishment

As of April 1, 2006

State	Death Row Inmates
1. California	652
2. Texas	404
3. Florida	392
4. Pennsylvania	232
5. Ohio	195
6. Alabama	191
6. North Carolina	188
8. Arizona	126
9. Tennessee	108
10. Georgia	107
11. Oklahoma	93
12. Louisiana	88
13. Nevada	81
14. South Carolina	71
15. Mississippi	67
16. Missouri	52
17. Arkansas	38
18. Kentucky	37
19. Oregon	33
20. Indiana	24
21. Virginia	22
22. Idaho	20
23. Delaware	17
24. New Jersey	13
25. Nebraska	10
25. Utah	9
25. Illinois	9
28. Washington	9
29. Connecticut	8
29. Maryland	8
29. Kansas	8
32. Montana	4
32. South Dakota	4
34. Colorado	2

34. New Mexico 2

34. Wyoming 2

37. New York 1

38. New Hampshire 0

Source: NAACP Legal Defense Fund, Death Row USA 29-30 (Spring 2006)

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsRobberyArmed RobberyPenaltiesCriminal Law & ProcedureCriminal OffensesHomicideMurderCapital MurderPenaltiesCriminal Law & ProcedureSentencingCapital PunishmentAggravating Circumstances

FOOTNOTES:

n1. John Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row's Population and Racial Composition, 1 J. Empirical L. Stud. 165, 171 (2004) [hereinafter Blume et al.] (relying on a variety of data sets to analyze sentencing trends across nearly all **death penalty** states).

n2. That death is qualitatively distinct from other forms of punishment was an argument first made by Justice Potter Stewart in his concurring opinion in Furman v. Georgia. 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Justice Stewart further noted in that case that the **death penalty** is unique in "its absolute renunciation of all that is embodied in our concept of humanity." Id. The exceptionality argument was eventually made most fervently by Troy Gregg through his lawyer during oral argument in Gregg v. Georgia. Transcript of Oral Argument at 12-14, Gregg v. Georgia, 428 U.S. 153 (1976) (No. 74-6257) microformed on The Complete Oral Arguments of the Supreme Court of the United States 1975 Term (Univ. Publ'ns of Am., Inc.). The Court went on to reinstate the **death penalty** in that case after a four-year hiatus. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976).

n3. Tom R. Tyler, Why People Obey the Law 161-67 (1990) (arguing that the legitimacy of law enforcement and the justice system rests on citizens' perceptions of how procedurally fair the system is); see also J.R. Lasley, The Impact of the Rodney King Incident on Citizen Attitudes Toward Police, 3 Policing & Soc'y 245 (1994) (analyzing trends in attitude by race before and after the Rodney King incident); Tom R. Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?, 19 Behav. Sci. & L. 215, 233-34 (2001) (presenting an alternative procedural-justice-based model that links public trust and confidence to views about the manner in which legal authorities treat the public).

n4. For examples of research finding evidence of arbitrariness and discrimination in capital punishment see: David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the **Death Penalty:** A Legal and Empirical Analysis 400-06 (1990) [hereinafter Baldus et al.] (studying the empirical impact of Georgia's post-Furman procedural death sentencing reforms); Charles L. Black, Jr., Capital Punishment:

The Inevitability of Caprice and Mistake 51-53 (2d ed. 1981) (arguing that no meaningful standard operates in the U.S. justice system for determining who should receive the **death penalty)**; Barry Nakell & Kenneth A. Hardy, The Arbitrariness of the **Death Penalty** 158-61 (1987) (detailing the measure of arbitrariness found at the pretrial, trial, and verdict stages of capital prosecutions); William J. Bowers & Glenn L. Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Delinq. 563 (1980) (examining arbitrariness and discrimination under capital statutes in Florida, Georgia, Texas, and Ohio); Samuel R. Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984) (examining sentencing under post-Furman **death penalty** laws in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia); Raymond Paternoster, Race of Victim and Location of Crime: The Decision to Seek the **Death Penalty** in South Carolina, 74 J. Crim. L. & Criminology 754, 762, 783-85 (1983) (reporting and analyzing the charging decisions made by local prosecutors in South Carolina immediately post-Gregg). Other authors have argued that the capital punishment debate should focus on punishing crime perpetrators rather than on systemic problems such as arbitrariness and discrimination. See, e.g., Ernest van den Haag, The Collapse of the Case Against Capital Punishment, Nat'l Rev., March 31, 1978 at 397 ("Justice requires punishing the guilty... . Justice must always be preferred to equality."). Some authors argue that arbitrariness and discrimination present significant constitutional problems that must not be ignored, including the following: Stan Robin Gregory, Comment, Capital Punishment and Equal Protection: Constitutional Problems, Race and the **Death Penalty,** 5 St. Thomas L. Rev. 257, 259, 272-73 (1992) (arguing that "as a group, all death row inmates should be equally protected regardless of race"); James Luginbuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 Ind. L.J. 1161 (1995) (arguing that jurors' poor understanding of jury instructions undermines the safeguards against arbitrary decisions in North Carolina law); Stephen Nathanson, Does It Matter If the **Death Penalty** Is Arbitrarily Administered?,14 Phil. & Pub. Aff. 149, 161-62 (1985) (arguing that society must not tolerate the arbitrary administration of the ultimate punishment of death).

