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Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina

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CHOOSING THOSE WHO WILL DIE: THE EFFECT OF
RACE, GENDER, AND LAW IN PROSECUTORIAL
DECISION TO SEEK THE DEATH PENALTY IN
DURHAM COUNTY, NORTH CAROLINA

Isaac Unah*

District prosecutors in the United States exercise virtually unfettered power and discretion to decide which murder cases to prosecute for capital punishment. According to neoclassical theory of formal legal rationality, the process for determining criminal punishment should be based upon legal rules established and sanctioned by the state to communicate the priorities of the political community. The theory therefore argues in favor of a determinate mode of decision-making that diminishes the importance of extrinsic elements such as race and gender in the application of law. In the empirical research herein reported, I test this theory using death eligible cases in Durham County, North Carolina from 2003 to 2007.

*The analysis indicates that although law has an important effect in determining criminal punishment, extrinsic elements such as race and gender overwhelm the law in influencing prosecutorial decisions to go for death. Durham county prosecutors are 43% more likely to seek the death penalty when a Black defendant kills a White victim compared to a situation where a Black defendant kills a Black victim. The analysis also demonstrates the existence of a gender gap in prosecutorial decision-making. Female murder victims are significantly more likely to precipitate a capital prosecution compared to male victims. These results have important policy implications. Despite publicized attempts by the Supreme Court to eradicate the twin evils of arbitrariness and discrimination from our system of capital punishment, these problems persist. Therefore, it is important for policy makers to devise explicit mechanisms to channel the discretionary judgments of local prosecutors toward greater reliance upon legal precepts rather than extra-legal considerations such as race and sex. As Justice William Brennan warned in his dissent in *McKleskey v. Kemp*, "The way in which we choose those who will die reveals the depth of moral commitment among the living."*

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INTRODUCTION

During the past three decades, approximately two percent of all murders committed in the United States by known offenders have resulted in a death sentence.¹ Before murder cases reach the sentencing stage of criminal procedure, numerous consequential decisions must be rendered by prosecuting and defense attorneys, judges, and jury. In practical terms, these decisions animate and shape the nature of capital prosecution and punishment in the United States.

In spite of several legal guidelines that have been instituted to safeguard the integrity of the U.S. criminal justice system, law enforcement remains an imperfect manifestation of the hope and ideals of governmental power. The human decision makers who staff the criminal justice system, including prosecutors, judges, and juries are not infallible. Yet they exercise broad discretion within a porous network of rules when deciding which murder cases merit the death penalty and which do not.

1. John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 174 (2004) (relying on a variety of datasets to analyze death row and execution trends across all death penalty states, and finding that a disproportionate number of death row inmates are black).

Because the death penalty is exceptional and irrevocable as a mechanism of social control,² it is especially important in a democratic society that citizens and policy makers understand how prosecutors, judges, and juries exercise their discretion to ensure that the choices they make are not racially motivated. The importance of this issue is best explained by Justice Anthony Kennedy in *Edmonson v. Leesville Concrete Company*³ when he stated that “racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming reality.”⁴ Citizens will only bestow a high level of public esteem upon the criminal justice system if the stewards of that system are perceived to be fair rather than unfair in the decisions they make.⁵

In the United States, the discretionary use of the death penalty creates many systemic dangers.⁶ Two of the most important are arbitrariness and discrimination.⁷ Both are salient and highly contested subject-matters in social science scholarship and in law.⁸ This Article seeks

2. 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). He 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 (Anthony G. Amsterdam) on March 30th, 1976 during oral argument in *Gregg v. Georgia*, 428 U.S. 153 (1976). See PETER IRONS & STEPHANIE CUITTON, *MAY IT PLEASE THE COURT* 232 (1993) (discussing the oral argument in *Gregg*). The Court went on to reinstate the death penalty in that case after a four-year hiatus.

3. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

4. *Edmonson*, 500 U.S. at 628.

5. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 73–74 (1990) (arguing that the legitimacy of law enforcement and the justice system rests on how procedurally fair citizens perceive the system to be); 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 *BEHAVIORAL SCIENCES AND THE LAW* 215, 215 (2001); J.R. Lasley, *Impact of the Rodney King Incident on Citizen Attitudes Toward Police*, 3 *POLICING AND SOCIETY* 245 (1994).

6. Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 117 (James R. Acker, Robert M. Bohm, and Charles S. Lanier, eds., 2003) (arguing that the lack of fairness in America’s death penalty system is a structural problem).

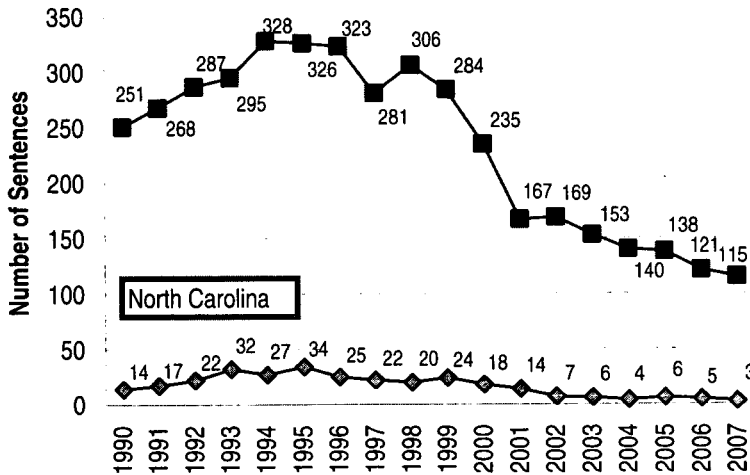
7. BARRY NAKELL & KENNETH HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987); DAVID BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); Raymond Paternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 *J. OF CRIME AND CRIMINOLOGY* 754 (1983).

8. Research finding evidence of arbitrariness and discrimination in capital punishment include: DAVID BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990); CHARLES BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 29 (2d ed. 1981) (arguing that no meaningful standard operates in the U.S. justice system for determining who should receive the death

to explore the answers to two critical questions: Do criminal prosecutors select the small number of death penalty cases from the large number of murders solely on the basis of legally relevant criteria such as the severity of the offense? Or is the decision to “go for death” linked in an important way to legally intolerable and irrational criteria such as race or gender? The central objective of this work is to contextualize the prosecutor’s decision to seek the death penalty by empirically examining the potential importance of race, gender, and legally relevant factors. I rely on murder indictments between 2003 and 2007 in Durham County, North Carolina. Focusing on this time period is appropriate for two reasons. First, it sets up a difficult empirical test. As Figure 1 indicates, the period coincides with a general decline in the use of capital punishment in North Carolina and nationwide. All things being equal, this should make it harder to find strong evidence of arbitrariness since presumably there are fewer opportunities for arbitrary treatment to occur. Second, it suggests a growing public repudiation of, or reluctance to impose, death sentences.

penalty); BARRY NAKELL & KENNETH HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987); William Bowers & Glenn Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 *CRIME & DELINQUENCY* 563 (1980); Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 *STAN. L. REV.* 27 (1984); Raymond Paternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 *J. CRIME & CRIMINOLOGY* 754 (1983). Authors arguing that the focus of debates should be on punishing crime perpetrators rather than on systemic problems such as arbitrariness and discrimination include: Ernest van den Haag, *The Collapse of the Case Against Capital Punishment*, *NATIONAL REVIEW*, Mar. 31, 1978, at 395. Papers arguing that arbitrariness and discrimination present significant constitutional problems that must not be ignored include: Stan Robin Gregory, *Capital Punishment and Equal Protection: Constitutional Problems, Race and the Death Penalty*, 5 *ST. THOMAS L. REV.* 257, 259 (1992); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 *IND. L.J.* 1161, 1161 (1995); Stephen Nathanson, *Does it Matter if the Death Penalty is Arbitrarily Administered?*, 14 *PHIL. & PUB. AFF.* 149, 150 (1985).

FIGURE 1
DECLINING TREND IN DEATH SENTENCES IN
NORTH CAROLINA AND THE UNITED STATE



Data source: Death Penalty Information Center.⁹ The squared line represents death sentences in the United States. The diamond line represents death sentences in North Carolina.

Figure 1 shows that the contemporary national downward trend in the number of death sentences started in 1998 when Bill Clinton was preparing to leave office. In that year 306 convicts were sentenced to death. The figure also shows that North Carolina experienced a two year lag behind the nation as a whole. North Carolina’s declining trend started in 2000 when 18 convicted felons were sentenced to death. The declining trend increased after the passage of key reform legislation in 2001, creating the Office of Indigent Defense Services (to improve justice) and granting prosecutors greater discretion to decide whether to pursue the death penalty even though aggravating circumstances are present.¹⁰

Sections I of this Article examines the problem of untrammelled prosecutorial discretion. Section II addresses why it is important that this analysis focuses on Durham County, North Carolina. Because this is an empirical study, I discuss in Section III the dependent variable (the decision of Durham County prosecutors to seek the death penalty for

9. Death Penalty Information Center, *Death Sentences in the United States From 1977 to 2007*, <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2007>, (last visited March 17, 2009).

10. N.C. GEN. STAT. § 15A-2004 (West 2009) was passed in 2001. Detailed empirical analysis of the impact of this reform legislation remains to be conducted.

known defendants). In Section IV, I explain the independent variables focusing on legal factors such as the number of criminal indictments brought against the defendant, and extra-legal factors such as the racial configuration of the offense and gender. Section V provides a focused description of the Durham County capital prosecution data. Section VI examines the results of the analysis and their implications for prosecutorial decision-making and the structural issue of fairness in the criminal justice system. Finally, sections VII and VIII discuss respectively the limitations and conclusions of this study.

I. ADDRESSING THE PROBLEM OF UNFETTERED PROSECUTORIAL DISCRETION

In the American scheme of justice, state prosecutors exercise unfettered power and discretion to decide which felony cases to prosecute for capital punishment and what prosecutorial strategy to adopt. Despite this widespread prosecutorial discretion, the decisions they make should still follow the neoclassical theory of formal legal rationality.¹¹ According to this theory, the process for determining criminal punishment should be based solely upon legal rules established and sanctioned by the state to communicate the priorities of the political community.¹² The theory recognizes that law is formal in character and usage; therefore, it argues in favor of a determinate mode of decision-making that diminishes the significance of extrinsic elements such as race and gender in the application of law.¹³ The advantage of this mode of legal decision-making is the universality and predictability that it fosters for all who must abide by the law and all who must interpret and implement it. But because legal rules are in many ways imprecise, questionable prosecutorial decisions are inevitable. Indeed they do occur regularly¹⁴ and, unfortunately, often because of the need for prosecutors to enhance their own professional

11. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY (1978); Max Rheinstein, *Max Weber on Law in Economy and Society*, in *LAW AND SOCIETY: READINGS ON THE STUDY OF LAW* 185 (Stewart Macaulay, Lawrence M. Friedman & John Stookey eds., 1995).

12. WEBER, *supra* note 11; Joachim J. Savelsberg, *Knowledge, Domination, and Capital Punishment* 99 AM. J. SOC. 911, 926 (1994); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48-53 (1999) (explaining the meaning of the legal model of judicial decision-making); Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81, 85 (Oxford University Press) (1992).

