

# ARTICLE

## CONTINUED RACIAL DISPARITIES IN THE CAPITAL OF CAPITAL PUNISHMENT: THE ROSENTHAL ERA

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### ABSTRACT

Given the substantial amount of research that has been conducted throughout the United States regarding the relationship between race and capital punishment, one might assume that much of the attention has been focused on Harris County, Texas. After all, Harris County—home to Houston and surrounding areas—is the capital of capital punishment. Indeed, if Harris County were a state it would rank second in executions after Texas. Yet only one study has examined whether race influences the death penalty in Houston. Specifically, Phillips (2008) reports that death was more likely to be imposed against black defendants, and more likely to be imposed on behalf of white victims, during the period from 1992 to 1999—the final years of Johnny Holmes’s tenure as District Attorney.

After Holmes retired, Charles Rosenthal served as District Attorney from January 1, 2001 to February 15, 2008. Did racial disparities continue during the Rosenthal administration? The current research suggests that the impact of defendant race disappeared, but the impact of victim race continued: death sentences were imposed on behalf of white victims at 2.5 times the rate one would expect if the system were blind to race, and death sentences were imposed on behalf of white female victims at 5 times the rate one would

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expect if the system were blind to race and gender.

Such disparities are particularly troubling because Rosenthal was forced out of office in a scandal that included racist e-mails. Given the disparities, coupled with racist e-mails from the elected official who decides whether to seek the death penalty, the paper contemplates a key moral question: Should the state of Texas be allowed to execute inmates who were sentenced to death in Harris County during the Rosenthal administration?

#### INTRODUCTION

For decades, scholars have examined the influence of race on capital punishment. The research literature suggests that the race of the defendant does not have a consistent impact on the death penalty—a few studies report that death is more likely to be imposed against black defendants than white defendants, but most do not.<sup>1</sup> In contrast, the race of the victim does have a consistent impact on the death penalty—the vast majority of studies report that death is more likely to be imposed on behalf of white victims, and particularly white female victims.<sup>2</sup>

Given the substantial amount of research that has been conducted on the relationship between race and capital punishment, one might assume that much of the attention has been focused on Harris County, Texas. After all, Harris County—home to Houston and surrounding areas—is arguably the capital of capital punishment. With 116 executions in the modern era,<sup>3</sup> defined as the Supreme Court's reinstatement of capital punishment in 1976 to the

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1. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990).

2. See, e.g., *id.*; RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT 208 (2008); David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 501, 516–18, 521, 528 (James R. Acker et al. eds., 2d ed. 2003); 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); Jefferson E. Holcomb, Marian R. Williams & Stephen Demuth, *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 877, 885, 892–93 (2004); Marian R. Williams, Stephen Demuth & Jefferson E. Holcomb, *Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision Making*, 45 CRIMINOLOGY 865, 869, 872, 874–77 (2007); Scott Phillips, Laura Potter Haas & James E. Coverdill, *Disentangling Victim Gender and Capital Punishment: The Role of Media*, 7 FEMINIST CRIMINOLOGY 130, 131–32 (2012).

3. *County of Conviction for Executed Offenders*, TEX. DEP'T OF CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_county\\_conviction\\_executed.html](http://www.tdcj.state.tx.us/death_row/dr_county_conviction_executed.html) (last visited Sept. 8, 2012).

present,<sup>4</sup> Harris County has often captured the national and international spotlight in the death-penalty debate.<sup>5</sup> To put the number of executions in perspective, consider the following: If Harris County were a state it would rank second in executions after Texas, outpacing both Virginia (109 executions) and Oklahoma (99 executions).<sup>6</sup> Indeed, Harris County has executed almost as many defendants as all of the other major urban counties in Texas combined.<sup>7</sup>

Yet only one study has examined whether race matters in the capital of capital punishment. Focusing on the final years of Johnny Holmes's term as District Attorney (DA), Phillips's research included the 504 defendants indicted for capital murder in Harris County from 1992 to 1999.<sup>8</sup> Phillips's findings are both surprising and