n5. Deborah Fins, NAACP Legal Def. and Educ. Fund, Death Row U.S.A. Spring 2006, at 57-58 (2006).

n6. Id.

n7. Blume et al., supra note 1, at 172.

n8. S.C. Const. art. V, 20.

n9. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

n10. Caldwell v. Mississippi, 472 U.S. 320, 323 (1985), provides evidence that prosecutors do make mistakes in interpreting state law. In Caldwell, the Supreme Court reversed a death sentence because the prosecutor overstated the extent and scope of appellate review of the jury's death sentencing decision under Mississippi law. Id. This error diminishes the jury's sense of responsibility for its **death penalty** decision. See id. at 333. At the district court level, some courts have found prosecutors' use of religious appeals in pursuing criminal prosecution to be improper because it suggests prosecutors are relying on laws other than the laws of the state. See, e.g., Commonwealth v. Chambers, 599 A.2d 630, 644 (Pa. 1991) (holding that reliance on any religious writing, such as the Bible, to support imposing the **death penalty** is reversible

error per se).

n11. See Kenneth Bresler, Seeking Justice, Seeking Election, and Seeking the **Death Penalty:** The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions, 7 Geo. J. Legal Ethics 941, 944 (1994) (arguing that it is unethical for prosecutors to campaign on their success rate on **death penalty** convictions).

n12. Incumbency protection is a common feature of all levels of American electoral politics. In addition, incumbent prosecutors often face weaker opponents, making defeat of these incumbents unlikely and their power largely unchecked. For a similar discussion related to judges, see Fred B. Burnside, Comment, Dying to Get Elected: A Challenge to the Jury Override, 1999 Wis. L. Rev. 1017, 1035-39 (1999) (describing the effects of popular election of judges on **death penalty** cases).

n13. 428 U.S. 153 (1976).

n14. See Nakell & Hardy, supra note 4, at 9-10.

n15. Paternoster, supra note 4, at 754-55.

n16. 408 U.S. 153 (1976).

n17. Id. at 754 (citing Furman, 408 U.S. at 257 (Marshall, J., dissenting)).

n18. Id.

n19. Raymond Paternoster, Capital Punishment in America 53 (George Ritzer ed., 1991).

n20. Paternoster, supra note 4, at 755.

n21. Id. at 754-55.

n22. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

n23. Id. at 309-10 (Stewart, J., concurring) (footnote omitted).

n24. Id. at 400-01 (Burger, C.J., dissenting).

n25. 428 U.S. 153, 206-07 (1976).

n26. 428 U.S. 262, 276-79 (1976).

n27. 428 U.S. 242, 260-61 (1976).

n28. See Gregg, 428 U.S. at 195 (1976).

n29. See id. at 197-98.

n30. Id. at 192 (Stewart, J., plurality opinion) ("It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.").

n31. Id. at 195.

n32. Id. at 207.

n33. See Appendix II for a listing of states' death row populations.

n34. See Gregory, supra note 4, at 260-61.

n35. See Baldus et al., supra note 4, at 401; Blume et al., supra note 1, at 200; Gross & Mauro, supra note 4, at 55; Paternoster, supra note 4, at 784; Raymond Paternoster et al., Justice by Geography and Race: The Administration of the **Death Penalty** in Maryland, 1978-1999, 4 Margins 1, 38-40 (2004); Michael L.