13. Savelsberg, *supra* note 12, at 924.

14. 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. Daniels*, 644 A.2d 1175, 1183 (Pa. 1994).

careers.¹⁵ Importantly, when prosecutors do exercise poor judgment,¹⁶ they are rarely punished politically through electoral defeat.¹⁷

During the 1970s and 1980s, the United States Supreme Court grappled with the issue of discretionary decision-making in capital cases and called for statutory standards that will guide the exercise of discretion by judges and juries in sentencing through its 1972 landmark decision, *Furman v. Georgia*.¹⁸ Guided discretion introduced individualized consideration into the process of determining capital punishment by channeling the jury's decision.¹⁹ The purpose of guided discretion was to bring about uniformity and eliminate bias in the administration of capital punishment.²⁰ Through *Furman*, the Court invalidated every death penalty statute in the United States.²¹ Although a majority of the Justices agreed

15. 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, 943 (1994) (arguing that it is improper for prosecutors to campaign on their success rate on death penalty convictions).

16. *Caldwell v. Mississippi*, 472 U.S.320 (1985) (providing evidence that prosecutors do make mistakes in interpreting state law). In this case 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 has the effect of diminishing 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. *Commonwealth v. Daniels*, 644 A.2d 1175, 1183 (Pa. 1994).

17. 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 more on this, *see generally* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. LAW 581-610 (forthcoming 2009) (electronic available at <http://ssrn.com/abstract=1339939>); Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017 (1999).

18. *See Furman*, 408 U.S. 238. at 256 (Douglas, J. concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."); *See Id.* at 400 (Burger, C.J., dissenting) ("[I]f state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made.").

19. *See Gregg*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, the discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

20. Nakell & Hardy, *supra* note 7, at 9; Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUMAN BEHAV. 337, 338 (2000).

21. *Furman*, 408 U.S. at 256 (Douglas, J., concurring). In *Furman*, William Furman was convicted and sentenced to death for murder. In the Texas case, Elmer Branch was sentenced to death on his conviction for rape. The Court consolidated the cases for decision. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 1172 (W.W. Norton and Co, 6th ed.) (2005).

that the death penalty was being applied arbitrarily in Georgia based on race, they were split in their reasoning.²² Only Justices Brennan and Marshall considered the death penalty unconstitutional *per se* and all five members of the *Furman* majority wrote separate opinions in what remains the longest opinion in Supreme Court history.²³ The most tenuous support for the decision came from Justices White and Stewart.²⁴ Both expressed the view that the death penalty as *practiced* during the early 1970s was unconstitutional because of the capricious manner capital defendants were selected by state prosecutors.²⁵ 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.”²⁶ Justice Stewart concurred, noting that this arbitrary meting out of death sentences constituted cruel and unusual punishment under the principles of the Eighth Amendment. Justice Stewart argued that the death penalty is:

[c]ruel 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 as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he 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.²⁷

Chief Justice Burger’s dissenting opinion, joined by Justices Blackmun, Powell, and Rehnquist, emphasized the hope that state legislatures will in the future 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*.²⁸ In three 1976 cases, *Gregg v. Georgia*,²⁹ *Jurek v. Texas*,³⁰ and *Proffitt v. Florida*,³¹ the Supreme

22. *Furman*, 408 U.S. at 238–470.

23. Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S. C. L. REV. 161, 165 (2006).

24. Paternoster, *supra* note 7, at 754–55.

25. *Furman*, 408 U.S. at 313 (White, J., concurring).

26. *Id.*

27. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

28. *Furman*, 408 U.S. at 375 (Burger, C.J., Blackmun, Powell & Rehnquist, JJ., dissenting).

29. *Gregg*, 428 U.S. at 153 (1976).

30. *Jurek v. Texas*, 428 U.S. 262 (1976).

31. *Proffitt v. Florida*, 428 U.S. 242 (1976).

Court upheld new death penalty sentencing schemes established by states in response to *Furman*.³² The new 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 murder.³³ Unless a jury finds at least one statutory aggravating factor that increases the severity of the murder, the state cannot impose the death penalty.³⁴ These factors typically include (but are usually not limited to) murders incident to additional felonies, such as armed robbery, burglary, killing of multiple victims, or endangering other people besides the victim.³⁵

The Court expected these statutes to eliminate arbitrariness by directing the attention of prosecutors and juries to specified characteristics of the offense.³⁶ The majority in *Gregg* held that, “[t]he concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”³⁷ The Court believed the new standards were significantly more structured than the pre-*Furman*, sentencing schemes. Under the new “structured” sentencing guidelines pronounced in *Gregg*, the Court opined that, “[t]he jury’s discretion is channeled. No jury can wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.”³⁸ The Supreme Court’s acceptance of Georgia’s new guidelines in *Gregg* led other states to adopt death-sentencing schemes similar to Georgia’s. Nearly all of the 38 states³⁹ currently permitting capital punishment employ a bifurcated sentencing process and guided discretion modeled after Georgia.⁴⁰

Despite the safeguards established by the Court in *Gregg*, empirical research suggests that sharp racial disparities persist in capital prosecution and sentencing.⁴¹ Many post-*Gregg* studies indicate profoundly different sentencing rates for different racial combination of victims and defendants.⁴² Eleven years after the *Gregg* decision, the use of statistical

32. Songer, *supra* note 23.

33. *Gregg*, 428 U.S. at 190–91.

34. *Id.* at 198.

35. *Id.* at 20506.

36. *Id.* at 206.

37. *Id.* at 155.

38. *Id.* at 206–07.

39. Blume, *supra* note 1, app. II, at 172.

40. Gregory, *supra* note 8, at 261.

41. Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 J. CRIM. JUST. 207–18 (2001).

42. See, e.g. BALDUS, *supra* note 7; Blume, *supra* note 1; Gross, *supra* note 8; Paternoster, *supra* note 8; Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland*, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 1 (2004);

evidence demonstrating discriminatory impact in capital sentencing came to the Supreme Court in *McCleskey v. Kemp*.⁴³ McCleskey, a Black male Georgian, convicted of killing a White police officer, presented in his defense, a comprehensive study of Georgia's post-*Gregg* capital punishment system conducted by David Baldus and his colleagues.⁴⁴ The Baldus study was truly seminal in its detail and conclusions. After controlling for dozens of potentially significant murder conditions, Baldus et al. determined that the odds of receiving a death sentence were 4.3 times greater in White-victim cases than in Black-victim cases.⁴⁵

Despite powerful statistical documentation of racially disparate sentencing patterns, the Court in its 1987 *McCleskey* decision ruled that direct evidence of purposeful discrimination was necessary to overturn death-sentencing schemes.⁴⁶ The Court affirmed that the presence of discriminatory intent in a defendant's case was an absolute requirement for showing racial discrimination.⁴⁷ Writing for the 5–4 majority, Justice Lewis Powell noted, "Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions. At most, they may show only a likelihood."⁴⁸ Four justices dissented from the majority's discriminatory intent requirement and insisted that the demonstrated patterns of racial disparity alone were sufficient to invalidate the sentencing statute.⁴⁹ Justice Brennan contended:

The studies demonstrate a strong probability that McCleskey's sentencing jury was influenced by the fact that he 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 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.⁵⁰

Michael Radelet and Glenn Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); Isaac Unah & John Charles Boger, *Race and the Process of Capital Punishment in the New South* (Sept. 8 2002) (unpublished manuscript, presented at the Annual Meeting of the American Political Science Association, Boston Mass., Sept. 31–Oct. 3, 2002), available at http://www.allacademic.com/met/p56960_index.html (follow "Get This Document"; then follow "American Political Science Foundation"; then follow ".PDF").

43. *McCleskey v. Kemp*, 481 US 279 (1987).

44. BALDUS, *supra* note 7 at 40–46

45. *Id.* at 401.

46. *McCleskey*, 481 U.S. at 292.

47. *Id.*

48. *Id.* at 308.

49. *Id.* at 320.

50. *Id.* at 366 (Stewart, J., dissenting).

Despite these objections, the Court's five-member majority mandated that defendants prove specific discrimination in their own cases, rendering impotent virtually all statistical challenges to death penalty statutes based on racial disparities.⁵¹ 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 v. Georgia*.

While the Court's death penalty decisions have focused mostly on arbitrariness in sentencing, there is an implicit assumption that the legal reforms or innovations instituted by the Court, especially through *Gregg*, will be reflected not only in jury decision-making but also in the prosecutor's selection of cases for the death penalty. Indeed in enunciating its structured sentencing guidelines in *Gregg*, the Burger Court envisioned that prosecutors seeking the death penalty would emphasize classical legal factors, those state-sanctioned aggravating circumstances that applied to the murder at issue rather than be unduly influenced by legally irrelevant considerations such as race or sex. I address in this Article whether this vision expressed so forcefully and clearly in *Gregg* to address Constitutional concerns of arbitrariness, has been obtained in Durham County by analyzing the extent to which extra-legal factors such as race and sex exert significant influence on the choices prosecutors make about who should face a capital trial.

II. WHY STUDY DURHAM COUNTY, NORTH CAROLINA?

This study focuses on Durham County for several reasons. First, the County is situated in the heart of the Research Triangle Area of North Carolina and is one of the largest and politically most progressive and racially mixed counties in North Carolina and throughout the South. Theoretically, this should make it difficult to find evidence of racial disparity and discrimination in the prosecution of capital cases. Second, the County is similar to most other North Carolina counties because it is neither among the most aggressive nor the least aggressive in pursuing the death penalty since reinstatement of capital punishment in 1976. Based upon a relatively recent unpublished study of capital prosecutions in North Carolina, Durham County ranks near the middle in death penalty prosecutions among North Carolina counties.⁵² Third, the County population is 38% Black in a region that is predominantly White, a feature

51. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (despite its reticence to see the value of statistical evidence in disposing of death penalty cases, the Supreme Court has routinely permitted the use of statistical evidence in employment discrimination cases and others brought under Title VII of the Civil Rights Act of 1965).

52. Unah, *supra* note 42, at 44.

that is shared by many other urban counties in the state.⁵³ Finally, Durham County is similar to other death penalty jurisdictions in that it employs a bifurcated judicial process for determining the death penalty as mandated by the Supreme Court in *Gregg v. Georgia*.⁵⁴

While I cannot claim that Durham County is politically and culturally representative of other counties within North Carolina or other states, I do claim that Durham County is not an outlier and that it exhibits political and legal characteristics that have been found in most other death penalty jurisdictions in North Carolina and nationwide. For example, district attorneys in Durham County are popularly elected and thus must face constituency pressure as in most other death penalty jurisdictions statewide.⁵⁵ For these reasons, it is reasonable to assume that while the analysis and findings herein reported are most germane to Durham County, the conclusions reached are useful in informing death penalty debates throughout North Carolina and indeed nationwide.