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4. In the landmark 1972 case of *Furman v. Georgia*, the Supreme Court ruled that capital punishment was administered in an arbitrary manner that constituted cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238, 239–40, 293 (1972) (Brennan, J., concurring). After the Supreme Court invalidated existing statutes in *Furman*, states began to pass new statutes in an attempt to both eliminate arbitrariness and reinstate the death penalty. Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 813 (2008). Some states attempted to eliminate arbitrariness by making the death penalty mandatory for defendants convicted of particular crimes. *Id.*

“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.”

*Id.* In *Woodson v. North Carolina* and the companion case *Roberts v. Louisiana*, the Supreme Court struck down mandatory death statutes, arguing that the protection of human dignity required individual consideration of each case. *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976); *Roberts v. Louisiana*, 431 U.S. 633, 637–38 (1977). But the Supreme Court upheld guided discretion statutes in *Gregg v. Georgia* and the companion cases *Proffitt v. Florida* and *Jurek v. Texas*. *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976). Thus, the Supreme Court's reinstatement of the death penalty in *Gregg v. Georgia* marks the beginning of the modern era of capital punishment.

5. See, e.g., AMNESTY INT'L, ONE COUNTY, 100 EXECUTIONS: HARRIS COUNTY AND TEXAS – A LETHAL COMBINATION 1, 3–6, 8–9 (2007), available at <http://www.amnesty.org/en/library/info/AMR51/125/2007/en> (expounding that Harris County accounted for 99 executions between 1982 and 2007 and had 3 more scheduled at that time, from July to September 2007).

6. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Sept. 8, 2012).

7. The other major urban counties in Texas—Dallas County (Dallas), Tarrant County (Fort Worth), Bexar County (San Antonio), and Travis County (Austin)—have executed a total of 127 inmates (as of June 7, 2012). *County of Conviction for Executed Offenders*, TEX. DEPT OF CRIM. JUST. OFFENDERS, [http://www.tdcj.state.tx.us/death\\_row/dr\\_county\\_conviction\\_executed.html](http://www.tdcj.state.tx.us/death_row/dr_county_conviction_executed.html) (last visited Sept. 8, 2012).

8. Phillips, *supra* note 4, at 809.

unsurprising. Surprisingly, death was more apt to be imposed against black defendants than white defendants.<sup>9</sup> Unsurprisingly, death was also more apt to be imposed on behalf of white victims than black victims.<sup>10</sup> No differences were found between the treatment of whites and Hispanics.<sup>11</sup>

After twenty years as DA, Johnny Holmes retired on December 31, 2000.<sup>12</sup> Holmes was replaced by his long-time lieutenant, Charles Rosenthal, on January 1, 2001.<sup>13</sup> In an interview with the *Houston Chronicle* the day before he was sworn into office, Rosenthal stressed the importance of equal justice:

We do everything based on what the evidence is, not because of who someone is, what they've done in the past or what they can do for you in the future . . . . That's the only way to do it.

Justice is about justice for everybody. If you show any preferences at all, then I think you're doing the wrong thing. You're doing a disservice to the office and to the community.<sup>14</sup>

Did Rosenthal treat all groups the same? Did the racial disparities that Phillips documented in the Holmes era disappear in the Rosenthal era? The question is particularly interesting because the number of death sentences in Harris County plummeted during Rosenthal's time at the helm.<sup>15</sup> Perhaps the change in leadership, coupled with the drop in death sentences, eliminated racial disparities.

To investigate whether racial disparities disappeared or continued, I begin by establishing a standard for judging equal treatment: If the death penalty is administered neutrally then the racial distribution of death sentences should be comparable to the racial distribution of death-eligible crimes. Put differently, death should not be imposed disproportionately against any group of defendants, nor should death be imposed disproportionately on behalf of any group of victims. Given such a standard, I proceed to: (1) establish the roster of death sentences attributable to the Rosenthal administration; (2) establish the roster of death eligible

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9. *Id.* at 812.

