

ARTICLE

RACIAL DISPARITIES IN THE CAPITAL OF CAPITAL PUNISHMENT

*Scott Phillips**

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I. INTRODUCTION

Justice is supposed to be blind—meted out according to the legal characteristics of a case rather than the social characteristics of the defendant and victim. Decades of research on race and capital punishment, however, demonstrate that blind justice is a mirage.¹

Ironically, the most rigorous research on race and capital punishment has not been conducted in the jurisdictions that execute the most offenders. In a recent comprehensive review of the literature, David Baldus and George Woodworth, leading scholars in the field, argue that “reasonably well-controlled” studies have been conducted in the following jurisdictions: California, Colorado, Georgia, Kentucky, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Philadelphia, and South Carolina.² The list of jurisdictions with “reasonably well-controlled” studies is striking due to glaring omissions—the list does not include the five most active death states: Texas,

1. See, e.g., RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, *THE DEATH PENALTY: AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 208 (2008) (detailing numerous studies from the 1930s that indicate racial disparities in the administration of the death penalty); U.S. GEN. ACCT. OFF., GGD-90-57, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* 5–6 (1990) (“The race of victim influence was found at all stages of the criminal justice system process . . .”); David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 501, 517–19 (James R. Acker, Robert M. Bohme & Charles S. Lanier eds., 2d ed. 2003) [hereinafter Baldus & Woodworth, *Empirical and Legal Overview*] (reviewing the results of the General Accounting Office’s 1990 report, including the finding that the odds of a death sentence were 4.3 times higher for defendants whose victims were white); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 198–203 (2003) [hereinafter Baldus & Woodworth, *Post-1990 Research*] (recounting the history of race-based death penalty studies and concluding that generally, disparities exist based on race of the victim).

2. Baldus & Woodworth, *Empirical and Legal Overview*, *supra* note 1, at 519.

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Virginia, Oklahoma, Missouri, and Florida.³ Such states account for 733 of the 1,119 executions in the modern era, defined as the Supreme Court's reinstatement of capital punishment in 1976 to the present.⁴

The current Paper advances the field of race and capital punishment by conducting "reasonably well-controlled" research in one of the most active death jurisdictions in the United States. To do so, I examine whether race influenced the District Attorney's (DA) decision to pursue a death trial or the jury's decision to impose a death sentence against adult defendants indicted for capital murder in Harris County, Texas from 1992 to 1999 (n = 504).⁵

Though the entire state of Texas has earned a reputation for execution, Harris County—home to Houston and surrounding areas—is arguably the capital of capital punishment. With 104 executions in the modern era, Harris County has often captured the national and international spotlight in the death penalty debate.⁶ Table 1 demonstrates three compelling patterns: (1) if Harris County were a state it would rank second in executions after Texas; (2) Harris County has executed more offenders than all the other major urban counties in Texas, combined; and (3) Harris County has executed more than twice as many offenders as the top death jurisdiction that has been subject to "reasonably well-controlled" research on race and capital punishment. The period from 1992 to 1999 is also critical because the number of death sentences in Harris County climbed to historic highs. From 1976 to 1991, Texas's death row received an average of six offenders per year from Harris County. But from 1992 to 1999, the average almost doubled to eleven offenders per

3. *Id.*; Death Penalty Information Center, Number of Executions by State and Region Since 1976, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Aug. 28, 2008).

4. Death Penalty Information Center, *supra* note 3. All death penalty data in this Article, including that found in the Article's tables and figures, are accurate as of August 28, 2008.

5. Baldus and Woodworth define "reasonably well-controlled" studies as those including "statistical controls for 10 or more legitimate non-racial case characteristics." Baldus & Woodworth, *Empirical and Legal Overview*, *supra* note 1, at 519. The current research meets the Baldus & Woodworth standard of being "reasonably well-controlled." To be clear, the current research does not claim to be in the same league as Baldus and colleagues' seminal research. The Baldus study remains by far the most rigorous research on race and capital punishment.

6. See, e.g., AMNESTY INT'L, USA: ONE COUNTY, 100 EXECUTIONS: HARRIS COUNTY AND TEXAS—A LETHAL COMBINATION 1 (2007), <http://www.amnesty.org/en/library/asset/AMR51/125/2007/en/dom-AMR511252007en.pdf> (expounding that Harris County accounted for 99 executions since 1982 and had 3 more scheduled at that time, from July to September 2007).

year—about one a month. The average dropped to five offenders per year from 2000 to 2007.⁷

7. The annual number of death sentences from Harris County was calculated from the Texas Department of Criminal Justice website, which lists the county of conviction for each offender and the date the offender was received on death row. Texas Department of Criminal Justice, Offenders on Death Row, <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last visited Aug. 28, 2008).

One could argue that it is inaccurate to call Harris County the “capital of capital punishment.” In an important article that provides the first comprehensive examination of death sentences for the entire nation, Blume and colleagues demonstrate that the death sentence rate in Texas is below the national average (the death sentence rate is defined as the number of death sentences divided by the number of murders). John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165 (2004). In fact, the death sentence rate in Texas ranks 16th among the 31 states that sent more than ten offenders to death row from 1977 to 1999. *Id.* at 172. The authors also note, in a *New York Times* article written about the study, that the death sentence rate in Harris County is average for Texas. Adam Liptak, *Study Revises Texas’s Standing as a Death Penalty Leader*, N.Y. TIMES, Feb. 14, 2004, at A10. Thus, the considerable number of executions in Texas is not a product of a high death sentence rate, but rather a large number of murders coupled with the state’s propensity to execute inmates who are sentenced to death. Blume et al., *supra*, at 172–73.

Given Blume and colleagues’ findings, how can Harris County be called the capital of capital punishment? Consider the following: (1) The execution rate is arguably more important than the death sentence rate—a death sentence is a crucial moment in a capital case, but execution is the quintessence of capital punishment. Calculating the execution rate reveals that Texas catapults from sixteenth to third in the national rankings (the execution rate is defined as the number of executions in each state from 1976 to the present, as enumerated on the Death Penalty Information Center website, divided by the number of murders in each state from 1976 to 1998, as enumerated in Table 1 of Blume and colleagues’ article). Such a comparison is appropriate given the time lag between a death sentence and an execution. Blume et al., *supra*, at 172; TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1999, at 10 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp99.pdf>. (2) Raw numbers and rates both matter. The following example from baseball illustrates the point. Barry Bonds holds the career home run record at 762, even though Bonds hit a home run in 7.7% of at-bats (762/9,847) compared to Babe Ruth, who hit a home run in 8.5% of at-bats (714/8,398). Ty Cobb holds the career batting average record at .366, even though Cobb had a total of 4,189 hits compared to Pete Rose’s 4,256 hits. Baseball-Reference.com, Leader and Record Board Index, <http://www.baseball-reference.com/leaders/> (last visited Aug. 28, 2008). Bonds’s raw number of home runs is not diminished by Ruth’s home run rate, nor is Cobb’s batting rate diminished by Rose’s raw number of hits. In most areas of life, including baseball and capital punishment, both raw numbers and rates contain important information needed to determine rankings. (3) The phrase “capital of capital punishment” is not meant to suggest that Harris County would be rated as the most prolific death penalty jurisdiction under any possible standard. Rather, the phrase is a heuristic device used to call attention to the indisputable fact that Harris County is one of the most active death jurisdictions in the nation.

Table 1: Number of Executions in Selected Jurisdictions, 1976 to Present⁸

<i>Top 10 States</i>		<i>Major Urban Counties in Texas</i>		<i>Jurisdictions with "Reasonably Well-Controlled" Research</i>	
Texas	413	Harris County (Houston)	104	Harris County (Houston)	104
Harris County (Houston)	104	Dallas County (Dallas)	38	North Carolina	43
Virginia	102	Tarrant County (Ft. Worth)	28	Georgia	42
Oklahoma	87	Bexar County (San Antonio)	26	South Carolina	39
Missouri	66	Travis County (Austin)	7	California	13
Florida	65			Mississippi	10
North Carolina	43			Maryland	5
Georgia	42			Philadelphia	3
Alabama	39			Nebraska	3
South Carolina	38			Kentucky	2
Louisiana	27			Colorado	1
				New Jersey	0
<i>Note:</i>					
• Numbers for Philadelphia represent Pennsylvania.					