III. DEPENDENT VARIABLE: THE DECISION TO SEEK THE DEATH PENALTY

The empirical analysis herein reported deals primarily with the causal factors linking the selection of death penalty cases by Durham County prosecutors. Therefore, the dependent variable is a binary outcome: whether the prosecutor seeks the death penalty or not. Although the Supreme Court in *Gregg v. Georgia* asserted that some racial difference in criminal justice decision-making is inevitable, prosecutors as agents of the state are expected to apply state laws fairly, uniformly, and dispassionately. A number of scholars have criticized prosecutors claiming that their decisional choices are biased on the basis of race and other extra-legal considerations.⁵⁶

Quite often, however, these claims rest largely on untested observational evidence. Those who make such claims operate under the assumption that unbridled prosecutorial discretion creates the potential for racial bias in capital case selection. For example, Harvard Law professor, Randall Kennedy, asserts that prosecutorial discretion is “the most significant factor that affects the far-flung and subtle racial selectivity

53. Durham County Population, <http://quickfacts.census.gov/qfd/states/37/37063.html> (last visited Feb. 19, 2009).

54. *Gregg*, 428 U.S. 153.

55. Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 52–55 (1981).

56. See Paternoster, *supra* note 42; Michael L. Radelet and Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW AND SOCIETY REVIEW 587, 587–621 (1985); Songer & Unah, *supra* note 23 at 161–210. (finding empirical evidence of racial disparity in the death charging behavior of South Carolina prosecutors).

that infects the death penalty system.”⁵⁷ In a 1998 study, Jeffrey Pokorak concludes that, “The dangers of discrimination are inherent in the system’s unfettered prosecutorial discretion.”⁵⁸ If these claims are true, the virtually unlimited discretion exercised by district attorneys in the selection of capital cases raises the potential for extra-legal bias. This is especially true since the prosecutor enjoys a tremendous informational advantage where only the prosecutor knows the true strength of her case and the defendant cannot shop around but must deal with the prosecutor. The claims made by critics of prosecutors would gain more credence if they were supported by strong empirical evidence. I shall attempt here to provide such evidence using data from Durham County, North Carolina and employing rigorous statistical methodology.

IV. INDEPENDENT VARIABLES: FACTORS AFFECTING THE DECISION TO SEEK DEATH PENALTY IN DURHAM COUNTY

My selection of independent variables is guided by two theoretical considerations expressed in the empirical literature. The first emphasizes that criminal offenders are predominantly a part of a social underclass which represents a threat to the economic, political, and social structure that aligns with majority interests.⁵⁹ This underclass theory predicts that social control and punishment would tend to focus on extra-legal factors such as race as a realistic and potentially important independent determinant, linking case facts with prosecutorial decision to seek the death penalty.⁶⁰ The second theoretical consideration emphasizes the importance of formal legal rationality in prosecutorial decision-making and focuses on factors enumerated in the general statute such as offense severity.⁶¹ Therefore, under this theory, individuals in similar situations should be treated equally regardless of skin color, sex, or other ascriptive characteristics.

On the issue of race, one recurrent and much debated finding in the death penalty literature is that non-White defendants accused of murdering White victims are far more likely to be charged with and receive death sentences than defendants who are accused of murdering

57. Randall Kennedy, *Repeating our Mistakes*, THE AM. LAW., July 1999, at 147, 149.

58. Jeffrey Pokorak, *Probing the Capital Prosecutor’s Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1820 (1998).

59. See HUBERT BLALOCK, TOWARD A THEORY OF MINORITY-GROUP RELATIONS (1967); V. O. KEY, SOUTHERN POLITICS IN STATE AND NATION (1949).

60. BLALOCK, *supra* note 59; KEY, *supra* note 59; Kevin B. Smith, *The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates*, 66 J. POL. 925, 925–38 (2004).

61. MAX WEBER, ECONOMY AND SOCIETY (1978).

Blacks regardless of their race.⁶² This suggests that Black victims pay a *race penalty* and that the justice system places a higher premium on the lives of White victims than the lives of Black victims. However, findings at the stage where the prosecutor actually chooses whether to “go for death” remain somewhat mixed. Some analyses have reported the prevalence of racial discrimination at the charging decision stage⁶³ while others find strong evidence of discrimination appearing elsewhere, primarily at the jury decision stage.⁶⁴

In 1990, the U.S. General Accounting Office added further assurance that race is important when it released an authoritative report analyzing 28 death penalty studies.⁶⁵ The GAO’s report found that in 82% of the studies, the race of the victim influenced the likelihood of being charged with capital murder or receiving the death penalty.⁶⁶ The agency concluded that this finding “was remarkably consistent across data sets, states, data collection methods, and analytic techniques.”⁶⁷

Similarly, research suggests that gender also affects the imposition of capital punishment. Women are less likely to face the death penalty than men, and female-victim cases are more likely to result in death sentences than male-victim cases.⁶⁸ Finally, a large number of studies tout the importance of legal factors in conditioning criminal prosecution and punishment.⁶⁹ In the following sections, I will explain the theoretical importance of our three primary independent variables: race, gender, and law.

62. See BALDUS et al., *supra* note 7, at 150; NAKELL & HARDY, *supra* note 7, at 146–48; Ernie Thomson, Research Note, Discrimination and the Death Penalty in Arizona, 22 CRIM. JUST. REV. 65, 68 (1997); WILLIAMS & HOLCOMB, *supra* note 41, at 214; Isaac Unah & John Charles Boger, Race and the Process of Capital Punishment in the New South 19 (Sept. 8, 2002) (unpublished manuscript, presented at the Annual Meeting of the American Political Science Association, Boston, Mass., Sept. 31–Oct. 3, 2002), available at http://www.allacademic.com/meta/p65960_index.html (follow “Get This Document; then follow “American Political Science Foundation”; then follow “.PDF”).

63. See BALDUS ET AL., *supra* note 7, at 162; Paternoster, *supra* note 42, at 25.

64. See Unah & Boger, *supra* note 62, at 24.

65. U.S. GEN. ACCOUNTING OFFICE, REPORT TO S. AND H.R. COMM. ON JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISPARITIES, GGD-90-57 (1990).

66. *Id.*

67. *Id.*

68. Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 434 (2002); Marian R. Williams & Jeffrey E. Holcomb, *The Interactive effects of Victim Race and Gender on Death Sentencing Disparity Findings*, 8 HOMICIDE STUDIES 350, 366 (2004) (“[F]emale victim homicides are disproportionately represented in death sentences.”).

69. Cf. BALDUS ET AL., *supra* note 7, at 100 (suggesting that legal reforms in Georgia caused differences in capital-sentencing patterns); Paternoster et al., *supra* note 42 at 45 (noting effect of prosecutorial discretion on sentencing patterns).

A. Race

1. The Literature on Racial Influences

The Baldus study of Georgia's capital punishment system is widely viewed as one of the most comprehensive studies conducted on racial effects in death penalty prosecution and sentencing within the last 30 years. The study's findings were presented to the United States Supreme Court in *McCleskey v. Kemp*.⁷⁰ The central finding of the Baldus study is simple: vast racial inequality exists in Georgia's capital punishment system and the primary location where this inequality is most acute is at the death-charging decisions of Georgia prosecutors.⁷¹ Baldus and his colleagues had substantial resources to conduct their study and so were able to control for a plethora of potentially relevant factors other than race.⁷² The study accounted for 230 potentially relevant non-racial variables for all murder cases charged in Georgia between 1973 and 1979. The data collected from these cases suggested a staggering disparity in death sentencing based on race.⁷³

The centerpiece of the findings of the Baldus study involved a race-of-the-victim multiplier, otherwise known as the odds ratio, which Baldus and his colleagues generated by estimating a 39-variables model with a high explanatory strength. This model included numerous potential aggravating and mitigating factors, the nature and location of the crime, numerous victim and defendant characteristics and relevant legal considerations.⁷⁴

The odds multiplier for race of the victim demonstrated that defendants accused of killing a White victim have a 4.3 times greater odds of receiving the death penalty than those accused of killing a Black victim.⁷⁵ The Baldus study declared, "[I]n many jurisdictions White-victim cases are treated more punitively than Black-victim cases at various stages in the process."⁷⁶ They also suggested that racial disparities illustrated by

70. *McCleskey v. Kemp*, 481 US 279, 286 (1987); BALDUS ET AL., *supra* note 7, at 394.

71. *Id.* at 403 ("The exercise of prosecutorial discretion is the principal source of the race-of-victim disparities observed in the system.")

72. Brief for petitioner at 67, *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987) (No. 84-6811) (quoting) Federal Trial Transcript at 1740, *McCleskey v. Zant* 580 F. Supp. 338 N.D. Ga. 1984). See also Randall L. Kennedy, *McCleskey v. Kemp: race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1399 (1988).

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

74. *Id.* at 383-84.

75. *Id.* at 401.

76. *Id.* at 405.

the study resulted from racially disparate prosecutorial discretion.⁷⁷ 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 and because race is particularly important in the charging decisions made by prosecutors following a jury conviction for murder.⁷⁸ The Baldus study noted the following prosecutorial death-seeking rates for murders with at least one aggravating factor:

Racial Configuration	Percent
Black defendant/ White victim:	70%
White defendant/ White victim:	32%
Black defendant/ Black victim:	15%
White defendant/ Black victim:	19%

The study controlled for many independent factors relating to the aggravation of each murder and 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 ($p < .01$).⁷⁹ These statistics demonstrate that prosecutors are far 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.

The study also shows that prosecutors seriously discounted Black-on-Black crime by consistently failing to ask for the death penalty in those cases. Prosecutors were nearly 5 times more likely to seek the death penalty against Black defendants accused of killing Whites than against Black defendants accused of killing Blacks. Thus prosecutors engaged in a phenomenon I would call "victim discounting"—meaning that prosecutors discount the lives of Black victims while unwittingly providing sentencing leniency for Black defendants.⁸⁰

Finally, the Baldus study concluded that racially disparate treatment was most pervasive in the middle range of murder cases. Cases wedged between the most aggravated and least aggravated murders showed the most dramatic evidence of racial disparities in death-charging rates. This

77. *Id.* at 403 ("The exercise of prosecutorial discretion is the principal source of the race-of-victim disparities observed in the system. Most important is the prosecutorial decision to seek a death sentence in cases that result in a murder-trial conviction.").

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

79. *Id.* at 327.

80. David C. Baldus et al, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, J. CRIM. L. & CRIMINOLOGY, 661, 709–10 (1983) (noting disparity in death sentences in White-victim versus Black-victim cases in Georgia); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 749 (1993) (describing victim discounting in the imposition of prison sentences).

middle range of cases allows prosecutors the greatest discretion to seek or not seek the death penalty, and prosecutors utilized this unfettered discretion in a racially disparate manner.

In a detailed and well-implemented, single-year study of all North Carolina murders that resulted in an arrest and prosecution during the period June 1, 1977 through May 21, 1978, Nakell and Hardy analyzed cases involving 489 defendant-victim combinations to determine whether the Supreme Court's call in *Furman v. Georgia* for an end to arbitrariness in capital prosecution and sentencing was being answered in North Carolina.⁸¹ They considered each discretionary stage separately: pretrial, trial, and sentencing.⁸² Their analysis led them to report that extra-legal factors were controlling.⁸³ For example, non-White defendants were significantly more likely to be brought to a capital trial and the race of the victim was found to be significant at the verdict stage.⁸⁴

Radalet and Pierce's notable examination of Florida's capital punishment system involving over 10,000 murder cases from 1976–1987 also supports conclusions reached by the United States General Accounting Office.⁸⁵ The study evaluated the potential effects of eight major factors that influenced whether or not a defendant received the death penalty in Florida: the race of the victim, race of the defendant, whether the crime was a felony or non-felony murder, whether the victim was a stranger or non-stranger, whether the crime involved single or multiple murders, the gender of the victim, the type of weapon used in the crime (gun, knife, or other instrument), and the location of the crime (rural or urban).⁸⁶

The predictor variables were combined into one statistical model with the dependent variable consisting of a dichotomous outcome: whether a murder resulted in a death sentence being imposed or not. Using the logistic regression method, Radelet and Pierce calculated an odds ratio showing the effect of all statistically significant variables. 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.⁸⁷ Once again, 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.⁸⁸

81. NAKELL AND HARDY, *supra* note 7.

82. *Id.* at 80–82.