10. *Id.*

11. *Id.*

12. Lisa Teachey, *Rosenthal to Succeed Holmes as DA Quietly*, HOUS. CHRON., Dec. 31, 2000, at 1A.

13. *See id.* (revealing that Rosenthal was "part of the team" and was "groomed by Johnny [Holmes]").

14. *Id.*

15. David McCord, *What's Messing with Texas Death Sentences?*, 43 TEX. TECH L. REV. 601, 610–11 (2011).

crimes that occurred during the Rosenthal administration; and (3) compare the racial distribution of death sentences to the racial distribution of death-eligible crimes.

To anticipate, the findings suggest that racial disparities continued during the Rosenthal administration, albeit in a slightly different manner. Although the race of the defendant did not influence death sentences during Rosenthal's term, the race of the victim did: The death penalty was more likely to be imposed on behalf of white victims, and particularly white female victims, despite the fact that minority victims were more likely to be killed in the most heinous murders. Moreover, Rosenthal was forced out of office based, in part, on racist e-mails.<sup>16</sup> Such a troubling combination—racist e-mails by the person who decides whether to seek the death penalty and racial disparities in the imposition of the death penalty—prompts a key moral question: Should the state of Texas be allowed to execute inmates who were sentenced to death during the Rosenthal administration? Before turning to the question, consider the details of the disparities.

#### DEATH SENTENCES ATTRIBUTABLE TO THE ROSENTHAL ADMINISTRATION

Rosenthal served as the Harris County DA from January 1, 2001 to February 15, 2008.<sup>17</sup> Based on an open-records request, the Harris County District Clerk provided a list of the defendants sentenced to death during the time period in question. The data reveal that thirty-nine cases resulted in a death sentence during Rosenthal's term.

Table 1 divides the thirty-nine cases into two types. Panel A includes the thirty cases that are fully attributable to the Rosenthal administration. The defendants in question were indicted for capital murder and sentenced to death during Rosenthal's term—he decided whether to seek the death penalty. Panel B includes the nine cases that are partially attributable to the Rosenthal administration. Here, the defendants in question were either: (a) indicted for capital murder prior to 2001, but sentenced to death during Rosenthal's term; or (b) sentenced to death prior to 2001, but retried and resentenced to death during Rosenthal's term. Thus, Panel B includes cases that were inherited from the Holmes administration.

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16. Leslie Casimir, *Black Leaders Urge Rosenthal to Step Down*, HOUS. CHRON., Jan. 12, 2008, at A1.

17. Teachey, *supra* note 12; Peggy O'Hare & Brian Rogers, *Rosenthal Quits, Cites Prescription Drugs*, HOUS. CHRON., Feb. 16, 2008, at A1.