Radelet & Glenn L. Pierce, Choosing Those Who Will Die: Race and the **Death Penalty** in Florida, 43 Fla. L. Rev. 1, 26 (1991) [hereinafter Radelet & Pierce, Choosing]; Isaac Unah & John Charles Boger, Race, Politics, and the Process of Capital Punishment in the South 17, Presentation at the Annual Meeting of the American Political Science Association, Boston, Mass., Sept. 30-Oct. 3, 2002.

n36. 481 U.S. 279, 286-91 (1987).

n37. See Baldus et al., supra note 4, at 310-11.

n38. Id. at 401.

n39. McCleskey, 481 U.S. at 297-98.

n40. Id. at 308.

n41. Id. at 335 (Brennan, J., dissenting).

n42. Id. at 366 (Stevens, J., dissenting) (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)).

n43. One group of researchers has theorized that McCleskey does not foreclose use of sufficiently precise, case-specific statistical evidence to attack a death sentence on grounds of racial discrimination. See John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, Post-McCleskey Racial Discrimination Claims in Capital Cases, 83 Cornell L. Rev. 1771, 1778, 1799 (1998). Despite the Supreme Court's reticence to see the value of statistical evidence in disposing of **death penalty** cases, it has routinely permitted the use of statistical evidence in employment discrimination cases and others brought under Title VII of the Civil Rights Act of 1964. Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (2000); see, e.g., Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 621-22 (1987) (accepting statistical evidence to determine whether the Agency had violated Title VII of the Civil Rights Act).

n44. S.C. Code Ann. 16-3-20 (1976 & Supp. 2004). South Carolina law lists the following aggravating factors, one of which must be present beyond a reasonable doubt, to obtain a death sentence in South Carolina:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal corrections officer, a county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

n45. Id.

n46. From 1977 to 1981, South Carolina prosecutors sought the **death penalty** in only 35.8% of all homicides that were accompanied by a statutory aggravating factor. See Paternoster, supra note 4, at 768.

n47. Id. at 769.

n48. S.C. Code Ann. 16-3-20(C)(a)(3) (2003).

n49. S.C. Code Ann. 16-3-20(C)(a)(1)(h).

n50. See infra Section III.C.2.a.

n51. See Baldus et al., supra note 4, at 401; Ernie Thomson, Discrimination and the **Death Penalty** in Arizona, 22 Crim. Just. Rev. 65, 73 (1997); Marian R. Williams & Jefferson E. Holcomb, Racial Disparity and Death Sentences in Ohio, 29 J. Crim. Just. 207, 214 (2001); Unah & Boger, supra note 35, at 17.

n52. Baldus et al., supra note 4, at 401; Thomson, supra note 53, at 73; Williams & Holcomb, supra note 53, at 214; Unah & Boger, supra note 35, at 18.

n53. See Baldus et al., supra note 4, at 164; Paternoster et al., supra note 35, at 22, 34-35.

n54. Unah & Boger, supra note 35, at 20.

n55. U.S. Gen. Accounting Office, **Death Penalty** Sentencing: Research Indicates Pattern of Racial Disparities (1990).

n56. Id.

n57. Id.

n58. 481 U.S. 279, 286 (1987).

n59. Baldus et al., supra note 4, at 145.

n60. Id. at 2-3, 59.

n61. Id. at 401.

n62. Id. at 75.

n63. Id. at 401.

n64. Id. at 185.

n65. Id. at 401-03.

n68. Id.

n66. Id. at 327.

n67. Id. at 327 tbl. 56.

n69. Id.

n70. Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743, 749 (1993) (applying the term "victim discounting" to explain low sentencing rates in black victim cases, and noting that this is a form of racial discrimination that "benefits" black defendants).

n71. David C. Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661, 707-10 (1983) (discussing the low death sentencing rate in black victim cases).

n72. Baldus et al., supra note 4, at 401-03.

n73. Id. at 403.

n74. Radelet & Pierce, Choosing, supra note 35, at 20-29.

n75. See id. at 28 tbl.8. These nine factors are as follows: (1) race of the victim, (2) race of the defendant, (3) whether the crime was a felony or non-felony murder, (4) whether the victim was a stranger or non-stranger, (5) whether the crime involved single or multiple homicides, (6) the number of assailants, (7) the gender of the victim, (8) the type of weapon used in the crime (gun, knife, or other instrument), and (9) the location of the crime (rural or urban). Id.

n76. Id. at 26.

n77. Id. at 26-27.