83. *See id.* at 151 (noting arbitrariness of administration of capital punishment process).

84. *See id.* at 158–59.

85. Michael L. Radalet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 20–22 (1991).

86. *Id.* at 21–27.

87. *Id.* at 28.

88. *Id.*

In a second study of Florida's capital punishment system, this time focusing on prosecutors, Radelet and Pierce revealed racially disparate prosecutorial decision-making.⁸⁹ The study examined whether the defendant's race and the victim's race affected how prosecutors developed evidence in murder cases. Their dataset consisted of 1,017 Florida murder cases from the 1970s.⁹⁰ Radelet and Pierce used data from two sources: (1) the FBI's Supplemental Homicide Reports (SHR), and (2) court records. Both data sources classified each homicide as a felony, possible felony, or non-felony murder.⁹¹ Radelet and Pierce then compared how the police report and the court record classified each case.

The comparisons revealed that the police reports and court records were consistently classified in 82.9% of the cases.⁹² However, 82 cases were downgraded from a felony in the police report to a non-felony in the court record and 92 cases were upgraded from the police report to the court record.⁹³ What is important is that cases in which Blacks were charged with killing Whites were the most likely to be upgraded and the least likely to be downgraded.⁹⁴ Radelet and Pierce found that the defendant's race and victim's race were both significant predictors of upgrading and downgrading by prosecutors.⁹⁵ 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 as felony murder.⁹⁶ Thus, Radelet and Pierce concluded that upgrading was a political tactic used by Florida prosecutors to strengthen a decision to seek a death sentence, and that the tactic was used overwhelmingly in cases involving Black defendants and White victims.⁹⁷ Although Radelet and Pierce's findings are suggestive of racial disparities in upgraded and downgraded cases, the analysis does not explore whether racial disparities taint the overall selection of death penalty cases.

Samuel Gross and Robert Mauro, who conducted an extensive study of the application of the death penalty in Georgia, Florida, and Illinois in the period immediately following the *Gregg* decision, found results similar to Radelet and Pierce's 11-year Florida study. Gross and Mauro analyzed data from all homicides reported to the FBI in these

89. Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615 (1985).

90. *Id.* at 597.

91. *Id.* at 598.

92. *Id.*

93. *Id.*

94. *Id.* at 600-01.

95. *Id.* at 609.

96. *Id.* at 612.

97. *Id.*

states between January 1, 1976 and December 31, 1980.⁹⁸ The study analyzed the effect of the same eight variables as Radelet and Pierce on the likelihood of a defendant receiving the death sentence. In addition, Gross and Mauro compiled a “scale of aggravation” or index ranging from 0–3, which measured the overall aggravating circumstances of the crime.⁹⁹ The index was calculated by adding one point each for three characteristics—if a stranger committed the crime, if the crime involved multiple victims and if the homicide was a felony murder (i.e. a murder committed during the commission of another felony).¹⁰⁰

Like Radelet and Pierce, Gross and Mauro analyzed their data using logistic regression and calculated an odds multiplier for each variable, controlling for all other factors in the study. In all three states, the study determined that the race of the victim had a significant impact on the odds that a defendant would receive 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.¹⁰¹ Similarly, the study found a race-of-victim odds ratio of 4.8 in Florida and 4.0 in Illinois.¹⁰² All three results were highly statistically significant at the .001 level or better, indicating that there is a less than one in one thousand chance that the relationship between the race of the victim and the probability of receiving the death penalty was by accident. Gross and Mauro concluded their study by stating:

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 examine. 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.¹⁰³

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

98. Gross and Mauro, *supra* note 8, at 54.

99. *Id.* at 70.

100. *Id.*

101. *Id.* at 78.

102. *Id.*

103. *Id.* at 105.

Raymond Paternoster determined that disparities in South Carolina's death penalty system during this time period emanated from prosecutorial charging decisions. Paternoster conducted a comprehensive analysis of all charging decisions for homicides in the state from 1977–1981.¹⁰⁴ Like the Baldus study, Paternoster's analysis is well-designed because it combines Supplemental Homicide Report data with original police reports and subsequent investigative reports on each homicide, allowing Paternoster to control for all legal death-charging considerations as well as numerous potentially relevant non-legal factors. After controlling for these myriad considerations, Paternoster found that the odds of being tried for capital murder in South Carolina were 9.6 times greater in White-victim cases than in Black-victim cases.¹⁰⁵

Studies of sentencing schemes in various states confirm that racial disparity in capital sentencing is a widespread phenomenon. In addition to states previously mentioned, a *Dallas Times Herald* report using data from the early 1980s found that defendants convicted of killing White victims in Maryland were eight times more likely to face the death penalty than killers of Black victims.¹⁰⁶ In Texas, the paper reported that killers of Whites were over three times more likely to receive death sentences than killers of Blacks.¹⁰⁷ In Virginia, analysis by John Blume and colleagues using data from 1977–1999 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.¹⁰⁸

Overall, the literature examining the influence of race in the application of capital punishment overwhelmingly demonstrates that racial bias infects capital charging and sentencing just as the social underclass theory of punishment would predict, and that the effects are not simply regional. Recent studies using data from the Midwestern state of Ohio¹⁰⁹ and from Southern states of Maryland¹¹⁰ and North Carolina¹¹¹ also show strong evidence that Black defendants accused of killing Whites fare significantly worse than any other group of defendants.¹¹² Some of these studies, like the Maryland study cited above, have also suggested that

104. Paternoster, *supra* note 7, at 762–63.

105. *Id.*

106. Jim Henderson & Jack Taylor, *Killers of Blacks Escape Death Penalty*, DALLAS TIMES HERALD, Nov. 17, 1985 at 1.

107. *Id.*

108. John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 197–99 (2004).

109. Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 J. CRIM. JUST. 207 (2001).

110. Paternoster et al., *supra* note 42.

111. Unah, *supra* note 42.

112. See BALDUS et al., *supra* note 7; Blume et al., *supra* note 1 at 199.

unequal prosecutorial charging decisions are likely the root cause of these disparate outcomes.¹¹³

Despite the studies of prosecutors by Paternoster and by Gross and Mauro, very few empirical studies have sought to scrutinize the potential for racial disparity—specifically at the prosecutorial charging stage of the criminal justice process. Indeed, the most comprehensive single-state multivariate regression analysis focusing specifically on prosecutorial decision-making, Raymond Paternoster's study of South Carolina, does not contain any data from the past 20 years.¹¹⁴ While capital punishment is used historically as an instrument of social control over Blacks and the disadvantaged,¹¹⁵ there is reason to believe that American society is now more progressive (though not free of racism) than in times past. Through an examination of Durham County, one of the largest in North Carolina, we seek in this study to determine whether race is still a meaningful factor in contemporary capital charging decisions in North Carolina. Based upon the foregoing discussion showing that race matters in death penalty decision-making, I formulate the following two hypotheses predicting that race is still an informal guiding principle in prosecutorial decision-making in contemporary times.

H1: Prosecutors are more likely to seek the death penalty in murders involving White victims than in murders involving Black victims.

H2: Prosecutors are more likely to seek the death penalty when a Black defendant kills a White victim than in any other racial combination of defendants and victims.

In light of these hypotheses, it is curious the mechanism through which race influences prosecutorial decision-making. In the next section, I examine this important issue.¹¹⁶

113. Paternoster et al., *supra* note 110, at 43.

114. Paternoster, *supra* note 7, at 762–65 (relying on data exclusively from 1977–1981).

115. See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* (1990); Charles D. Phillips, *Exploring Relations among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889–1918* 21 *LAW AND SOC'Y REV.* 361 (1987); CATHERINE BECKETT, *MAKING CRIME PAY* (1997); KEALLY MCBRIDE, *PUNISHMENT AND POLITICAL ORDER* (2007).

116. This section relies on my previous work. See Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 *S.C. L. REV.* 161 (2006) (discussing the mechanisms of racial influence in prosecutors' decisions).

2. Process by which Race Influences Prosecutorial Choices

Across the United States, survey-based statistics provided by Bureau of Justice Statistics indicate that the vast majority of prosecutors are White.¹¹⁷ In Durham County, there are five primary murder prosecutors who make discretionary charging decisions during 2003–2007 all of whom are White, except one (Ms. Tracey Cline).¹¹⁸ Many would think the prosecutor's race is of no consequence in the charging decision and may ask: But so what? Indeed race should not matter. But the simple answer to the question is that for many of our citizens, race is an important symbol of political power.¹¹⁹ Hence, the first mechanism through which race influences prosecutorial decisions is in *the symbolic importance of race*. White prosecutors may have internalized the cultural typecasting of African Americans as inferior and thus may come to perceive African American defendants as more violent than White defendants and as potentially dangerous to the political and economic arrangements in society.¹²⁰ Similarly, a crime may seem more horrible to White prosecutors if the victim is White than if the victim is not.¹²¹ An array of psychological studies on in-group bias demonstrates that people identify and empathize more closely with members of their own racial group.¹²² Therefore, Durham County's White prosecutors may show greater empathy towards White murder victims than Black murder victims by "going for death" more frequently in White-victim cases than in Black victim cases.

But no direct prosecutorial racism is necessary for charging decisions to disparately affect African Americans and this leads us to the second mechanism by which race affects prosecutorial decision-making:

117. Bureau of Justice Statistics, *Typical State Prosecutor's Office is Small with Large Caseload* (Dec. 23, 1993), <http://www.ojp.usdoj.gov/bjs/pub/press/pisc92.pr>. See also Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817–18 (indicating that approximately 98% of all death penalty prosecutors are White, 1% is black, 1% is Latino and in the thirty eight death penalty states, prosecutors are exclusively White) (1998).

118. Interview with Jay Ferguson, Capital Def. Attorney in Durham County, N.C. (May 25, 2009).

119. HOWARD SCHUMAN, CHARLOTTE STEEH & LAWRENCE BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1995).

120. Stephen Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 436–37 (1995). Cf. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1006 (2007) (finding through empirical studies that not only are Whites more resistant to the framing of arguments against the death penalty than blacks, but "many whites actually become more supportive of the death penalty upon learning that it discriminates against blacks.").

121. Bright, *supra* note 120 at 437.

122. Dalmas A. Taylor & Beatrice Moriaty, *In-group Bias as a Function of Competition and Race*, 31 J. CONFLICT RESOL. 192, 192 (1987).