To anticipate, the results challenge conventional wisdom regarding the basic relationship between race and capital punishment. Conventional wisdom holds that the race of the victim is pivotal, but the race of the defendant is not.⁹ The current research suggests that the race of the defendant and victim are both pivotal in the capital of capital punishment:

8. Data on Texas come from the Texas Department of Criminal Justice website. Texas Department of Criminal Justice, <http://www.tdcj.state.tx.us/stat/countyexecuted.htm> (last visited Aug. 28, 2008). Data for the remaining states come from the Death Penalty Information Center website. Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Aug. 28, 2008).

9. See U.S. GEN. ACCT. OFF., *supra* note 1, at 5–6 (“To summarize, the synthesis supports a strong race of victim influence. The race of the offender influence is not as clear cut and varies across a number of dimensions.”).

death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims. No Hispanic–white disparities were observed.

Before proceeding, it is important to note that the central claim of the research—racial disparities exist—does not insinuate that judicial actors intend to discriminate. Because human motivations are unobservable, scientific methods cannot be used to determine whether disparities are intentional or unintentional, conscious or unconscious.¹⁰ The word “disparities” is used throughout the research to denote aggregate numerical differences, while the word “discrimination” has been avoided because it unfairly impugns motives.

II. RACE AND CAPITAL PUNISHMENT

Rather than attempt to summarize the immense body of scholarship on race and capital punishment, the following review focuses on five issues that are relevant to the current project: (1) landmark Supreme Court cases; (2) seminal research conducted by Baldus and colleagues; (3) existing reviews of the literature; (4) prior research in Texas; and (5) the limitations of prior research in Texas.

In *Furman v. Georgia* (1972), the Supreme Court ruled in a 5–4 vote that capital punishment was administered in an arbitrary manner that constituted cruel and unusual punishment.¹¹ Several of the Justices in the majority used the word “arbitrary” to refer to numerical disparities, arguing that there was no legal basis for distinguishing the handful of defendants who were sentenced to death from the large number of defendants who committed equally reprehensible crimes but were not condemned.¹² But two Justices, Justices Douglas and Marshall, also used the concept of “arbitrariness” to refer to racial disparities in the imposition of capital punishment.¹³

10. Donald Black, *The Epistemology of Pure Sociology*, 20 LAW & SOC. INQUIRY 829, 862 (1995) (“The ends of people are not directly observable. We cannot observe the subjective goals or preferences of individuals, for example, nor the goals or needs of social systems” (footnote omitted)).

11. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

12. *Id.* at 248 n.11, 249 (Douglas, J., concurring) (opining that the infrequent and varied applications of the death penalty give rise to an “inference of arbitrariness” (citation omitted)); *id.* at 274, 275 n.18, 276–77, 293, 300 (Brennan, J., concurring) (arguing that the infliction of a severe punishment in a small percentage of cases in which it is available and the use of less severe punishments for comparatively more serious crimes indicates the arbitrariness of the death penalty).

13. *Id.* at 249–50, 256–57 (Douglas, J., concurring) (explaining that the death penalty is imposed in an arbitrary manner that discriminates against the poor, racial

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After the Supreme Court's decision in *Furman*, states began to revise their laws and reinstate capital punishment. Some states eliminated arbitrariness by making the death penalty mandatory for defendants convicted of certain crimes.¹⁴ Other states adopted "guided discretion," an approach that narrowed and specified the range of crimes eligible for death, separated the guilt and sentencing phases of a capital trial (allowing the prosecution and defense to introduce evidence of aggravating and mitigating circumstances during the sentencing phase that could not have been introduced during the guilt phase), and required automatic appellate review of death sentences.¹⁵ In *Woodson v. North Carolina* (1976) and the companion case *Roberts v. Louisiana* (1976), the Supreme Court struck down mandatory death statutes arguing that the protection of human dignity required individual consideration of each case.¹⁶ But the Supreme Court upheld guided discretion statutes in *Gregg v. Georgia* (1976) and the companion cases *Proffitt v. Florida* (1976) and *Jurek v. Texas* (1976), beginning the modern era of capital punishment.¹⁷ Guided discretion statutes soon proliferated as states passed legislation that would comply with the ruling in *Gregg*.¹⁸

Following the Supreme Court decision in *Gregg*, social scientists began to examine whether guided discretion eliminated the influence of race on capital punishment. Baldus and colleagues' *Procedural Reform Study* (PRS) and *Charging and Sentencing Study* (CSS) remain the most important and rigorous research on the topic.¹⁹ The PRS includes 750 (156 pre-*Furman* and 594 post-*Furman*) murder convictions in Georgia spanning 1970 to 1978, and the CSS includes 1,066 defendants convicted of murder or voluntary manslaughter in Georgia from 1973 to 1979.²⁰ Both studies control for an enormous number of potential confounders. The statewide post-*Furman* findings reveal that the race of the defendant was not a significant predictor of case

minorities, and unpopular groups); *id.* at 363–66 (Marshall, J., concurring) (citing statistical data showing that the death penalty discriminates against the poor, minority groups, and underprivileged portions of society).

14. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 22 (1990).

15. *Id.* at 22–25.

16. *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 335–36 (1976).

17. *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976); *Proffitt v. Florida*, 428 U.S. 253 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

18. BALDUS ET AL., *supra* note 14, at 22–25.

19. *See generally id.* (analyzing these two empirical studies to determine the effectiveness of death penalty sentencing reform).

20. *Id.* at 2–3.

outcomes, but the race of the victim was crucial; the odds of a death sentence were 4.3 times higher for defendants who killed a white victim, as compared to defendants who killed a black victim.²¹ Moreover, black defendants who killed white victims were more likely to be sentenced to death than any other racial combination.²²

The results of the CSS, and to a lesser degree the PRS, became the basis for the most important Supreme Court decision on race and capital punishment: *McCleskey v. Kemp* (1987).²³ McCleskey argued that racial disparities in the administration of capital punishment rendered the ultimate sanction unconstitutional.²⁴ The Supreme Court did not contest the empirical patterns, but nonetheless rejected McCleskey's challenge in a 5–4 vote.²⁵ Most centrally, the Court argued that statistical evidence of racial disparities alone, without evidence of discrimination in the particular case at hand, does not establish a constitutional violation.²⁶ The Court was also reluctant to open Pandora's box, reasoning that if social science research regarding racial disparities invalidated capital punishment, then social science research could ultimately undermine the entire criminal justice system.²⁷

Two comprehensive reviews of research on race and capital punishment have been conducted since the Supreme Court decision in *McCleskey*. The U.S. General Accounting Office reviewed the 28 studies published from 1972 to 1990, and, more recently, Baldus and Woodworth reviewed the 18 studies reported or published from 1990 to 2003.²⁸ Both reviews reach the same conclusions: (1) The race of the defendant does not have a consistent influence on capital punishment—some studies suggest the disparate treatment of black defendants, but most do not; and (2) The race of the victim has a consistent and robust influence on capital punishment—almost all studies suggest that death is more apt to be imposed on behalf of white victims.²⁹

21. *Id.* at 401.

22. *Id.* at 194 n.56, 315.

23. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

24. *Id.* at 286.

25. *Id.* at 282, 308–09.

26. *Id.* at 292–93.

27. *See id.* at 314–19 (“[Petitioner]’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”).

28. U.S. GEN. ACCT. OFF., *supra* note 1; Baldus & Woodworth, *Empirical and Legal Overview*, *supra* note 1; Baldus & Woodworth, *Post-1990 Research*, *supra* note 1.