n78. Id. at 28.

n79. Id. at 28.

n80. Michael L. Radelet & Glenn L. Pierce, Race and **Prosecutorial Discretion** in Homicide Cases, 19 Law & Soc'y Rev. 587, 615-19 (1985) [hereinafter Radelet & Pierce, **Prosecutorial Discretion**].

n81. Id. at 598.

n82. Id. at 597, 599.

n83. Id. at 595-96.

n84. Id.

n85. Id. at 596-97.

n86. Id. at 598.

n87. Id.

n88. Id. at 601.

n89. Id. at 615.

n90. Id. at 612.

n91. The study primarily analyzed the results for Georgia, Florida, and Illinois as the states with the highest number of death sentences, but the study also discussed the data for Arkansas, Mississippi, North Carolina, Oklahoma, and Virginia. Gross & Mauro, supra note 4, at 54.

n92. Id. at 49.

n93. Id. at 50.

n94. Id. at 70.

n95. Id. at 75.

n96. Id. at 79.

n97. Id. at 78-79.

n98. Id. at 79.

n99. Id. at 105.

n100. Paternoster, supra note 4, at 784.

n101. Id. at 762.

n102. Id. at 763-64.

n103. Id. at 783.

n104. Paternoster's analysis does not contain data on any homicides that occurred after December 31, 1981. See id. at 765.

n105. In addition to states previously mentioned, a Dallas Times Herald report using data from 1977 to 1984 found that defendants convicted of killing white victims in Maryland were 8 times more likely to face the **death penalty** than killers of black victims. See Jim Henderson & Jack Taylor, Killers of Dallas Blacks Escape the **Death Penalty,** Dallas Times Herald, Nov. 17, 1985, at 1. In Texas, the paper reported that killers of whites were over 5 times more likely to receive death sentences than killers of blacks. Id. In Virginia, analysis by John Blume and colleagues from 1977 to 1999 revealed that only 0.36% of black-on-black murders resulted in death sentences while nearly 6.5% of cases involving black defendants and white victims led to the **death penalty.** See Blume et al., supra note 1, at 199.

n106. Williams & Holcomb, supra note 51, at 214 (finding that black defendants accused of killing white victims were over 2 times more likely to receive a death sentence than white defendants accused of killing white victims).

n107. Paternoster et al., supra note 35, at 35-36 (finding black offenders who kill white victims are more likely to be sentenced to death in Maryland).

n108. Unah & Boger, supra note 35, at 17 (finding that when a nonwhite defendant kills a white victim, the death sentencing rate is 5.1%, compared with a sentencing rate of 1.5% when a nonwhite defendant kills a nonwhite victim).

n109. See Baldus et al., supra note 4, at 162 (showing that Georgia prosecutors sought the **death penalty** in 58% of cases involving a black defendant and white victim, 38% of cases involving a white defendant and white victim, 21% of cases involving a white defendant and black victim, and 15% of cases involving a black defendant and black victim); Blume et al., supra note 1, at 197, 199 (stating that 6.5% of black-on-white murders in Virginia led to the **death penalty,** a far higher proportion than any other racial combination of victims and defendants); Gross & Mauro, supra note 4, at 78-79 (stating that in Florida, white victim cases are 4.8 times more likely to result in death sentences than black victim cases).

n110. See Baldus et al., supra note 4, at 403 (noting that **prosecutorial discretion** is the main source of race of victim disparities); Blume et al., supra note 1, at 202 (stating that prosecutors systematically decline to seek the **death penalty** in black-on-black cases). But see Unah & Boger, supra note 35, at 24 (stating that prosecutorial charging decisions are not the cause of disparate outcomes).

n111. For a general discussion of the relationship of the **death penalty** and lynchings to changes in race relations, see Charles David Phillips, Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918, 21 Law & Soc'y Rev. 361, 368-72 (1987).

n112. Jeffrey J. Pokorak, Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors, 83 Cornell L. Rev. 1811, 1817 (1998).

n113. See Stephen B. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the **Death Penalty,** 35 Santa Clara L. Rev. 433, 437 (1995).

n114. Id.

n115. See e.g., Douglas O. Linder, Juror Empathy and Race, 63 Tenn. L. Rev. 887, 900-02 (1996) (discussing studies showing relationship of race to empathy).