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 in an environment of scarce resources.¹²³ Prosecutors have an incentive to seek the death penalty in cases that show promise for a successful prosecution in order to enhance a tough-on-crime image. 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 an empirical study published in the September 2000 issue of *Southern California Law Review*, economist Richard Brooks outlined the difference in police activity in predominately minority and lower class neighborhoods compared to mostly White and upper class areas.¹²⁴ Brooks demonstrates that crimes in White areas receive far more police attention and investigative resources compared to Black areas, leading to negative perception of law enforcement among Blacks.¹²⁵ Murders in predominantly Black neighborhoods often resulted in limited or shoddy investigations.¹²⁶ Because more information is usually gathered about the crime and its aggravating circumstances in White-victim cases, prosecutors may be more likely to seek the death penalty in these cases than in Black-victim cases.

The third and final mechanism is *impunity from judicial review*. Even if prosecutors submit that the death-charging decisions they make are racially disproportionate, the decisions still enjoy virtual impunity because they are rarely overturned on appeal. In any particular case, it is easy for prosecutors to articulate nonracial justifications for seeking the death penalty.¹²⁷ In many jurisdictions the courts of appeals have repeatedly deferred to the judgment of prosecutors and have refused to overturn death-charging decisions that are claimed to be based on race.¹²⁸ Thus, prosecutors who seek the death penalty understand at the outset that their decisions have a good chance of being upheld on appeal. For prosecutors then the risks associated with discrimination seem minimal.

123. See Celeste Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 *LAW & SOC'Y REV.* 291, 295 (1987).

124. 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 (2000).

125. *Id.*

126. Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 *J. CRIM. L. & CRIMINOLOGY* 1259, 1270 (1982).

127. Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 *SUP. CT. REV.* 145, 169 (1998).

128. Susan H. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 *TUL. L. REV.* 1801, 1830 n.93 (1993).

B. Gender

The gender gap is a long-standing feature of American electoral politics and apparently it operates in the criminal justice system as well. During every presidential election cycle since the 1980 campaign between Ronald Reagan and Jimmy Carter, American citizens have been treated to a cocktail of media and public discussions about the gender gap in voting.¹²⁹ In the electoral realm, the gender-gap refers to differences between men and women in candidate preference based upon candidates' issue positions, with women tending to favor candidates strong on pocket book issues such as healthcare while men tend to support candidates strong on issues of national security.¹³⁰ But the gender-gap is not relegated to presidential election politics alone. Several studies suggest that a gender gap also exists in the U.S. criminal justice system, especially in the prosecution of cases and in the application of the death penalty.¹³¹

As a group, women are less violent and have lower recidivism rates than men.¹³² Consequently, they are not viewed as a threat to socio-political and economic arrangements the way Blacks are generally viewed and this gives women something of an advantage. Indeed empirical evidence suggests there is widespread reluctance by prosecutors, judges, and juries to prosecute and punish women offenders harshly.¹³³ One explanation stems from the types of homicide women commit. Most homicides committed by women are those involving close relations such as family members, friends, or acquaintances. Such crimes are often thought to have lower elements of aggravation and so, the argument goes, are less likely to precipitate a capital prosecution. Another explanation pertains to the structure of gender roles in society where gendered power relations between men and women lead to women being perceived as compassionate and therefore morally incapable of engaging in the calculus

129. Kristin Kanthak & Barbara Norrander, *The Enduring Gender Gap*, in *MODELS OF VOTING IN PRESIDENTIAL ELECTIONS* 141, 141–142 (Herbert Weisberg & Clyde Wilcox, eds., 2004).

130. Kristin Kanthak & Barbara Norrander, *The Enduring Gender Gap*, in *MODELS OF VOTING IN PRESIDENTIAL ELECTIONS* 141, 141–142 (Herbert Weisberg & Clyde Wilcox, eds., 2004).

131. See, e.g., Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181 (1994); Ernie Thompson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65 (1997).

132. Kim S. Ménard, Amy L. Anderson & Suzanne M. Goldboldt, *Gender Differences in Intimate Partner Recidivism: A 5-Year Follow-Up*, 36 CRIM. JUST. & BEHAV. 61 (2009).

133. See, e.g., Andrea Shapiro, *Unequal before the law: Men, women and the death penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427 (2000); Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002) (arguing that the death penalty is a "masculine sanctuary" that is significantly uncomfortable with female capital offenders in its midst).

of murder.¹³⁴ But by and large, the gender gap in capital prosecution and punishment exist because men commit far more crimes (especially violent crimes) than women.¹³⁵

Law professor and former Dean, Victor Streib, compiles and publishes a quarterly statistical overview of women and the death penalty. From this overview, we get an insightful look at the treatment of gender in the criminal justice system. Streib's data from 1900 to 2005 reveal that the death penalty for women is a tale of rarity and inconsistency.¹³⁶ For instance, only 0.6% (50/8339) of all executions were women during that period.¹³⁷ However, from 1973 to 2005, 11 out of 1004 executions were women (1.1%).¹³⁸ Streib's statistics demonstrate that female murder defendants are less likely to face the death penalty than male defendants, but the data does not address the relative severity of crimes committed by men and women. Furthermore, Streib's analysis is not based on the type of rigorous statistical methodology that has the capacity of demonstrating whether these disparities result from different frequencies of aggravated murders among men and women. But Streib's data illuminate trends of gender disparity in capital sentencing that cannot be ignored.

Prosecutors' broad discretion to choose death penalty cases also facilitates the potential influence of gender in case selection. At the end of 1997, only 1.5% of America's death row inmates were women even though women commit nearly 12% of the nation's homicides.¹³⁹ Clearly the criminal justice system is reluctant to impose the death penalty on female offenders. A study of male and female judges in New York and Massachusetts found that women generally receive lighter sentences than men who commit similarly aggravated crimes.¹⁴⁰ A broader study of six states, published in 1989, demonstrates that women usually receive disproportionately lighter sentences than male defendants for similar offenses.¹⁴¹

The disparity in punishment for male and female defendants may also result from different prosecutorial interpretations of the premeditation of any murder, the likelihood of rehabilitation and future dangerousness. Crime and gender expert, Victor Streib, contends that women are more likely than men to be seen as viable candidates for rehabilitation.¹⁴² As a result of these culturally engendered perceptions, it is

134. Streib, *supra* note 133 at 459–63.

135. *Id.* at 459–61.

136. Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 *FORDHAM URB. L.J.* 609 (2006).

137. *Id.* at 621.

138. *Id.* at 622.

139. Shapiro, *supra* note 133 at 448.

140. *Id.* at 452.

141. *Id.*

142. Victor Streib, *Death Penalty for Female Defendants*, 58 *U. CIN. L. REV.* 845 (1990).

expected that prosecutors will disproportionately seek the death penalty against male defendants compared to female defendants in murder cases.

H3: Prosecutors are more likely to seek the death penalty against male murder defendants than female murder defendants.

A victim's gender may influence a prosecutor's decision to charge a defendant with a capital offense in a similar manner. Due to cultural stereotypes of female "defenselessness"¹⁴³ and the perception that females are less likely to contribute to their own victimization,¹⁴⁴ prosecutors may perceive female murder victims to be more vulnerable and in need of protection than males killed in a similar manner. Thus, prosecutors may perceive female-victim crimes to be more severe. Even among cases with similar number of offense charges or legal aggravation, prosecutors may seek the death penalty more frequently in female-victim cases than in male-victim cases.

H4: Female victim cases are more likely to result in a death penalty prosecution than male-victim cases.

This expectation is especially true for cases involving White female victims. American history is replete with evidence of the symbolic power of White females in our culture, especially in the South.¹⁴⁵ When it comes to criminal justice, White females are perceived as a subgroup deserving of special protection and this has often led to differential responses to their victimization.¹⁴⁶ The symbolic power of White female victims (especially when the assailant is non-White) has been used to generate public support for a variety of governmental policies, some highly punitive.¹⁴⁷

For example, the rape of a White female has historically been treated more seriously and with greater punishment than the rapes of Black women.¹⁴⁸ Until abolished in *Coker v. Georgia*,¹⁴⁹ the use of capital punishment for rape was reserved almost exclusively for cases involving White female victims, especially in the South and typically when the

143. SAMUEL GROSS & R. MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989).

144. R. A. FARRELL & V. L. SWIGERT, *Adjudication in Homicide: An Interpretive Analysis of the Effects of Defendant and Victim Social Characteristics*, 23 J. RES. CRIME & DELIN. 349 (1986).

145. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993).

146. Jefferson E. Holcomb et al., *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 877 (2004).

147. *Id.*

148. GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE* (1989); Holcomb et al., *supra* note 146, at 877-901.

149. *Coker v. Georgia*, 433 U.S. 58 (1977).

attacker is of a different ethnicity.¹⁵⁰ Moreover, the Mann Act which Congress enacted and took effect in 1910¹⁵¹ was designed principally to protect White females from crimes of moral turpitude.¹⁵² These examples are clearly not exhaustive but they provide some historical evidence of increased concern with the victimization of White females for certain types of crimes, especially when those crimes are committed by men who are non-White. And so as hypothesized in H4, we would expect gender to play a statistically significant role in the charging decisions of Durham County prosecutors.

C. Legally-Relevant Factors

The use of legally relevant factors in decision-making is the hallmark of the neoclassical theory of formal legal rationality. It emphasizes adherence to institutional rules and procedural due process to achieve predictability and uniformity in the conduct and outcomes of public policy.¹⁵³

Within the context of these institutional rules, each year the district attorneys in Durham County must determine the course of many murder prosecutions. Due to limited resources, prosecutors must be judicious in selecting cases, usually an even smaller number, in which to seek the death penalty. To help prosecutors select capital cases and avoid arbitrary decision-making in accordance with *Gregg v. Georgia*,¹⁵⁴ the North Carolina General Assembly permits the state to seek the death penalty only in cases of willful murder in conjunction with at least one of many statutory aggravating circumstances such as the killing of a peace officer or the killing of, or causing a risk of death to, multiple victims.¹⁵⁵

Under *Gregg* and hence in North Carolina, the aggravating circumstances requirement ensures that capital punishment is reserved for the most heinous murders, irrespective of the race or gender of the victim or defendant.¹⁵⁶ Thus, prosecutors should choose death penalty cases by identifying aggravating factors incident to a murder. Furthermore, under North Carolina's general statute, a murder is considered aggravated in the

150. FRIEDMAN, *supra* note 145, at [].

151. White Slave Traffic (Mann) Act of June 25 1910, c. 395, 36 Stat. 825, 18 USC § 2421 (2009) (The Act prohibits the transportation of women across state lines for "immoral purposes.").

152. DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* (1978).

153. WEBER, *supra* note 11.

154. *Gregg v. Georgia*, 428 U.S. 153 (1976).

155. See NC GEN. STAT. § 15A-2000 (2009); See also THOMAS H. THURNBURG, *NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME* 62 (5th ed. UNC Chapel Hill, Institute of Government 2001).

156. *Gregg*, 428 U.S. at 153.

number of tangent crimes accompanying the murder itself.¹⁵⁷ Thus, the charge of murder combined with a charge of robbery with a deadly weapon as well as a charge of rape is considered more aggravated than a charge of premeditated murder that is accompanied by only one charge of robbery with a deadly weapon.