29. U.S. GEN. ACCT. OFF., *supra* note 1, at 5–6; Baldus & Woodworth, *Post-1990 Research*, *supra* note 1, at 200–02.

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Drawing on Supplemental Homicide Reports (SHR), scholars have also examined the relationship between race and capital punishment in Texas. The SHR data are used to examine whether race distinguishes the large number of defendants who commit murder from the small number sentenced to death.³⁰ The post-*Furman* findings in Texas mirror established patterns: the race of the defendant does not seem to matter; death is more apt to be imposed on behalf of white victims; and minorities who kill whites are more apt to be sentenced to death than any other racial combination.³¹

Existing research in Texas suffers from five important limitations, most of which stem from a reliance on SHR data: (1) SHR data cannot control for critical confounders such as the defendant's prior criminal record or the heinousness of the crime. Hence, no study in Texas meets the Baldus & Woodworth standard for "reasonably well-controlled" research enumerated

30. See Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 20–24 (2005) (showing how race data within SHR is used to compare information collected by law enforcement on homicide suspects with information on all death sentenced defendants).

31. See William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 595 (1980) (explaining that race of the victim is a greater factor than race of the offender in receiving the death penalty); see also JAMES W. MARQUART, SHELDON EKLAND-OLSON & JONATHAN R. SORENSEN, *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990*, at 158 (1994) ("[P]ost-*Furman* researchers have consistently found that death sentences are most likely when the victim is Anglo and that this tendency is heightened when the offender is African-American."); Deon Brock, Nigel Cohen & Jonathan Sorensen, *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. CRIM. L. 43, 68 (2000) (noting that studies have consistently shown that killers of whites are "overrepresented" on death row); Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade after Furman in Texas*, 69 SOC. SCI. Q. 853, 853 (1988) (noting the race of the defendant has become less important in sentencing, but that of the victim still influences sentencing); Jonathan R. Sorenson & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE, 743, 765 (1990–1991) (concluding that racial discrimination based on the victim's race is prevalent).

For pre-*Furman* patterns, see, for example, Robert J. Hunter, Paige Heather Ralph & James Marquart, *The Death Sentencing of Rapists in Pre-Furman Texas (1942–1971): The Racial Dimension*, 20 AM. J. CRIM. L. 313, 316–17 (1993) (analyzing death sentencing trends for rapists 1942–1971 and finding that African Americans were disproportionately sentenced to death for the rape of a white victim); Rupert C. Koeninger, *Capital Punishment in Texas, 1924–1968*, 15 CRIME & DELINQ. 132, 138 (1969) (offering evidence that African-American offenders in Pre-*Furman* Texas would get death more often for raping a white woman, but not for raping African-American adults); Paige H. Ralph, Jonathan R. Sorensen & James W. Marquart, *A Comparison of Death-Sentenced and Incarcerated Murderers in Pre-Furman Texas*, 9 JUST. Q. 185, 187 (1992) (reviewing data on death-eligible male defendants in Texas 1942–1970 and finding that although non-Anglo-Americans were not sentenced to death arbitrarily on the basis of their race, murderers of Anglo-Americans resulted in far more death sentences).

above. (2) SHR data cannot isolate murder defendants who were eligible for capital punishment under Texas law, so the imperfect comparison includes defendants who were not eligible for death or excludes defendants who were eligible for death, or both. (3) If racial disparities emerge, SHR data cannot identify the stage of the process that produced the disparities. Disparities may originate in the decision to charge a defendant with capital murder, the decision to indict a defendant for capital murder, the DA's decision to pursue a death trial, or the jury's decision to impose a death sentence. (4) SHR data are sometimes problematic due to missing values. (5) Existing studies tend to examine the entire state of Texas.³² Because capital punishment in Texas is the aggregation of capital punishment in 254 counties with different histories, cultures, political climates, and legal actors—including different DAs who decide whether to pursue a death trial—an investigation of race and capital punishment across the state of Texas cannot account for local conditions.³³

The current research overcomes such limitations by controlling for critical confounders, focusing exclusively on defendants who were eligible for death, identifying the stage of the process that produced racial disparities, including complete data for all cases, and examining patterns for a single county.

III. RESEARCH METHODS

A. *Dependent Variables: Trajectory and Disposition*

In Harris County, the path from the commission of a murder to the pronouncement of a death sentence includes four major decisions: the intake prosecutor's decision to charge a defendant with capital murder;³⁴ the grand jury's decision to indict a

32. For an exception, see Brock et al., *supra* note 31, at 43 (examining the imposition of death sentences in four Texas counties).

33. SHR data also have important advantages, including detailed information about the offender—victim relationship and the ability to examine the totality of racial disparities from the inception of the case (commission of murder) to the conclusion of the case (death sentence and execution).

34. The Harris County intake division prosecutor must determine whether a homicide can be charged under the Texas capital murder statute. Despite repeated attempts, collecting the data needed to examine the impact of race on the charging decision proved impossible. But, the charging decision does not appear to exhibit much variation. To begin, the Texas capital murder statute delineates narrow categories of murder that are death-eligible. The precision of the statute simplifies the charging decision, as opposed to states that define heinous murders as death eligible. See TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2007) (defining capital murder in Texas). Moreover, the *Houston Chronicle* reported in a February 2001 special series that the intake prosecutor has “standing orders” to file capital murder charges in all possible cases. Mike Tolson, *A Deadly Distinction*, HOUSTON CHRON., Feb. 4, 2001, at A1. This

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defendant for capital murder; the DA's decision to pursue a death trial;³⁵ and the jury's decision to impose a death sentence.³⁶ Because the charging and indictment decisions do not appear to exhibit enough variation to warrant an investigation, the current research focuses on whether race influenced the DA's decision to pursue death or the jury's decision to impose death—the trajectory and disposition of a case.

The data include the population of adult defendants indicted for capital murder in Harris County, Texas from 1992 to 1999 (n = 504).³⁷ The Harris County District Clerk (HCDC) used the Harris County Justice Information Management System (JIMS) to identify the defendants. The HCDC also provided a JIMS file that contained public information about each case, including whether the case resulted in a plea bargain or trial and the disposition. The Harris County DA's office provided archival documents that were used to verify the list of defendants and determine if the DA pursued a death trial.

Figure 1 traces the trajectory, disposition, and current status of the 504 defendants who murdered 614 victims (defendants who were age seventeen or older at the time of the crime were considered adults in Texas during the time period under consideration). The figure reveals that the DA pursued a death trial against 129 of the 504 defendants. Of the 129 defendants who advanced to a death trial, 98 were sentenced to death, 29 were sentenced to life imprisonment, 1 was sentenced to confinement in the Texas Department of Corrections (TDC) for some period of time less than life, and 1 was acquitted.³⁸ Of the

article ran as part of a four-part series in the *Houston Chronicle* from February 5–7, 2008. The series, written by Steve Brewer, Mike Tolson, and Allan Turner, was entitled *Harris County is a Pipeline to Death Row: A Four-Part Series Examines Why, and Explores Whether Justice Is Served*. *Id.* Nonetheless, the inability to examine the charging decision remains a potential weakness of the current research.

35. The grand jury must return a "Bill of Indictment" for capital murder in order for the DA to pursue a death trial. TEX. CONST. art. I, § 10. This step borders on a formality, as data from the Harris County district clerk indicates that grand juries returned a "No Bill" in just seven capital cases from 1992 to 1999.

36. Tolson, *supra* note 34.

37. Defendants were excluded if the case was dismissed, the case was disposed but expunged, the defendant was never arrested, the victim's remains could not be identified, or the case had not been disposed at the time the list of cases was requested from the Harris County District Clerk in December 2001. The two Native-American defendants were also excluded.