n116. Bright, supra note 113, at 451-52. For an in-depth discussion of how disparate police activity affects attitudes towards the criminal justice system, see Richard R.W. Brooks, Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities, 73 S. Cal. L. Rev. 1219, 1227-29 (2000).

n117. Bright, supra note 113, at 451-52.

n118. Id. at 452.

n119. Id. at 451.

n120. See Evan Tsen Lee & Ashutosh Bhagwat, The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing, 1998 Sup. Ct. Rev. 145, 159 (1999) (arguing "prosecutors are free to discriminate against victims on the basis of race" so long as they are not overt) (citing McCleskey v. Kemp, 481 U.S. 179, 297 (1987)).

n121. Id. at 169.

n122. See Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 Fordham L. Rev. 13, 24, 38-50 (1998).

n123. See, e.g., J. Eric Oliver & Tali Mendelberg, Reconsidering the Environmental Determinants of White Racial Attitudes, 44 Am. J. Pol. Sci. 574, 575-76 (2000) (discussing how white housing patterns affect implementation of race-targeted policies).

n124. See Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 110 (1993) (discussing the link between prejudice and segregation); cf. Alan J. Lizotte & David J. Bordua, Firearms Ownership for Sport and Protection, 45 Am. Soc. Rev. 229, 239-41 (1980) (finding no correlation between firearm ownership for protection and the proximity of blacks but noting the possibility that proximity of blacks is used as a proxy measure for the one statistically significant predictor, actual county crime rate).

n125. Marian J. Borg, The Southern Subculture of Punitiveness? Regional Variation in Support of Capital Punishment, 34 J. Research in Crime & Delinq. 25, 29 (1997).

n126. Lizotte & Bordua, supra note 124, at 241.

n127. See Adalberto Aguirre & David V. Baker, Racial Prejudice and the **Death Penalty:** A Research Note, 20 Soc. Just. 150, 151-52 (1993) (discussing the association between racist attitudes and support for the **death penalty)**.

n128. See Unah & Boger, supra note 35, at 21 (analyzing North Carolina data).

n129. See, e.g., Baldus et al., supra note 4, at 121 (noting a dramatic difference in death sentencing between urban and rural Georgia); Gross & Mauro, supra note 4, at 65 (reporting findings of a greater likelihood of a death sentence for murders committed in rural Georgia and Florida, but not Illinois); Paternoster, supra note 4, at 779-80 (finding disparities in South Carolina due to urban/rural distinctions); Richard Willing & Gary Fields, Geography of the **Death Penalty,** USA Today, Dec. 20, 1999, at A1 (discussing nationwide evidence of an urban/rural disparity).

n130. Paternoster, supra note 4, at 780.

n131. Id. at 778-79.

n132. Id. at 780.

n133. Willing & Fields, supra note 129.

n134. Id.

n135. Id.

n136. Blume et al., supra note 1, at 171-75.

n137. Id. at 172 tbl.1 (stating that the death sentencing rate in Nevada is 6% and in Colorado is 0.4%).

n138. Id. at 176.

n139. Davis, supra note 122, at 57.

n140. See Sanford C. Gordon & Gregory A. Huber, Citizen Oversight and the Electoral Incentives of Criminal Prosecutors, 46 Am. J. Pol. Sci. 334, 346-49 (2002) (analyzing empirically the role of constituency pressure in the decisions prosecutors make).

n141. Pokorak, supra note 112, at 1811-12.

n142. Id.

n143. See Schuyler Kropf, Judge Discusses **Death Penalty;** Law Students Are Told Future Lawyers to Decide Value of Capital Punishment, Post and Courier (Charleston, S.C.), Sept. 15, 2006, at B3.

n144. Paternoster, supra note 4, at 778-79, 779 tbl.6 (stating that after considering exclusively cases that contained at least one statutory aggravating factor, prosecutorial seek rates still varied from 86.7% in Judicial District Fifteen to 16.7% in District Four).

n145. Blume et al., supra note 1, at 182-83.

n146. Id.

n147. See Kristin Kanthak & Barbara Norrander, The Enduring Gender Gap, in Models of Voting in Presidential Elections 141, 141-42 (Herbert F. Weisberg & Clyde Wilcox, eds., 2004).

n148. Id.

n149. See, e.g., Cassia C. Spohn & Jeffrey W. Spears, Gender and Case Processing Decisions: A Comparison of Case Outcomes for Male and Female Defendants Charged with Violent Felonies, 8 Women & Crim. Just. 29, 51-54 (1997) (finding that in a study of Detroit offenders, women were treated more leniently than men at the charging, convicting, and sentencing stages).