However, prosecutors must still choose only a small number of these “death eligible” cases to seek the death penalty. For purposes of the Durham County study, death eligible cases are all murder indictments for which the prosecutor had to make a decision whether to seek the death penalty.¹⁵⁸ These included all murder indictments except those for which the prosecutor could not legally seek the death penalty: (i) murder indictments specifically delineated as second degree murder; (ii) charges against juveniles (see Data section); and (iii) murders which occurred in 1976 when North Carolina did not have a valid death penalty statute.¹⁵⁹

During 2003–2007, prosecutors in Durham County sought the death penalty in 13% of all these cases.¹⁶⁰ In doing so, prosecutors must define statutory factors to determine whether those factors apply in each particular case. Several aggravating circumstances, such as whether the defendant knowingly created a great risk to more than one person or whether the crime involved another felony such as physical torture may be reasonably interpreted in multiple ways for the same criminal act. This subjectivity has consequences for the decisions of Durham County prosecutors regarding the death penalty. Such discretion can invoke considerations other than the seriousness of the crime. This discussion leads to the following hypotheses regarding the role of legal factors in murder prosecutions:

H5: Durham County prosecutors are more likely to seek the death penalty in murder cases that are accompanied by a higher number of criminal charges.

H6: Durham County prosecutors are more likely to seek the death penalty in cases involving multiple murder victims.

H7: Durham County prosecutors are more likely to seek the death penalty in cases with a higher total number of individual victims

157. N.C. GEN. STAT. § 15A-1340.16(d),(e) (2009).

158. For a similar definition of death eligible murders, see Amy R. Stauffer et al., *The Interaction Between Victim Race and Gender on Sentencing Outcomes in Capital Murder Trials: A Further Exploration* 10 HOMICIDE STUDIES 98, 101 (defining capital cases as “those in which (a) a first-degree murder conviction was secured, (b) the state sought the death penalty, and (c) the trial advanced to a sentencing phase whereby the jury recommended either a life sentence or the death penalty for the defendant.”).

159. N.C. GEN. STAT. § 15A-2004 (2009).

160. This statistic is derived from the Durham County prosecution data and is presented in Table 1 below.

To summarize, the decision to seek the death penalty should be guided by legal factors to achieve the purpose of the general statute, which is to promote safety and security.¹⁶¹ However, prosecutorial discretion presents many opportunities for the introduction of extra-legal considerations such as racial or gender disparity into prosecutors' choice of cases in which to seek the death penalty.

Because Durham district attorneys are publicly elected as are district attorneys across North Carolina, they may respond to political pressure from constituents. Such pressure will likely vary according to numerous factors, including the demographic and ideological composition of the prosecutor's judicial district, the level of media attention that a crime receives, the race and gender configuration of the victim and defendant, the victim's standing in the community, etc. Moreover, the ideology of individual prosecutors and their natural affinities for different types of victims and defendants can potentially influence capital charging decisions. Therefore, it is possible that legally similar crimes and criminals will receive different treatment in fact. When evaluated in the aggregate, the decisions of Durham prosecutors may cause some groups of defendants to be consistently more likely to have death sentences sought against them than other types of defendants. But this does not excuse a pattern of capital prosecutions based strongly on race or sex.

V. THE DATA

The data consist of Durham County murder cases with known defendants indicted between January 1, 2003 and December 31, 2007. The data were derived from the Durham County Courthouse and from other public records. Only cases that could possibly have been given the death penalty if an aggravating factor was present were considered for this empirical analysis. Because prosecutors are forbidden by state law to seek the death penalty in murders involving juvenile offenders,¹⁶² all defendants represented in the dataset are at least 17 years of age. The Supreme Court banned the execution of juveniles (under 18 years old) in March 1, 2005 in the case of *Roper v. Simmons*.¹⁶³ Prior to this date, only defendants under 17 were death ineligible. To be consistent with *Roper*, all defendants charged after March 1, 2005 and were less than 18 years of age at the time of the offense are considered juveniles and exempt from the death penalty. Cases decided in 1976 when North Carolina lacked a valid death penalty statute are also death ineligible and were excluded from the analysis.¹⁶⁴

161. N.C. GEN. STAT. § 15A-2004 (2009).

162. *Roper v. Simmons*, 543 U.S. 551 (2005).

163. *Id.*

164. See, e.g. *Woodson v. North Carolina* 428 U.S. 280 (1976).

The study thus involves every murder indictment unless the indictment specifically indicates the charge is less than first degree murder. The unit of analysis is the act of committing homicide by a single defendant. If two or more offenders kill a single victim, each defendant was evaluated as a separate case in the dataset since each defendant is potentially culpable for the offense. One defendant accused of killing several victims was evaluated in terms of the number of victims. That is, an offender accused of a double murder was entered in the dataset as two cases, corresponding to the number of victims. Murders are defined in this manner because prosecutors in Durham County must investigate, charge, and prosecute each defendant for each murder; prosecutors have discretion to charge co-defendants in the same crime separately and unequally.¹⁶⁵

During the 2003 to 2007 period, 151 death eligible murders with known defendants were prosecuted in Durham County. These exclude offenses charged as second degree murder or manslaughter. By statute, such lower-level homicides are exempt from capital punishment in North Carolina under the assumption that they lack element of premeditation and aggravation.¹⁶⁶

Table 1 reports descriptive statistics of the variables regarding the 151 death eligible murders. Durham County prosecutors sought the death penalty in 13% of the murders that were death eligible. This proportion seems small and would tend to suggest that the County is a less active death penalty district compared to other jurisdictions. But in fact, this proportion reflects the overall declining trend in death penalty prosecutions and sentences statewide. The criminal justice reforms passed by the North Carolina General Assembly in 2001 permitting prosecutors discretion to plead first-degree murder cases to noncapital offenses even if they contain evidence of aggravating circumstances is largely responsible for the small proportion of capital charges and it represents a real break from the past.¹⁶⁷ For example, while the ratio of death sentences to murders was 5.02% in 1995, that ratio has declined to .93% in 2006 partly in response to this reform.¹⁶⁸

165. THORNBURG, *supra* note 56.

166. *Woodson*, 428 U.S. at 291.

167. N.C. GEN. STAT. § 15A-2004 (2009).

168. Interview with Jay Ferguson, Capital Defense Attorney, Durham County (Jan. 30, 2009).

TABLE 1
DESCRIPTIVE STATISTICS OF THE VARIABLES IN THE ANALYSIS
(DEATH ELIGIBLE CASES ONLY, 2003–2007)

Variable	N	Minimum	Maximum	Mean	Standard Deviation
Prosecutor seeks death penalty	151	0	1	.13	.340
Black defendant/Black victim	151	0	1	.71	.456
Black defendant/White victim	151	0	1	.14	.347
White defendant/White victim	151	0	1	.08	.271
White defendant/Black victim	151	0	1	.01	.115
Black defendant	151	0	1	.85	.354
White defendant	151	0	1	.09	.291
Black victim	151	0	1	.73	.443
White victim	151	0	1	.23	.419
Victim's gender (1=male)	151	0	1	.80	.400
Defendant's gender (1=male)	151	0	1	.94	.238
Multiple murder victims	151	0	1	.05	.225
Total victims per case (including non murder victims in collateral offenses)	151	1	5	1.34	.923
Number of indictments	151	1	6	1.92	1.278

In Durham County, the vast majority of capital prosecutions involve murders committed by defendants who are male (94%) and Black (85%). According to the data, Blacks are far more likely to be murder victims in Durham County (73%) compared to Whites (23%). Males constitute a much higher proportion of murder victims (80%) than females. According to the data, only 5% of the murders in Durham County in the period examined are multiple victim murders. In terms of racial configuration, there are disproportionately more Black-on-Black murders (71%) than any other racial configuration.

VI. RESULTS AND ANALYSIS

A. Descriptive Analysis

For the five years of prosecutorial activity examined in this study, several notable patterns in death charging decisions are apparent. To what extent is racial disparity in death penalty prosecutions in Durham County a problem? As indicated in Table 2, between 2003 and 2007, Durham County prosecutors processed 34 White murder-victim cases and seek the death penalty in 23.5% of them. By contrast there were 111 Black murder-victim cases processed during that time and in only 10.8% did prosecutors seek the death penalty. The difference between the death-seeking rates for

Black-victim cases and White-victim cases is statistically significant using a chi-square test of the different proportions ($p < .06$), suggesting that the difference is not due to chance. This finding confirms hypothesis 1 and is consistent with results from other states, which demonstrate that White-victim cases are significantly more likely to lead to capital prosecution than Black-victim cases.¹⁶⁹

TABLE 2
DEATH-SEEKING BEHAVIOR GROUPED BY VICTIM'S RACE

Victim's Race	Number of Murders	Death Penalty Cases	Death-Seeking Rate
White	34	8	23.5%
Black	111	12	10.8%
Significance test of the difference in death-seeking rates based on a chi-square test: $p \leq .03$ (one-tailed)			

Table 3 gives the death-seeking rate of Durham County prosecutors and is grouped by racial configuration of victims and defendants.¹⁷⁰ Despite the high number of Black murder victims, Durham County prosecutors seek the death penalty in only 9.3% of the cases in which Blacks murder other Blacks. The difference between this rate and that for all other racial configurations combined is statistically significant ($p < .05$) indicating that it is not likely a matter of chance that prosecutors are unlikely to seek the death penalty when Blacks murder other Blacks. Prosecutors seek the death penalty in 8.3% of cases in which Whites murder other Whites but compared to all other combinations, the difference is not statistically significant. When considered together the differences in the intra-racial (same race) murders indicate the presence of race-based victim discounting in Durham County at least during the period investigated. This type of victim discounting defines the situation whereby the lives of victims of whatever race are discounted in value through the leniency shown accused murderers of individuals of the same race.¹⁷¹

In terms of inter-racial (different-race) homicides, the data indicate that there are only two instances in which a White suspect was charged

169. Songer et al., *supra* note 23, at 177–78 (discussing the mechanisms of racial influence in prosecutors' decisions at pp.177–178); See also Radalet et al., *supra* note 56.

170. Stated differently, Table 3 gives the death-seeking rates for defendants arranged by race but controlling for the race of the victim.

171. Previous research has shown predominantly Black victim discounting. See Baldus et al., *supra* note 80 (discussing evidence of black-victim discounting in Georgia); Songer et al., *supra* note 23, at 177–78 (discussing evidence of black-victim discounting in South Carolina); Paternoster et al., *supra* note 42 (discussing evidence of black-victim discounting in Maryland).

with murdering a Black victim. None of these murders resulted in a death penalty charge, apparently because they were not sufficiently aggravated.

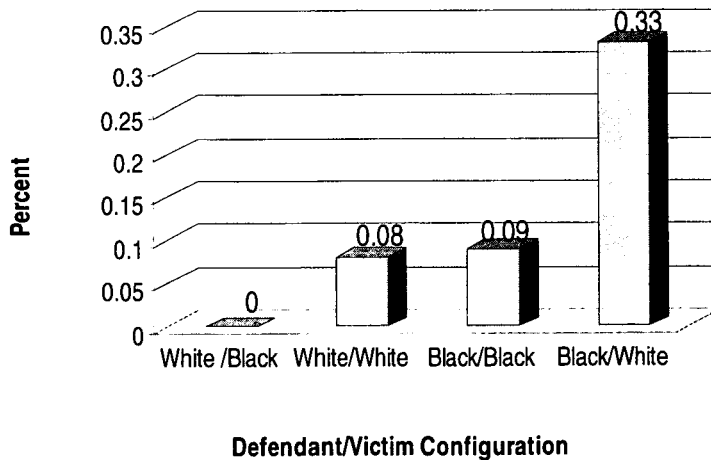
By far the most striking result is in the Black defendant/White victim category. As predicted in hypothesis 2, when a Black defendant is accused of murdering a White victim, 33% of the time prosecutors seek the death penalty in the case. The proportion is significantly higher than in any other racial combination and is highly statistically significant when compared to all other racial combinations. Figure 2 presents a graphical representation of the findings.