38. The inmates sentenced to life imprisonment are eligible for parole because Texas did not pass a life without parole (LWOP) statute until 2005 (defendants in the data who were convicted in 1992 must serve 35 years before becoming eligible for parole; defendants in the data who were convicted between 1993 and the passage of LWOP must serve forty years before becoming eligible for parole). Note, *A Matter of Life and Death: The Effect of Life-Without-Parole-Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1843–44 (2006) (noting that Texas Governor Rick Perry signed the LWOP bill into

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98 condemned defendants, 34 have been executed to date, 50 remain on death row, and 14 will not be executed (10 were commuted to life imprisonment due to the Supreme Court's 2005 decision regarding juveniles in *Roper v. Simmons*;³⁹ 4 died of natural causes on death row). The figure also reveals that the DA pursued a life trial against 218 defendants and reached a plea bargain with 157 defendants.

Perhaps the most compelling pattern in Figure 1 is that the DA at the time, John Holmes, was both selective and effective: he did not seek the death penalty nearly as often as he could have, but once he sought death, he usually got it. The current research examines whether race influenced the winnowing process depicted in the figure.

B. *Race/Ethnicity*

Table 2 describes measurement strategies, data sources, and means for the race/ethnicity of the defendant and victim. Though the terms "race" and "ethnicity" are not interchangeable, in the interest of brevity, the generic term "race" is used throughout the remainder of the paper.

Data regarding the defendant's race were obtained from JIMS. The JIMS file included separate indicators for race (white, black, Asian) and ethnic origin (Hispanic). But important clues suggested that JIMS did not distinguish between Hispanic defendants and non-Hispanic defendants in a consistent manner. An examination of defendants' names suggested a problem of underinclusion: defendants coded as Hispanic tended to have Spanish surnames, but some defendants with Spanish surnames were not coded as Hispanic. The same defendants who appeared to be miscoded tended to murder Hispanic victims, a pattern that supports the presumption of coding errors in JIMS considering the intraracial nature of most murders. The problem was addressed with a two-pronged approach: (1) If a defendant was coded as Hispanic in JIMS then the original code remained the same. (2) If a defendant was coded as non-Hispanic in JIMS then the defendant's name was compared to the U.S. Census Bureau's 1990 Spanish Surname List.⁴⁰ The list classifies 12,215 surnames as "Heavily Hispanic," meaning more than 75% of Census

39. *Roper v. Simmons*, 543 U.S. 551 (2005). *Roper* held unconstitutional the execution of convicted murders who were under eighteen at the time of the offense. *Id.* at 568.

40. David L. Word & R. Colby Perkins, Jr., *Building a Spanish Surname List for the 1990's—A New Approach to an Old Problem* (Population Div., U.S. Bureau of the Census, Technical Working Paper No. 13, 1996), available at <http://www.census.gov/population/documentation/twppo13.pdf>.

respondents with the surname reported being Hispanic. Using a conservative standard, capital murder defendants were recoded as Hispanic if at least 80% of Census respondents with the same surname reported being Hispanic. After correcting Hispanic origin, the defendants are distributed as follows: 24% white, 23% Hispanic, 49% black, and 3% Asian.

Table 2: Measurement Strategies, Data Sources, and Means for the Independent Variables

Variable	Measurement	Data Source*	Mean
Defendant Race			
White	1 = yes	JIMS	.24
Hispanic	1 = yes	JIMS	.23
Black	1 = yes	JIMS	.49
Asian	1 = yes	JIMS	.03
Victim Race			
White	1 = yes	VSMF	.41
Hispanic	1 = yes	VSMF	.24
Black	1 = yes	VSMF	.28
Asian	1 = yes	VSMF	.10
Controls			
<i>Legal Dimensions of Case</i>			
Heinous Level 1	1 = yes	HC	.27
Heinous Level 2	1 = yes	HC	.51
Heinous Level 3	1 = yes	HC	.22
Multiple Defendants Indicted on Case	1 = yes	GJI	.49
Form of Capital Murder: Robbery	1 = yes	GJI	.72
Form of Capital Murder: Burglary	1 = yes	GJI	.10
Form of Capital Murder: Multiple Victims	1 = yes	GJI	.17
Form of Capital Murder: Kidnapping	1 = yes	GJI	.10
Form of Capital Murder: Rape	1 = yes	GJI	.06
Form of Capital Murder: Remunerate	1 = yes	GJI	.05
Form of Capital Murder: Child	1 = age 0 to 5	GJI	.03
Form of Capital Murder:	1 = yes	GJI	.02

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Variable	Measurement	Data Source*	Mean
Other			
Method of Murder: Shot	1 = yes	HCME	.74
Method of Murder: Beaten	1 = yes	HCME	.14
Method of Murder: Stabbed	1 = yes	HCME	.10
Method of Murder: Asphyxiated	1 = yes	HCME	.09
<i>Defendant Social Characteristics</i>			
Teen	1 = 17 to 19	JIMS	.37
Young Adult	1 = 20 to 29	JIMS	.44
Adult	1 = \geq 30	JIMS	.19
Sex	1 = male	JIMS	.95
Prior Violent Conviction	1 = yes	JIMS	.19
Prior Nonviolent Conviction	1 = yes	JIMS	.45
Appointed Attorney	1 = appointed only	JIMS	.73
<i>Victim Social Characteristics</i>			
Vulnerable Age	1 = age 6–16 or > 60	VSMF	.12
Sex	1 = female	VSMF	.27
Prior Conviction	1 = yes	www.publ icdata.co m	.14
*Note:			
<ul style="list-style-type: none"> • Abbreviations: JIMS = Justice Information Management System; VSMF = Vital Statistics Mortality File; HC = <i>The Houston Chronicle</i>; GJI = Grand Jury Indictment; HCME = Harris County Medical Examiner. 			

Data regarding the victim's race were obtained from a name-identified version of the Texas Department of Health's Vital Statistics Mortality File (VSMF).⁴¹ Coding the race of the victim required a procedure that could accommodate cases with multiple victims: 75 cases include multiple victims of the same race; 11 cases include multiple victims of different races. If multiple victims are the same race, then one dichotomous indicator

41. If data were missing in the VSMF, then Harris County Medical Examiner records were used to code the race of the victim.

represents the victims (if a white defendant murders two Hispanic victims then the indicator for Hispanic victim is coded 1). If multiple victims are of different races, then multiple dichotomous indicators represent the victims (if a white defendant murders a Hispanic victim and a black victim then the indicators for Hispanic victim and black victim are both coded 1). The dichotomous indicators capture the presence or absence of victims of each race. The victims are distributed as follows: 41% white, 24% Hispanic, 28% black, and 10% Asian (percentages do not sum to 100 because the dichotomous indicators for each case are not mutually exclusive).

C. Controls

To control for potential confounders, the models also examine the social characteristics of the defendant, the social characteristics of the victim, and the legal dimensions of the case. Table 2 also reports measurement strategies, data sources, and means for the controls.

1. *Defendant Social Characteristics.* Data regarding defendant social characteristics were drawn from the JIMS file. The multivariate models control for the defendant's sex (1 = male), age (dichotomous indicators for teen 17 to 19, young adult 20 to 29, and adult 30 or more), whether the defendant had a prior violent conviction (discussed below), whether the defendant had a prior nonviolent conviction (discussed below), and the defendant's form of legal counsel (discussed below). Measurement of the defendant's prior record and legal counsel require elaboration.

Controlling for the defendant's criminal record is crucial because of the special sentencing issues considered during the punishment phase of a Texas capital murder trial. To sentence a defendant to death, jurors must answer two or three questions depending on whether the defendant was a lone actor or a party to the case: (1) Does the defendant pose a continuing threat to society?; (2) If the defendant is a party to the case, did the defendant cause the death of the victim, intend to cause the death of the victim, or anticipate that a life would be taken?; and (3) Do mitigating circumstances warrant a life sentence? If the jurors unanimously answer the questions in the following order—yes, yes, no—then the defendant is sentenced to death.⁴²

42. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2006).