n150. Andrea Shapiro, Unequal Before the Law: Men, Women and the **Death Penalty,** 8 J. Gender Soc. Pol'y & L. 427, 449-53 (2000) (surveying the literature).

n151. See Meg Kinnard, Murder Case Leads to Rarity for S.C., State (Columbia, S.C.), June 26, 2006, at A1 (indicating that "prosecutors are seeking the **death penalty** against Jennifer Annette Holloway of Tennessee for the kidnapping and murder of an S.C. businessman").

n152. Id.

n153. Victor Streib, **Death Penalty** for Female Offenders, January 1, 1973, through June 30, 2006, at 3.

n154. Id.

n155. Id. at 6.

n156. Victor L. Streib, **Death Penalty** for Female Defendants, 58 U. Cin. L. Rev. 845, 875 (1990).

n157. Id. at 875-76 (noting the perception that female offenders are less dangerous to society and that women commit fewer premeditated murders).

n158. Cf. Ex parte Littlefield, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000) ("The South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands.").

n159. As reported to the FBI and recorded in the agency's Supplemental Homicide Reports (on file with authors).

n160. FBI Supplementary Homicide Reports, 1993-1997. This figure does not include cases reported to the FBI in which there was no known defendant.

n161. This percentage does not account for whether the state actually sought the **death penalty** in a trial or allowed a plea bargain.

n162. Paternoster, supra note 4, at 763.

n163. The Official Website of the State of South Carolina, http://www.sc.gov (last visited Oct. 10, 2006).

n164. Radelet and Pierce compared SHR data to court data in their extensive study of Florida's **death penalty** system. See supra notes 74-91 and accompanying text. Gross and Mauro's eight-state analysis relied exclusively on information from the SHRs and found statistically significant race-of-the-victim effects in each state. See supra notes 92-101 and accompanying text.

n165. Blume is Associate Professor of Law and Director of the Cornell Law School **Death Penalty** Project. Blume provided information on several cases in the list of 130 capital prosecutions by the state of South Carolina during the 1993-1997 period.

n166. See Gross & Mauro, supra note 4, at 53.

n167. To conduct this test, we calculated the 95% confidence interval for the difference between the two proportions. The formula is:

[SEE EQUATION IN ORIGINAL]

where p<1> is the **death penalty** seek rate for white victims and p<2> is the **death penalty** seek rate for black victims, n<1> is white homicides and n<2> is black homicides, zeta ([ZETA]) is 1.96 (the statistical value for 95% confidence interval) and <radicalb>(.) is the standard deviation of the difference between the two proportions. Using this formula, the calculated confidence interval is (0.0444, 0.0816). Since the interval does not include zero, we reject the null hypothesis that there is no meaningful difference between the two death seek rates. This means that we are 95% confident that South Carolina prosecutors seek the **death penalty** in white victim cases significantly more than in black victim cases and that the percent more falls within the .0444 and .0816 interval. For further discussion of the difference of proportions test, see David S. Moore, Basic Practice of Statistics 492-96 (3rd ed. 2004).

n168. See Gross & Mauro, supra note 4, at 54-55.

n169. Stated differently, Table 3 gives the **death penalty** seek rates for defendants arranged by race but controlling for the race of the victim.

n170. See Baldus et al., supra note 4, at 401, for evidence of victim discounting in Georgia.

n171. S.C. Code Ann. 16-3-20 (2003).

n172. See Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers 12.1, 321 (1990).

n173. Ordinary least squares estimation technique is inappropriate because, given the dichotomous nature of the dependent variable, an important assumption of normally distributed error variance is violated. Logistic regression techniques overcome this important problem and produce unbiased, reliable estimates. See John H. Aldrich & Forrest D. Nelson, Linear Probability, Logit, and Probit Models 52-54 (1984); see also Finkelstein & Levin supra note 172, at 451 (explaining benefits of maximum likelihood method).

n174. See Finkelstein & Levin, supra note 172, at 448 (explaining that a logarithmic unit is also called a "logit," and that logistic regression is also known as logit regression).

n175. Lawrence C. Hamilton, Regression with Graphics: A Second Course in Applied Statistics 230 (1992).

n176. The analysis was conducted using the SPSS statistical software.