TABLE 3
DEATH-SEEKING RATES BY DEFENDANT/VICTIM RACIAL CONFIGURATION

Defendant / Victim	Number of Murders	Death Penalty Cases	Death-Seeking Rate
Black / Black	107	10	9.3%**
Black / White	21	7	33.3%***
White / White	12	1	8.3%
White / Black	2	0	0%

Significance level based on Pearson chi-square test: ** p ≤ .05; *** p ≤ .01 (one-tailed test)

FIGURE 2
PROSECUTORIAL DECISION TO SEEK THE DEATH PENALTY
IN DURHAM COUNTY NORTH CAROLINA, 2003–2007



Turning now to accused offenders, Black murder suspects are nearly twice as likely to face the death penalty as White murder suspects in Durham County. Prosecutors seek the death penalty in 13.28% of the 128 death eligible murders committed by Black offenders. White suspects registered 14 death eligible murder offenses and prosecutors seek the death penalty in 7.14% of these. However, a difference of proportions test indicates that the difference is not statistically significant. That is, when examination of defendants is not contingent upon the race of the victim, there is no statistical difference in the charging of Black and White defendants. Of course there is reason to believe that, in reality, prosecutors do look at the defendant/victim combination rather than only at the defendant in isolation to determine how to proceed.

Finally, a wide gender gap exists in the prosecution of capital cases in Durham County but that gap exists only with respect to victims not defendants. The results are reported in Table 4, which is divided into Panel A, Panel B, and Panel C. Panel A indicates that the vast majority of murder defendants are men. Male offenders participated in 142 murders and the prosecutor sought the death penalty in 19 of these cases (13.38%). Female offenders participated in only 9 murders and the prosecutor sought the death penalty in one case (11%). The difference between the two proportions is not statistically meaningful. Thus, there is no support for hypothesis 3. However, the analysis does indicate support for hypothesis 4: female victim cases are more likely to result in a death penalty prosecution than male-victim cases. That hypothesis is tested more directly in Panel C. But we examine first the configurations designated in Panel B for a more complete view. When we examine male offenders only and control for the sex of their victims, prosecutors are more likely to seek the death penalty if the victim is female than if the victim is male. The difference is statistically significant ($p < .05$). However, when we examine female offenders only and control for the sex of their victims, the difference in death-seeking rates is not statistically significant. Setting aside the conditionality inherent in Panel B and looking only at victims (Panel C), there are 30 death eligible female-victim cases during the period analyzed. The prosecutor sought the death penalty in seven cases (23.33%). Conversely, there are 121 death eligible male-victim cases overall and the prosecutor sought the death penalty in only 10.74% of these. The difference in the death-seeking rates is statistically significant ($p < .05$), providing support for hypothesis 4. While sex is not a legally permissible consideration for whether or not to charge a defendant with the death penalty, disparities based on sex do exist in Durham County despite North Carolina's facially sex-neutral criminal statute.

TABLE 4
GENDER AND PROSECUTORIAL DECISION TO SEEK THE
DEATH PENALTY IN DURHAM COUNTY

Defendant's Sex Only (Panel A)	Number of Cases	Prosecutor Seeks Death	Percent
Female	9	1	11.1
Male	142	19	13.38
<i>Defendant/Victim Configuration (Panel B)</i>			
Male/Female	28	7	25
Male/Male	114	12	10.5
Female/Female	2	0	0
Female/Male	7	1	14.3
<i>Victim's Sex Only (Panel C)</i>			
Female	30	7	23.33
Male	121	13	10.74

A Pearson chi-square test was conducted for all panels. For Panel A, the difference in percent death-seeking rate for male and female defendants is not statistically significant. For Panel B, the difference for male defendants is significant ($p < .05$). However, the difference for female defendants is not statistically significant. For Panel C, the difference in the death-seeking rates for victims is statistically significant ($p < .05$).

Thus far, analysis of the charging decisions of Durham County prosecutors reveals three distinct groups of murders that are likely to result in capital prosecution: murders committed against White victims; murders committed against female victims; and murders committed by male defendants. However, these correlations alone are insufficient to conclude that a causal linkage exists. It is possible that the racial and gender effects that have been uncovered originate from the unequal distribution of the severity of murders. If murders involving White victims and strangers contain a higher incidence of aggravating factors, for example, prosecutors may be responding to these aggravating factors instead of non-legal stimuli. Multiple regression techniques, which measure the impact of certain variables while controlling for other possible influences, are necessary to make a more definitive judgment about the role of race, gender, and victim-defendant relationship in prosecutorial charging decisions.

B. Logistic Regression Analysis

The death penalty data 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 is dichotomous, i.e., whether or not County prosecutors seek the death penalty, ordinary least squares regression technique is inappropriate and use of that technique will produce biased and unstable estimates. Instead, I employ logistic regression, which is a maximum likelihood estimation technique.¹⁷² 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. Since interpretation of the estimate is easily stated, but not so easily understood, I also present the odds ratio (or odds multiplier) 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 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 the effect of the independent variable on the dependent variable.¹⁷³ Each variable's impact will be assessed using the odds ratio. However, because odds ratios can be difficult to understand, I have also reported the conservative probability estimate for the impact of the regression coefficient using the "divide by 4 rule".¹⁷⁴ The results of the logistic regression analysis are presented in Table 5.¹⁷⁵

Three different models are reported in that table. Model 1 uses only the race variables to isolate their independent impact; model 2 adds sex into the mix; finally, Model 3 uses the variables predicted to have an impact on prosecutorial charging decisions. Model 3 is therefore the most complete and accurate model. Model 3 utilized seven independent variables including legal factors relating to the severity of the crime and the demographic characteristics of defendants and victims such as race and gender. As an indicator of how good the various estimated models are, I have calculated the percent of all murder cases that are correctly predicted by each model. These percentages suggest that the models are

172. See JOHN H. ALDRICH & FORREST D. NELSON, *LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS* (1984) (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 produces unbiased and reliable estimates).

173. LAWRENCE C. HAMILTON, *REGRESSION WITH GRAPHICS: A SECOND COURSE IN APPLIED REGRESSION* 230 (1991).

174. The rule is simply to divide the logistic regression coefficient by 4 to derive a probability score. ANDREW GELMAN AND JENNIFER HILL, *DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS* 82 (2007).

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

highly plausible and not the result of chance. Several independent variables exerted statistically significant influence on death-charging decisions.

TABLE 5
LOGISTIC REGRESSION MODELS OF PROSECUTORIAL DECISION TO SEEK
DEATH PENALTY IN DURHAM COUNTY, NORTH CAROLINA
(DEATH ELIGIBLE CASES ONLY, 2003–2007)

Independent variable	Model 1 (Race Only)		Model 2 (Race and Sex Only)		Model 3 (Race, Sex, and Law)	
	β (Standard error)	Odds ratio (Probability)	β (Standard error)	Odds Ratio (Probability)	β (Standard error)	Odds ratio (Probability)
Black defendant/ White victim	1.466*** (.554)	4.333 (.37)	1.411*** (.562)	4.101 (.35)	1.734** (.761)	5.662 (.43)
White defendant/ White Victim	-.238 (1.088)	.795 (.06)	-.198 (1.108)	.820 (.05)	1.023 (1.337)	2.782 (.25)
Victim's sex (male=1)			-.824* (.541)	.439 (.22)	-1.436** (.748)	.238 (.36)
Defendant's sex (male=1)			.126 (1.127)	1.135 (.03)	-1.066 (1.314)	.344 (.27)
Number of criminal indictments					1.058*** (.280)	2.881 (.26)
Multiple murder victims					.138 (1.346)	1.148 (.03)
Total number of offense Victims					.322 (.347)	1.380 (.08)
Constant	-2.159*** (.305)	.115	-1.657 (1.179)	.191	-3.537** (1.472)	.03
Number of cases	149		149		149	
-2*Log likelihood	110.78		108.58		69.11	
% Correctly predicted	.87		.87		.93	

The dependent variable is the prosecutor's decision to seek the death penalty (coded 1) or not (coded 0). In the full dataset there are 177 cases charged as murder or first degree murder during the period analyzed. Of these 20 murders had juvenile defendants and 6 murders occurred in 1976 when North Carolina had no death penalty statute. These cases are death ineligible and are therefore excluded from the analysis. In addition, there are only 2 cases in the White defendant/Black victim category, too few to be included in the logistic analysis as a separate variable.

1. The Role of Race, Sex, and Legally Relevant Factors

Beginning with model 1, the analysis indicates that all else equal, the odds are 4.333 times higher that Black defendants who murder White victims will face the death penalty compared to the odds confronting Black defendants who kill Black victims (the unreported base category). This translates into a probability of approximately 37%. This variable is statistically significant beyond the .01 level and suggests that there is a less than one in one hundred chance that this finding occurred randomly. Results that are significant at or below the .05 critical level are generally considered highly statistically significant; those significant at the .10 critical level are considered acceptable for purposes of statistical inference.¹⁷⁶ White defendant/White victim cases fail to reach that minimum critical level for statistical significance. The model also calculates a “constant” value, which indicates that in the absence of all the variables in the model, the odds are .11 times lower that prosecutors would seek the death penalty in death eligible murders cases in Durham County. Overall, this model predicts 87% of prosecutors’ decisions correctly.

Model 2 reports the findings that consider race but also include the role of gender in prosecutorial decision-making. As in the first model, the Black-on-White murders show the greatest impact. After controlling for sex of the victim and defendant, the odds that prosecutors would seek the death penalty when a Black defendant kills a White victim remain virtually unchanged at 4.101, even after controlling for the sex of the victim and defendant. Such resilience is an additional measure of confidence in the results.

The analysis indicates that sex also plays an important independent role in the model. The variable called “victim’s sex” is represented in the model in terms of male victims. The result will be compared to female victims. The odds are .439 times lower that male victim murders would precipitate a capital charge compared to female victim murders. And this translates into a probability of 22% less likelihood. This finding is a confirmation of the earlier postulated gender gap hypothesis 4. The defendant’s sex consistently fails to reach statistical significance in all the models.

Model 3 represents an aggregate assessment utilizing all the variables earlier discussed, including those related to law. The analysis indicates that the model is highly plausible because 93% of the decisions that Durham County prosecutors make are correctly predicted by this model. Once again, looking at the racial configuration of the offense, we find that after controlling for variables related to “victim’s sex” and “offense severity,” the odds are 5.662 times higher that prosecutors would seek the death penalty

176. HAMILTON, *supra* note 173.

when a Black defendant kills a White victim compared to the odds in circumstances where a Black defendant kills a Black victim. This translates into a probability of 43%. That is Black defendants who kill White victims are 43% more likely to face the death penalty than Black defendants who kill Black victims, when all else is equal. This finding is statistically significant at the .05 level, indicating that there is less than one in 20 chances that this result occurred by happenstance. The finding is remarkably consistent across all the models herein reported and remarkably consistent with findings reported by other researchers working with data from other states.¹⁷⁷ As with the other models reported in this Article, murders in which White defendants kill White victims fail to reach statistical significance when compared to murders in which Black defendants kill Black victims.