Prior to 1991, jurors considered three different special sentencing issues: (1) Did the defendant deliberately kill the victim?; (2) Does the defendant pose a continuing

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Research suggests that future dangerousness is the most critical sentencing consideration in Texas: most defendants sentenced to life were spared because jurors concluded that the defendant did not pose a continuing threat, not because jurors concluded that mitigating circumstances warranted mercy.⁴³ Thus, to pursue a death trial, the DA must decide if the defendant's criminal record (or some other aspect of the case) supports a prediction of future dangerousness. Although the DA has access to national criminal record data, JIMS criminal record data are limited to Harris County. To address the problem, JIMS data were supplemented with information from the website: www.publicdata.com.⁴⁴ The website charges users a fee to access public criminal record data compiled from 43 states, including Texas.⁴⁵ Searches were conducted on all defendants. The inquiries revealed that among defendants who had a clean record in JIMS, 13 had a prior violent conviction, and 32 had a prior nonviolent conviction on the public data website. Merging data from JIMS and the public data website, the indicators for prior violent conviction and prior nonviolent conviction are coded 1 = yes, 0 = no.

Controlling for the defendant's form of legal counsel is also important, particularly because Harris County does not have a Public Defender's Office; if a defendant is indigent then the judge appoints defense counsel from a list of qualified attorneys.⁴⁶ The

threat to society?; and (3) If relevant, was the defendant's behavior an unreasonable response to the victim's provocation? If the jury unanimously answered "yes" to all three questions, then the defendant was sentenced to death. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 310 (1989) (specifically noting that Texas law requires courts to hand down a death sentence where jurors return affirmative answers to the three sentencing issues). The second question regarding future dangerousness was meant to allow the defense to present the types of mitigating circumstances that the Supreme Court required for a statute to pass constitutional muster. *Id.* at 316. However, Penry, a mentally retarded defendant who was a victim of child abuse, maintained that the second special sentencing issue did just the opposite in his case. *Id.* at 308–09, 312. Specifically, Penry claimed that if he presented the issues of retardation and abuse as mitigating circumstances, the jury might conclude that he was more of a future danger, thereby transforming mitigating circumstances into aggravating circumstances. The Supreme Court ultimately upheld the defendant's challenge, leading to the adoption of the current special sentencing issues which explicitly require consideration of mitigating circumstances. *Id.* at 328; JON SORENSON & ROCKY LEANN PILGRIM, *LETHAL INJECTION: CAPITAL PUNISHMENT IN TEXAS DURING THE MODERN ERA* 7 (2006).

43. *See* Jon Sorenson & James Marquart, *Future Dangerousness and Incapacitation, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 1, at 283, 286 (noting a study showing that jurors' decisions that a defendant would not pose a future danger to society resulted in leniency 85% of the time); *see also* SORENSON & PILGRIM, *supra* note 42, at 53 (same).

44. PublicData.com, <http://www.publicdata.com> (last visited Aug. 28, 2008).

45. PublicData.com Pricing, <http://www.publicdata.com/prices.html> (last visited Aug. 28, 2008).

46. TEX. CODE CRIM. PROC. ANN. arts. 1.051, 26.04 (Vernon Supp. 2007); *see also* HARRIS COUNTY CRIMINAL COURTS AT LAW, *ALTERNATIVE PLAN IMPLEMENTING THE TEXAS*

JIMS file indicates that 369 defendants were appointed counsel, 31 defendants hired counsel, and 104 defendants had both hired and appointed counsel at different stages of the case.⁴⁷ Legal counsel is measured through a dichotomous indicator coded 1 = appointed only, 0 = hired counsel at some point during the case.⁴⁸

2. *Victim Social Characteristics.* Data regarding victim social characteristics were drawn from the Vital Statistics Mortality File⁴⁹ and www.publicdata.com.⁵⁰ The multivariate models control for the victim's sex (1 = female), whether the victim was vulnerable due to age (1 = 6 to 16 or over 60; children 0 to 5 considered below), and whether the victim had a prior violent or nonviolent conviction (1 = yes; searches were conducted on all victims on the public data website). Coding the victims' characteristics required a procedure that could accommodate cases with multiple victims. Because each of the characteristics is thought to influence the chance of a death trial and a death sentence—more on behalf of female victims and vulnerable victims, but less on behalf of disreputable victims with a prior criminal record—a case is coded 1 if one or more of the victims meet the specified criterion.

3. *Legal Dimensions of Case.* Data regarding the legal dimensions of the case were obtained from grand jury indictments, the Harris County Medical Examiner (HCME), and *The Houston Chronicle*. The multivariate models control for the heinousness of the crime (discussed below), whether multiple defendants were indicted (1 = yes), the form of capital murder (discussed below), and the method of murder (dichotomous indicators for shot, stabbed, beaten, and asphyxiated). Controls for heinousness and the form of capital murder require elaboration.

FAIR DEFENSE ACT (2007), available at <http://www.ccl.hctx.net/attorneys/FDA/FDA%20Alt%20Plan.pdf> (describing the official protocol for providing indigent defendants with legal counsel in Harris County); Tolson, *supra* note 34 (reporting that Harris County lacks a Public Defender's Office).

47. The JIMS file does not indicate whether defendants changed from appointed-to-hired or hired-to-appointed or the date of the change.

48. Legal counsel could also be measured through three dichotomous indicators: appointed, hired, and both. But this approach poses the problem of quasi-complete separation: 1 of the 31 defendants with hired counsel advanced to a death trial; 0 of the 31 defendants with hired counsel received a death sentence. For more on quasi-complete separation, see generally PAUL D. ALLISON, LOGISTIC REGRESSION: USING THE SAS SYSTEM 41–48 (1999).

49. If data were missing in the VSMF, then Harris County Medical Examiner records were used to code the age and sex of the victim.

50. PublicData.com, *supra* note 44.

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To measure the heinousness of the crime, newspaper articles about each case were collected from *The Houston Chronicle* online archive (an average of 6.75 articles per case, for a total of more than 3,400 articles). The aggravating and mitigating circumstances in each case were coded based on a list drawn from Baldus and colleagues' research on race and capital punishment.⁵¹ Table 3 lists the aggravating and mitigating circumstances in question. The following formula was used to construct a scale of heinousness: number of aggravating circumstances minus number of mitigating circumstances (the scale ranged from -3 to +7). The original scale was transformed into three dichotomous indicators: Level 1 Heinousness (bottom quartile of scores ranging from -3 to 0), Level 2 Heinousness (middle 50% of scores ranging from 1 to 2), and Level 3 Heinousness (top quartile of scores ranging from 3 to 7).

The heinousness measure included missing data because *The Houston Chronicle* did not report on 28 cases. To address the problem, missing cases are assumed to be Level 1. This assumption is based on compelling patterns. To begin, the cliché "if it bleeds it leads" encapsulates the media's obsession with sensational crimes. Considering the fact that *The Houston Chronicle* reported on 476 of the 504 cases, the 28 capital murders that did not attract media attention are almost sure to be the least heinous of all. In fact, the DA did not pursue a death trial against any of the 28 defendants, bolstering the assumption of minimal heinousness. Because the substantive results are the same regardless of whether the missing cases are excluded or coded as Level 1, the models presented in the results section use the revised indicator of heinousness to ensure complete data for all cases. Thus, the original scale was transformed into three dichotomous indicators to facilitate a solution to the missing data problem (also because several values on the original scale had no cases or just one case).⁵²

51. BALDUS ET AL., *supra* note 14, at 526–35.

52. Heinousness was also coded based on a visceral reaction to the facts of the crime, just as a DA or juror would use their visceral reaction to weigh the heinousness of a crime. Each case was assigned to Level 1 (relatively minimal), Level 2 (intermediate), or Level 3 (extreme). The Baldus measure of heinousness (based on coding of aggravating and mitigating circumstances) and the visceral measure of heinousness produce the same substantive results. The Baldus measure is used here because it provides slightly more conservative estimates of the impact of race on capital punishment.