n177. Hamilton, supra note 175, at 44.

n178. S.C. Code Ann. 16-3-20(C)(a)(10) (2003).

n179. See, e.g., Baldus et al., supra note 4, at 157 (noting many characteristics of cases that statistically impact whether the **death penalty** is sought); Gross & Mauro, supra note 4, at 80 (explaining the influence of aggravating factors on the odds of receiving a death sentence); Radelet & Pierce, Choosing, supra note 36, at 13 (noting, among other factors, that "death sentences are more often imposed in cases of multiple murder").

n180. There is no statutory provision for any consideration of prior relationship between the offender and victim. S.C. Code Ann. 16-3-20 (2003). South Carolina statutes do not include familial ties in the list of statutory aggravating factors or permissible considerations for determining punishment. Id.

n181. Id.

n182. In addition to assessing the effects of various demographic populations, political pressure should be assessed by evaluating the political ideology of different districts. After all, most prosecutors are elected from within their local judicial districts and should be expected to respond to district pressure. The popular notion is that support for the **death penalty** tends to be higher in conservative districts that pride themselves on belief in law and order than in liberal districts. We measured district political ideology through the percentage vote received by the Republican candidate, Senator Robert Dole, during the 1996 presidential election. We assumed that conservative districts voted for Dole because they found his overall conservative platform, not just his stance on capital punishment, more consistent with their values than the platform presented by his opponent, incumbent Bill Clinton. But a correlation analysis indicates that district ideology is highly correlated with percent minority in the district ($r = .82$). Therefore, we consider percent minority as an alternative measure for district ideology. To deal with the high multicollinearity that would be produced by the possible inclusion of these two variables in the regression model, we combined the two variables to form one new variable we called "new district ideology." The results did not change by replacing percent minority with this new variable and re-estimating the model. This finding bolstered our

conviction that percent minority is an alternative measure for district ideology in South Carolina. For more on the use of this technique for dealing with multicollinearity, see John Fox, Regression Diagnostics 14-15 (1991).

n183. See supra note 129 and accompanying text.

n184. Paternoster, supra note 4, at 780.

n185. Metropolitan Statistical Areas are areas "containing a recognized population nucleus and adjacent communities that have a high degree of integration with that nucleus." Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82,228 (Dec. 27, 2000). The Office of Management and Budget develops Metropolitan Statistical Areas to provide consistent geographical areas for use by federal agencies. Id.

n186. The four urban districts (with urban center in parentheses) are District Five (Columbia), District Seven (Spartanburg), District Nine (Charleston), and District Thirteen (Greenville). Although each of these districts includes other counties that may reasonably be considered rural, the vast majority of each district's residents live in urban areas.

n187. The seven are Districts Eight, Ten, Eleven, Twelve, Thirteen, Fifteen, and Sixteen.

n188. In the other nine districts, some homicides in the database in which the state sought the **death penalty** had to be marked "not **death penalty**" because no match with a **death penalty** case could be positively determined. In the seven districts used in the district logistic analysis, all cases coded "not **death penalty**" are definitely not **death penalty** cases.

n189. We excluded district ideology from this second logistic model because it was not statistically significant in this or any of our models. Diagnostic testing indicates that district ideology is highly correlated with minority percentage in the district (r = .82).

n190. District Eleven had a calculated odds ratio of 6.44, the second highest odds ratio of the examined districts (District Sixteen had an odds ratio of 6.89).

n191. Man Gets Life, No Parole for Killing Two, Post & Courier (Charleston, S.C.), Mar. 6, 2000, at C6.

n192. Clif LeBlanc, Solicitor Finds His Wife Dead, State (Columbia, SC), Apr. 4, 2006.

n193. State's Death Row Population Adds 8, Rises to 68 in 1996, The Herald (Rock Hill, S.C.) Jan. 13, 1997, at A8.

n194. Willing & Fields, supra note 93.

n195. Id.

n196. Id.

n197. Id.

n198. Id.

n199. Of the 273 homicides in District Five (containing Richland County) during the period of this analysis, no defendant was sentenced to death.

n200. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

n201. Gregg v. Georgia, 428 U.S. 153, 195 (1976) (Stewart, Powell, and Stevens, J.J.) (plurality opinion) ("The concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").

n202. Gregory, supra note 4.

n203. From Justice John Marshall Harlan's famous dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

n204. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

n205. McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).