Model 3 also showcases the importance of gender in prosecutorial decision-making. The sex variables indicate that male victims are less likely to cause a death sentence to be sought compared to female victims, a finding that is consistent with the gender gap hypothesis in criminal punishment.

North Carolina criminal statutes require legal factors to be the primary conditions for seeking the death penalty.¹⁷⁸ How did legally-relevant factors perform in this study? To address that question, I included in the analysis three legal factors relating to the severity of the offense: the number of criminal indictments (including the murder) filed against the offender; whether the case involves multiple murder victims; and the total number of offense victims in the case, including those not killed. Of these legally-relevant factors, only the number of criminal indictments reaches statistical significance in influencing Durham County prosecutors' charging decisions, providing some support for Max Weber's formal legal rationality theory.

That variable reported an odds ratio of 2.881, which is statistically significant at the .01 level, holding all other variables constant at their means. This translates into a probability of approximately 26% that the prosecutor would seek the death penalty for a unit increase in the number of criminal charges. Generally speaking, this finding indicates that there is less than a one in 100 chances that the result thus obtained occurred by chance. From the perspective of North Carolina law, this is the only acceptable finding and it should be applauded because it is related to aggravating factors required by the general criminal statute. But it is interesting to note that the odds ratio for the Black defendant/White victim variable is significantly higher. The ratio nearly doubles the odds ratio for the number of criminal indictments. Durham County prosecutors are making several decisions on a daily basis about which

177. See BALDUS et al., *supra* note 7; Paternoster et al., *supra* note 42.

178. Thurnberg, *supra* note 155, at 62.

murder cases to “go for death.” Importantly, there are extra-legal factors that are far more important in influencing their calculations than the legally relevant factors the state requires. Among the most important of these factors is the racial configuration of the offense victim and defendant.

VII. DISCUSSION AND IMPLICATIONS

The new guided discretion rules enunciated by the Supreme Court in *Gregg v. Georgia*¹⁷⁹ and affirmed in *McCleskey*¹⁸⁰ were designed to eliminate or significantly reduce the arbitrary nature of capital punishment, which the justices determined amounted to cruel and unusual punishment earlier on in *Furman v. Georgia*.¹⁸¹

In the years since the *Gregg* decision, the 38 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.¹⁸² Despite these efforts, this study indicates that arbitrariness has not been eradicated from Durham County’s capital punishment system. The willingness of prosecutors to seek the death penalty varies profoundly across racial and gender categorizations, especially with respect to the victim.

Most distressingly, the study confirms that insidious racial disparities still haunt Durham County’s death penalty system. Durham County prosecutors are about 43% more likely to seek the death penalty in White-victim cases than in Black-victim cases if the defendant is Black. All of these results are statistically significant at or beyond conventional significance levels.

The central finding of this study is simple: North Carolina’s death penalty statute is not uniformly applied in Durham County and has not eliminated arbitrariness and hence discrimination. Even though North Carolina capital punishment system is enumerated by statewide statutes calling for fair and just treatment of all parties, the implementation of these statutes is actually shaped by the proclivities of local prosecutors who exercise virtually unfettered discretion to select death penalty cases within their districts. From 2003–2007, Durham County prosecutors utilized this discretion in an arbitrary manner. The results of this analysis are even more disturbing because the study focuses solely on the charging decisions of county prosecutors. Potentially arbitrary jury decision-

179. *Gregg v. Georgia*, 428 US 123 (1972).

180. *McCleskey v. Kemp*, 481 US 279 (1987).

181. *Furman v. Georgia*, 408 U.S. 238 (Stewart, J. concurring).

182. Gregory, *supra* note 8.

making cannot account for the racial and gender disparities illuminated by the Durham County data.

A county justice system that continues to seek the death penalty based in part on skin color and gender identity is inexcusable in a region that prides inclusivity and in a nation that champions its multiculturalism and egalitarian political culture, including a “color-blind Constitution that neither knows nor tolerates classes among citizens.”¹⁸³ Despite this enlightened tradition, all death eligible murder cases in Durham County with comparable severity are not treated equally. Murders receive systematically different treatment based upon the race and sex of the victim and perpetrators of the crime. The Supreme Court must therefore continue to confront this persistently wanton and racially arbitrary application of capital punishment that has not been eradicated by prosecutorial and sentencing schemes the Court approved in *Gregg* and *McCleskey*. Furthermore, the current application of the death penalty in Durham County is inconsistent with the Supreme Court’s admonition in *McCleskey* that capital punishment should “be imposed fairly, and with reasonable consistency, or not at all.”¹⁸⁴

Our Constitution permits capital punishment under the Eighth Amendment and requires its fair application under the 14th Amendment Due Process Clause.¹⁸⁵ Thus, the importance of fair application of capital punishment cannot be overstated. Improper application of the rules jeopardizes a defendant’s constitutional right to a fair trial. More importantly, it also sows the seed of doubt and distrust among the populace in their moral sanctioning of capital punishment as a just form of social control. In his dissent from the Supreme Court’s 5–4 decision in *McCleskey*, the landmark case that discarded evidence of group based racial bias as a factor in death penalty appeals, Justice Brennan warned American society that:

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.¹⁸⁶

183. *Plessy v. Ferguson*, 163 US 537 (1896) (Harlan, J., dissenting).

184. *See McCleskey*, at 366–379 (Stevens, J., dissenting).

185. *Gregg v. Georgia*, 428 U.S.153 at 177 (“It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State . . .”).

186. *McCleskey*, 481 U.S. at 344 (Brennan, J., dissenting).

A. Limitations and Caveats of the Study

Any empirical study is only as good as available data would permit. The analysis reported here is limited in some respects. First, because the data are from a single county, one should be careful in generalizing the findings to other districts within North Carolina and nationwide. However, it is reassuring that the analysis has been based upon careful research design techniques and the analysis has been conducted with sophisticated methodology which places severe demands upon the data. Hence the results can inform discussion about capital punishment in other parts of the state and in the United States.

Second, the analysis covers only a period of five years and this makes it difficult to uncover longer term patterns that might be latent in Durham County prosecutors' behavioral choices. For example, it is unclear whether the pattern of racial disparity reported here is a recent phenomenon due to legal reforms in 2001 or has a longer but undetected historical trajectory.

Third, the data are limited because they do not include information about the role of political pressure in the choices that prosecutors make. It is plausible to believe and some have indeed argued convincingly that electoral pressure is an important consideration that affects the capital punishment decisions of state officials.¹⁸⁷ Future analyses should consider how Durham County prosecutors may or may not be influenced by political pressure in their charging decisions, especially in light of the public pressure introduced by the recent accusations of rape involving a few members of the Duke University Lacrosse team and the eventual disbarment of the chief prosecutor for unscrupulous professional misrepresentations.

Finally, the legal variables addressed in this analysis can be more complete. Future researchers examining Durham County prosecutorial decision-making should explore more deeply the role of statutory aggravating and mitigating circumstances in the charging decisions that prosecutors make. Doing so will permit a more detailed accounting of the considerations that determine whether Durham County prosecutors would seek the death penalty in a particular case or not.

CONCLUSION

Guided discretion rules announced in *Gregg v. Georgia* were meant to eradicate, or at the very least, minimize arbitrariness and discrimination in death penalty decision-making at the prosecutorial and jury decisions

187. Sanford Gordon and Gregory Huber, *Accountability or Coercion: Is Justice Blind when it Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004).

stages. This study has reported on the death penalty charging decisions of prosecutors in Durham County, North Carolina.

Contrary to the progressive impulses of the Research Triangle Area of North Carolina where Durham County is located, there is strong evidence that the legal orders issued in *Gregg* against arbitrariness and discrimination are yet to eradicate the problem. Arbitrariness and discrimination remain an on-going problem when Durham County prosecutors decide which murder defendant shall face the death penalty and which shall be spared. Defendants of whatever race who kill White victims are significantly worse off than defendants who kill Black victims. Prosecutors are far more likely to seek the death penalty in White victim cases, especially when the defendant in the case is Black. Similarly, prosecutors are more likely to seek the death penalty when the victim is a woman rather than a man. These findings were remarkably consistent across the models reported and the different methods of analysis. They lend support for the social underclass theory which focuses on race to explain escalation of punishment for those viewed as a threat to the social and economic structure.

Part of the explanation for this finding is the domination and untrammelled discretion that prosecutors enjoy when deciding whom to charge with a capital crime. While individual prosecutors in Durham County may not be consciously engaging in discriminatory behavior, the general pattern revealed by data indicates that prosecutorial decisions are being based irrationally on extra-legal considerations above and beyond the requirements of formal legal rationality. Indeed, the explanatory impact of extra-legal factors proves to be far greater than the impact of legal circumstances concerning the severity of the offense. It is important that policy makers take note and devise ways to channel the discretion of prosecutors to encourage greater reliance upon legal precepts rather than on extra-legal factors such as race and sex when formulating their decision to go for the ultimate sentence.

APPENDIX I
VARIABLE MEASUREMENTS FOR LOGISTIC REGRESSION MODEL

DEPENDENT VARIABLE:

Whether the state seeks the death penalty (coded 1) or not (coded 0).

INDEPENDENT VARIABLES:

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

White victim: Cases involving a 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.

Total number of offense victims: represents a count of all offense victims in the case including those in a collateral offense who were not killed.

Number of indictments: Count of the total number of indictments brought against the defendant in the case.

Black defendant: Black defendants were coded 1, White defendants were coded 0.

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

APPENDIX II

Rank	State	Total Death Row Inmates [Number of Women]
1.	California	667 [15]
2.	Florida	397 [0]
3.	Texas	372 [9]
4.	Pennsylvania	228 [3]
5.	Alabama	203 [2]
6.	Ohio	188 [1]
7.	North Carolina	173 [4]
8.	Arizona	126 [2]
9.	Georgia	107 [1]
10.	Tennessee	102 [2]
11.	Louisiana	88 [2]
12.	Oklahoma	84 [1]
13.	Nevada	77 [0]
14.	Mississippi	64 [2]
15.	South Carolina	63 [0]
16.	Missouri	48 [0]
17.	Arkansas	40 [0]
18.	Kentucky	39 [0]
19.	Oregon	35 [0]
20.	Virginia	21 [1]
21.	Indiana	19 [1]
21.	Idaho	19 [1]
21.	Delaware	19 [0]
24.	Illinois	13 [0]
25.	Nebraska	10 [0]
26.	Connecticut	9 [0]
26.	Kansas	9 [0]
26.	Utah	9 [0]
26.	Washington	9 [0]
30.	Maryland	6 [0]
31.	South Dakota	3 [0]
32.	Colorado	2 [0]
32.	Montana	2 [0]
32.	New Mexico	2 [0]
32.	Wyoming	2 [0]
36.	New Hampshire	0 [0]
36.	New Jersey	0 [0]
36.	New York	0 [0]

Source: NAACP Legal Defense Fund, *Death Row USA*, February 20, 2009, available at http://www.deathpenaltyinfo.org/state_by_state