Using newspaper articles to code heinousness (based on the aggravating and mitigating circumstances in a case) is not ideal, but all other avenues were closed. The ideal approach would be to examine the capital murder summary memorandum that the DA uses to decide whether to seek the death penalty. But I was denied access to the memoranda. I also gathered police reports on the cases, but in numerous instances the reports included insufficient information, or the police eliminated large amounts of

Table 3: Aggravating and Mitigating Circumstances Used to Construct Measure of Heinousness⁵³

Aggravating Circumstances	Mitigating Circumstances
<ul style="list-style-type: none"> • Victim vulnerable (e.g., handicapped, mental retardation, frail, pregnant) • Victim suffered physical torture (methodical infliction of severe pain) • Victim suffered mental torture (e.g., hostage informed of impending death before homicide) • Unnecessary pain (pain that is not necessary to kill the victim given the method of killing) • Victim suffered lingering death • Victim suffered brutal beating (e.g., stomping, clubbing) • Victim bound/gagged • Victim ambushed • Execution style murder (methodical, passionless killing of subdued/defenseless victim) • Killing unnecessary to complete felony (e.g., storekeeper turns over money and then shot) • Victim plead for life • Defendant expressed 	<ul style="list-style-type: none"> • Defendant showed remorse • Victim aroused defendant's sexual desire at time of homicide • Victim aroused defendant's fear for life at time of homicide • Victim provoked defendant (e.g., verbal abuse or physical attack at time of homicide) • Victim provoked defendant (e.g., verbal abuse or physical attack of someone defendant cares about) • Victim aroused defendant's hate on a previous occasion • Victim had used alcohol or drugs immediately prior to crime • Victim used or talked about large amounts of money • History of bad blood between defendant and victim • Victim consented to killing • Victim was a participant in the crime • Victim engaged in questionable behavior • Defendant mental impairment

information before providing the documents. Case files and trial transcripts were not an option because of the number of cases disposed through a plea bargain. Nonetheless, focusing on newspaper articles is a reasonable approach. To begin, the measure has face validity: 12% of cases coded as Level 1 heinousness received a death sentence, 17% of cases coded as Level 2 heinousness received a death sentence, and 35% of cases coded as Level 3 heinousness received a death sentence. In addition, the aggravating and mitigating circumstances listed in Table 3 are the sort of facts a newspaper would tend to report.

53. The list of aggravating and mitigating circumstances was derived from Baldus & Woodworth, *Empirical and Legal Overview*, *supra* note 1, at 526–35.

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Aggravating Circumstances	Mitigating Circumstances
<p>pleasure regarding killing</p> <ul style="list-style-type: none"> • Defendant violated victim's dead body (e.g., mutilation, sexual assault) • Victim disrobed • Defendant engaged in significant planning for murder • Defendant attempted to dispose/conceal body of the victim • Victim killed in presence of family members or friends • Defendant used multiple methods for killing • Overkill 	

Grand Jury indictments were used to determine the form of capital murder. Of the forms delineated in the Texas capital murder statute, the following appear in the data: robbery, burglary, multiple victims, kidnapping, rape, remuneration, child 0 to 5 years old, police officer, arson, and obstruction/retaliation. The form of capital murder is measured through dichotomous indicators coded 1 = yes, 0 = no (due to limited numbers of cases, the indicators for police officer, arson, and obstruction/retaliation were combined to form an "other" category). Because a case can be designated a capital murder for multiple reasons, the indicators are not mutually exclusive.

D. Modeling

Logistic regression is used to estimate the impact of race on the odds of a death trial (1 = death trial; 0 = all other trajectories) and a death sentence (1 = death sentence; 0 = all other dispositions). In a logistic model, odds ratios represent the effect of a unit change in the independent variable on the odds of the outcome occurring—a death trial or a death sentence. An odds ratio greater than 1 denotes a direct relationship, an odds ratio less than 1 denotes an inverse relationship, and an odds ratio of 1 suggests that the independent variable has no influence on the outcome. So, for example, an odds ratio of 1.5 would suggest that being a black defendant, relative to the reference of being a white defendant, increases the odds of a death trial by 50% (or, the

odds of a death trial are 1.5 times greater for black defendants than white defendants). An odds ratio of .7 would suggest that being a black defendant, relative to the reference of being a white defendant, reduces the odds of a death trial by 30% ($1 - .7 = .3$).

Because the data include a population rather than a random sample, statistical significance becomes meaningless.⁵⁴ Tests of statistical significance examine a narrow question: The probability of making a Type 1 or Type 2 error in generalizing from a sample to a population. The current research does not generalize from a sample to a population, but rather describes the impact of race on capital punishment for a population of cases. The critical issue in the current research is substantive significance, not statistical significance. Thus, I focus on the magnitude of population parameters.⁵⁵ Specifically, regression coefficients are converted to predicted probabilities in order to examine the cost of racial disparities in human lives. Ignoring statistical significance also eliminates the need to correct for non-independent observations (clustering occurs because multiple defendants are often indicted for the same crime). Non-independent observations can produce correlated error terms leading to biased standard errors and inaccurate tests of statistical significance.⁵⁶ But correlated error terms do not influence population parameters.

It is important to note that the data do not include enough Asian defendants or Asian victims to produce robust parameters (for defendants, the DA pursued a death trial in 4 of 15 cases and jurors imposed death in 3 of 15 cases; for victims, the DA pursued death in 8 of 48 cases and jurors imposed death in 6 of 48 cases). To preserve the population of cases, Asian defendants and Asian victims are included in the multivariate models. But the parameters for Asian defendants and Asian victims are reported in table footnotes and should not be interpreted.⁵⁷

54. See Charles D. Cowger, *Author's Reply*, 59 SOC. SERV. REV. 520, 520–22 (1985) (discussing how significance tests are inappropriate when applied to total populations); Charles D. Cowger, *Statistical Significance Tests: Scientific Ritualism or Scientific Method?*, 58 SOC. SERV. REV. 358, 359–66 (1984) (same).

55. See Kenneth A. Bollen, *Apparent and Nonapparent Significance Tests*, 25 SOC. METHODOLOGY 459, 462–67 (1995) (suggesting six “alternative approaches to apparent populations”).

56. MCKEE J. MCCLENDON, *MULTIPLE REGRESSION AND CAUSAL ANALYSIS* 154 (1994).

57. Because Asians are often considered the “model minority,” whites and Asians could be combined into a single category. But whites and Asians are treated differently (see Table 4), so combining the groups would dilute black–white and Hispanic–white comparisons.

E. Limitations

The most significant limitation is the inability to control for the strength of evidence in each case, an important consideration in the DA's decision to pursue a death trial and the jury's decision to impose a death sentence. This is not a fatal flaw. The only reason to control for a potential confounder is if the confounder is correlated with both race and the trajectory or disposition of cases. Strength of evidence could be related to race if members of certain racial groups tend to be defendants or victims in capital murders that naturally produce more evidence. If, for example, beating a rape victim to death produces more evidence than shooting a robbery victim, and if certain racial groups are more apt to be defendants or victims in the former murder than the latter, then apparent racial disparities might be a legitimate response to differences in the strength of evidence across cases. But the models control for the form and method of murder, so the data include proxies for strength of evidence. Strength of evidence could also be related to race if the police conduct more thorough investigations against certain racial groups, or on behalf of certain racial groups. If so, then controlling for strength of evidence might locate the source of racial disparities in the police department rather than the DA's office or the jurors' deliberation room, but would not eliminate the existence of racial disparities. It is also worth noting that the only study to measure strength of evidence in capital cases found that inclusion of the evidence variable did not change the race findings.⁵⁸ Moreover, in the current data 496 of the 504 defendants were convicted, suggesting that insufficient evidence was rarely a problem for the Harris County DA.⁵⁹

IV. RESULTS

A. Bivariate Patterns

Table 4 presents percentage distributions for case trajectory and case disposition by race. Panel A demonstrates the equal treatment of defendants: the DA pursued a death trial against 27% of white defendants, 25% of Hispanic defendants, and 25% of black defendants; a death sentence was imposed against 21% of

58. BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* (1987).

59. I could have measured the strength of evidence in each case if the DA's office had provided access to the capital murder memorandum for each case. Unfortunately, the DA's office denied access to the memoranda.

white defendants, 19% of Hispanic defendants, and 19% of black defendants.

Panel B demonstrates the relatively equal treatment of Hispanic and white victims, but suggests disparities in the treatment of black victims compared to white victims: the DA pursued a death trial on behalf of 30% of white victims and 26% of Hispanic victims, but just 23% of black victims; a death sentence was imposed on behalf of 23% of white victims and 21% of Hispanic victims, but just 18% of black victims.

*B. Multivariate Patterns: Death Trial*⁶⁰

Do the bivariate patterns regarding death trials hold in a multivariate context? Table 5 reports odds ratios from the logistic regression of death trial on race. The results present a surprising twist. The bivariate comparison of Hispanics to whites holds: Hispanic and white defendants and victims are treated the same. But the bivariate comparison of blacks to whites does not.

1. *Black and White Defendants.* The percentage distribution suggested that the DA pursued death against black defendants and white defendants at the same rate, but controlling for confounders reveals disparities in the treatment of black defendants: the odds ratio for black defendant changes from .91 in the bivariate logistic model to 1.75 in the multivariate logistic model. The transformation occurs because black defendants committed murders that were less “serious.” Here, the term “serious” refers to the features of a murder that increase the chance of a death trial at the bivariate level in the current data. Table 6 demonstrates that black defendants were less likely than white defendants to:

- murder white victims;
- commit the most heinous murders;
- commit murders involving burglary, kidnapping, rape, remuneration, or a child;
- commit murder by beating, stabbing, or asphyxiating the victim;
- commit murder as an adult;
- murder victims who were vulnerable due to age; and
- murder women.

60. The bivariate logistic models mentioned in this section are available from the Author upon request.

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Table 5. Odds Ratios from the Logistic Regression of Case Trajectory on Race (n = 504)

	Death Trial
Defendant Race	
Hispanic	1.043
Black	1.752
Victim Race	
Hispanic	1.045
Black	.565
Control	
<i>Legal Dimensions of Case</i>	
Heinous Level 2	1.890
Heinous Level 3	2.285
Multiple Defendants Indicted on Case	.268
Type of Capital Murder: Burglary	.497
Type of Capital Murder: Multiple Victims	2.508
Type of Capital Murder: Kidnapping	2.235
Type of Capital Murder: Rape	2.565
Type of Capital Murder: Remunerate	11.900
Type of Capital Murder: Child	.794
Type of Capital Murder: Other	10.376
Method of Murder: Beaten	1.031
Method of Murder: Stabbed	1.617
Method of Murder: Asphyxiated	1.103
<i>Defendant Social Characteristics</i>	
Young Adult	1.056
Adult	1.050
Male	5.822
Prior Violent Conviction	2.030
Prior Nonviolent Conviction	1.278
Appointed Attorney	1.237
<i>Victim Social Characteristics</i>	
Vulnerable Age	1.748
Female	2.697
Prior Conviction	.511
<i>Notes:</i>	
<ul style="list-style-type: none"> • Reference categories: defendant race = white; victim race = white; heinousness = level 1; type of capital murder = robbery; method of murder = shot; defendant age = teen. • The odds ratio for Asian defendant is 1.773. The odds ratio for Asian victim is .853. 	

Table 6. Explaining the Relationship Between Black Defendant and Case Trajectory

	Black Defendant (%)	White Defendant (%)	Death Trial (%)
<i>Victim Race</i>			
White	26	77	30
Hispanic	16	13	26
Black	53	3	23
Asian	8	8	17
<i>Heinousness</i>			
Level 1	28	22	14
Level 2	54	55	26
Level 3	18	23	38
<i>Type of Capital Murder</i>			
Robbery	79	61	19
Burglary	8	12	24
Child	2	7	35
Multiple Victims	15	16	38
Kidnapping	8	14	41
Remunerate	4	9	50
Rape	4	6	63
Other	1	2	75
<i>Method of Murder</i>			
Shot	86	47	23
Beaten	8	25	29
Stabbed	7	20	35
Asphyxiated	6	16	46
<i>Defendant Age</i>			
Teen	37	27	18
Young Adult	49	36	26
Adult	14	37	39
<i>Victim Vulnerable Age</i>			
17 to 60	89	79	23
6 to 16 or > 60	9	15	46
<i>Victim Gender</i>			
Male	74	62	17
Female	26	38	49

So the DA pursued death against black defendants and white defendants at the same rate despite the fact that black defendants committed murders that were less serious along several dimensions, meaning murders that were less likely to

include the features that tend to lead to a death trial. Put differently, the bar appears to have been set lower for pursuing death against black defendants. Comparing the percentage distribution to the multivariate finding leads to the following conclusion: to impose equal punishment against unequal crimes is to impose unequal punishment.

2. *Black and White Victims.* The percentage distribution suggested that the DA was less likely to pursue death on behalf of black victims than white victims, but controlling for confounders amplifies the original disparity: the odds ratio for black victims changes from .75 in the bivariate logistic model to .57 in the multivariate logistic model. The transformation occurs because black victims were twice as likely to be killed in murders with multiple victims: 24% of black victim cases had multiple victims, compared to just 11% of white victim cases. So the DA pursued death less on behalf of black victims than white victims despite the fact that black victims were killed in more serious murders with multiple victims. Put differently, the bar appears to have been set higher for pursuing death on behalf of black victims.

C. *Multivariate Patterns: Death Sentence*

The DA decides whether to pursue a death trial, but jurors decide whether to impose a death sentence. If jurors treated all cases the same regardless of race, then disparities in death trials would be duplicated in death sentences. But jurors could also strengthen, attenuate, or eliminate disparities that originate in the DA's office. Table 7 reports odds ratios from the logistic regression of death sentence on race.

The results suggest duplication and slight attenuation. Duplicating the existing patterns, Hispanic and white defendants and victims are treated the same. But jurors attenuate the differential treatment of blacks and whites: the odds of a death trial are 1.75 times higher against black defendants than white defendants, but drop to 1.49 times higher for a death sentence; the odds of a death trial are 43% lower on behalf of black victims relative to white victims, but drop to 38% lower for a death sentence. Presumably, the partial correction by jurors is a response to the DA occasionally overreaching against black defendants and on behalf of white victims. But the correction is partial—disparities in death sentences remain.⁶¹

61. The multivariate models for death trial and death sentence were also run controlling for the relationship between the defendant and victim. Data regarding the

Table 7. Odds Ratios from Logistic Regression of Case Disposition on Race (N = 504)

	Death Sentence
Defendant Race	
Hispanic	.966
Black	1.491
Victim Race	
Hispanic	1.186
Black	.615
Controls	
<i>Legal Dimensions of Case</i>	
Heinous Level 2	1.162
Heinous Level 3	2.793
Multiple Defendants Indicted On Case	.316
Type of Capital Murder: Burglary	.621
Type of Capital Murder: Multiple Victims	1.886
Type of Capital Murder: Kidnapping	1.474
Type of Capital Murder: Rape	2.104
Type of Capital Murder: Remunerate	7.166
Type of Capital Murder: Child	.523
Type of Capital Murder: Other	2.964
Method of Murder: Beaten	1.038
Method of Murder: Stabbed	1.803
Method of Murder: Asphyxiated	1.624
<i>Defendant Social Characteristics</i>	
Young Adult	.997
Adult	.940
Male	3.816
Prior Violent Conviction	1.966
Prior Nonviolent Conviction	.908
Appointed Attorney	2.154
<i>Victim Social Characteristics</i>	
Vulnerable Age	1.505
Female	2.044
Prior Conviction	.569

defendant–victim relationship were drawn from newspaper articles about each case (stranger = 1, nonstranger = 0). If the newspaper did not mention a relationship, then the defendant and victim were considered to be strangers. Controlling for the defendant–victim relationship did not change the substantive results. However, the relationship variable is not included in the tables due to missing data and the obvious problems of relying on the newspaper for such information.

Notes:

- Reference categories: defendant race = white; victim race = white; heinousness = level 1; type of capital murder = robbery; method of murder = shot; defendant age = teen.
- The odds ratio for Asian defendant is 1.518. The odds ratio for Asian victim is .865.

D. Using Predicted Probabilities to Examine the Magnitude of Black–White Disparities

The results suggest that capital punishment in Harris County is stratified according to race—Hispanics and whites are treated the same, but blacks and whites are not. How substantial are the black–white disparities? To provide a more interpretable metric, Table 8 presents predicted probabilities of death trials and death sentences (confounders held constant at the mean). The predicted probabilities are then used to calculate the conditional probability of juries imposing a death sentence against defendants who advance to a death trial. To illustrate the calculation of conditional probabilities, consider the following example. For black defendants, the predicted probability of a death trial is .23 and the predicted probability of a death sentence is .17. Thus, the conditional probability of juries imposing a death sentence is: $.23x = .17$; $x = .17/.23$; $x = .74$.

Table 8. Using Predicted Probabilities (PP) to Illuminate Black–White Disparities

	Death Trial	Conditional Probability: Death Sentence if Death Trial*	Death Sentence
Panel A. Race of Defendant			
Black	.23	.74	.17
White	.15	.80	.12
Panel B. Race of Victim			
White	.22	.68	.15
Black	.13	.77	.10
<i>*Notes:</i>			
<ul style="list-style-type: none"> • (PP Death Trial)(X) = PP Death Sentence • $X = (\text{PP Death Sentence}) / (\text{PP Death Trial})$ 			

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Panel A examines the impact of defendant race. Assume, hypothetically, that 100 black defendants and 100 white defendants were indicted for capital murder. The predicted probabilities suggest the following: the DA would pursue death against 23 black defendants, and jurors would impose death in 74% of the cases, so 17 black defendants would be condemned; the DA would pursue death against 15 white defendants, and jurors would impose death in 80% of the cases, so 12 white defendants would be condemned. The probabilities translate abstract numbers into human lives: 5 black defendants would be sentenced to the ultimate state sanction because of race.

Panel B examines the impact of victim race. Here, assume, hypothetically, that 100 defendants murdered white victims and 100 defendants murdered black victims. The predicted probabilities suggest the following: the DA would pursue death on behalf of 22 white victims and jurors would impose death in 68% of the cases, so 15 defendants would be condemned; the DA would pursue death on behalf of 13 black victims and jurors would impose death in 77% of the cases, so 10 defendants would be condemned. The impact in terms of human lives is the same: 5 defendants would be sentenced to the ultimate state sanction because the victim is white.

The predicted probabilities also demonstrate how jurors provide a partial correction to disparities that arise in the DA's decision to pursue a death trial. The DA is considerably more likely to pursue death against black defendants and on behalf of white victims, but jurors are slightly more likely to impose death against white defendants and on behalf of black victims. The net effect is that jurors attenuate but do not eliminate the overall black-white disparities—black defendants and defendants who kill whites are still more likely to be sentenced to death, all else equal. The bottom line is clear: race continues to shape case outcomes decades after the Supreme Court declared in *Gregg v. Georgia* (1976) that guided discretion would eliminate arbitrariness in the administration of capital punishment.

V. CONCLUSION

The race and capital punishment literature is somewhat paradoxical. Numerous studies have been conducted over the years, but no “reasonably well-controlled” research has been done in the five most active death states: Texas, Virginia, Oklahoma, Missouri, and Florida. The current research begins to address this paradox by focusing on the capital of capital punishment. Harris County is exceptional in the modern era of execution. Not

only has the county executed 104 inmates, 119 more inmates from Harris County are currently awaiting execution on Texas's death row. Because the pipeline is full, Harris County will probably continue to be one of the most active death jurisdictions in the United States for the foreseeable future.

Some might consider the focus on Harris County to be a limitation rather than an asset—because Harris County is exceptional, the findings do not tell us much about the relationship between race and capital punishment in a broader context. But this potential critique misses the mark. No research on race and capital punishment can be generalized to other places or time periods. Seminal research in Georgia⁶² and Maryland,⁶³ for example, cannot be generalized to Harris County, nor can research in Harris County be generalized to Georgia or Maryland. Research in Harris County cannot even be generalized to the rest of Texas—Texas does not have a singular capital punishment regime, but rather 254 capital punishment regimes operating in separate counties authorized by state law.⁶⁴ The fact that all research on the topic is confined to particular places and time periods might seem dire, but such a pessimistic conclusion is unwarranted. Our understanding of the relationship between race and capital punishment has always expanded through individual studies that cannot be generalized, but nonetheless combine to form a composite picture—the current research adds an important pixel.

How does the current pixel sharpen the existing image? The findings challenge conventional wisdom by suggesting that the race of the defendant and victim are both pivotal in the capital of capital punishment: death is more likely to be imposed against black defendants than white defendants, and death is more likely to be imposed on behalf of white victims than black victims. The central pattern stems from an intriguing interplay between race, the seriousness of a murder, and the stages of capital litigation. Defendants and victims are considered in turn.

- Defendants: The DA pursued death against black defendants and white defendants at the same rate, but controlling for confounders revealed the disparate treatment of black defendants. The apparent equal

62. BALDUS ET AL., *supra* note 14.

63. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 MARGINS: U. MD. L.J. ON RACE, RELIGION, GENDER & CLASS 1 (2004).

64. R.G. Ratcliffe, *Controversial Milestone: 25 Years of Lethal Injection*, TEX. DIST. & COUNTY ATTORNEYS ASS'N, Dec. 7, 2007, <http://www.tdcaa.com/node/1618> (noting the state's 254-county system).

treatment is misleading because black defendants committed murders that were less “serious” along several dimensions. Despite the fact that the DA was considerably more likely to pursue death against black defendants, juries were slightly more likely to impose death against white defendants. Presumably, the jurors’ behavior is a response to the DA’s occasional overreaching against black defendants. The net effect is that juries attenuate, but do not eliminate, disparities between black and white defendants that originate in the DA’s office.

- Victims: The DA was considerably more likely to pursue death on behalf of white victims than black victims, particularly given the fact that black victims tended to be killed in murders that were more serious due to the presence of multiple victims. But jurors were slightly more likely to impose death on behalf of black victims. The jurors’ behavior is assumed to be a response to the DA’s occasional overreaching on behalf of white victims. The net effect is that juries attenuate, but do not eliminate, disparities between black and white victims that originate in the DA’s office.

Perhaps surprisingly, the findings also suggest that Hispanics and whites are treated the same. This pattern could be a product of the demographic landscape: whites and Hispanics represent an equal share of Harris County residents at 38% each, compared to 19% for blacks.⁶⁵ Such numbers suggest that Hispanics wield more political power and are a greater presence within criminal justice, such as on juries. More research is needed to understand the juxtaposition of black–white disparities but Hispanic–white parities.

The capital punishment literature is marked by exemplary research regarding the role of race.⁶⁶ The current research

65. United States Census Bureau, <http://quickfacts.census.gov/qfd/states/48/48201.html> (last visited Aug. 28, 2008).

66. See, e.g., BALDUS ET AL., *supra* note 14; SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); NAKELL & HARDY, *supra* note 58; Blume et al., *supra* note 7; Bowers & Pierce, *supra* note 31; Linda A. Foley & Richard S. Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16 (1982); Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region, and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549 (2006); Thomas J. Keil & Gennaro F. Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 CRIMINOLOGY 511 (1989); Paternoster et al., *supra* note 63; Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC’Y REV. 437 (1984); Pierce & Radelet, *supra* note 30;

contributes to a crowded field by: focusing on the capital of capital punishment; challenging conventional wisdom regarding the basic relationship between race and capital punishment; demonstrating the nuanced interplay between race, the seriousness of a murder, and the stages of capital litigation; translating abstract odds ratios into interpretable predicted probabilities that are accessible to policymakers; and serving as a call to action for scholars to initiate “reasonably well-controlled” studies in the most active death jurisdictions in the United States.