Case	Victim(s)				Statutory Aggravator	Date Crime	Date Indict	Date Dispose	Defendant Race & Gender	Victim Race & Gender	Current Status
	Defendant(s)	Victim(s)	Statutory Aggravator	Date Crime							
1	Danny Paul Bible	Inez Deaton	Rape	5/27/79	4/29/03	6/23/03	WM	WF	DR		
2	William Darin Irvan	Michele Denise Shadbolt	Rape	2/14/87	3/12/01	12/10/03	WM	WF	DR		
3	Anthony Allen Shore	Laurie Lee Tremblay Maria Del Carmen Estrada Diana Rebellar Dana Lizette Sanchez	Rape Multiple Murders	9/26/86 4/16/92 8/7/94 7/6/95	1/15/04	10/21/04	WM	WF HF HF HF	DR		
4	Perry Allen Austin	David Kazmouz	Kidnapping	8/19/92	2/28/01	4/3/02	WM	WM	DR		
5	Ronald Jeffrey Prible	Esteban 'Steve' Herrera Nilda Tirado Rachel Elizabeth Cumpain Valerie Herrera Jade Herrera	Child Under 6 Multiple Murders Arson	4/24/99	8/15/02	10/25/02	WM	HM HF HF HF HF	DR		
6	Tarus Vandell Sales	Tyrone Butler	Obstruct/ Retaliate	7/21/00	1/7/02	3/1/03	BM	BM	DR		
7	Robert Gene Will	Barrett "Barry" Hill	Police Officer	12/4/00	2/27/01	1/23/02	WM	WM	DR		
8	Richard Allen Masterson	Darin Honeycutt	Robbery	2/9/01	5/4/01	4/24/02	WM	WM	DR		
9	Linda Carty	Joana Rodriguez	Kidnapping Robbery	5/16/01	7/18/01	2/19/02	BF	HF	DR		
10	Jesus Flores	Joseph Dennis	Police Officer	5/22/01	7/27/01	11/29/01	HM	WM	Removed from DR		
11	Alexander Rey Martinez	Helen Joyce Oliveros	Robbery	8/12/01	10/11/02	12/6/02	HM	WF	Executed		
12	Pete Russell	Tanjala Brewer	Obstruct/ Retaliate	8/13/01	1/09/02	2/13/03	BM	BF	DR		
13	Ronald James Hamilton	Ismail Matakah	Robbery	1/17/01	4/18/02	11/12/02	BM	WM	DR		
14	Edgardo Rafael Cubas Walter Alexander Sorto	Esmeralda Alvarado Roxana Aracelie Capulin Maria Moreno Rangel	Rape Multiple Murders Kidnapping	1/16/02 6/1/02 6/1/02	3/17/04 11/18/02	5/21/04 11/12/03	HM HM	HF HF HF	DR DR DR		

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15	Timothy Wayne Adams	Timothy Adams Jr.	Child Under 6	2/20/02	5/1/02	3/12/03	BM	BM	Executed
16	Ray McArthur Freeny	Vicky Kay Dean Kirshalynne Chanel Jones	Rape Multiple Murders	4/21/02 4/18/02	6/6/02	8/25/03	BM	WF BF	DR
17	Derrick Dewayne Charles	Obie Lee Bennett Brenda Bennett Mytesha Bennett	Rape Multiple Murders	7/6/02	3/11/03	5/14/03	BM	BM BF BF	DR
18	Juan Reynoso	Tonya Lynn Riedel	Robbery	3/2/03	5/29/03	5/12/04	HM	WF	DR
19	Damon Roshun Matthews	Esphandiar Gonzalez	Robbery	3/6/03	6/3/03	4/6/04	BM	HM	DR
20	Elijah Dwayne Joubert Alfred Dewayne Brown	Charles R. Clark Alfredia Jones	Robbery Police Officer Multiple Murders	4/3/03 4/3/03	6/18/03 7/26/05	10/21/04 10/25/05	BM BM	WM BF	DR DR
21	Gerald Edward Marshall	Christopher Martin Dean	Robbery	5/11/03	7/30/03	11/12/04	BM	WM	DR
22	Anthony Quinn Francois	Ashley Patterson Brittney Patterson Naikasha Patterson	Multiple Murders	9/11/03	12/4/03	7/28/04	BM	BF BF BF	DR
23	Calvin Letroy Hunter	Jong Suk Choi	Robbery	10/25/03	2/13/04	7/12/04	BM	AM	DR
24	Robert Aaron Acuna	James Carroll Joyce Carroll	Robbery Multiple Murders	11/12/03	1/12/04	8/6/04	HM	WM WF	Removed from DR
25	Tomas Raul Gallo	Destiny Marie Flores	Rape Child Under 6	12/11/03	2/20/03	2/18/04	WM	HF	DR
26	Demetrius Dewayne Smith	Tammie Evette Harris Christina Harris	Multiple Murders	3/24/05	6/2/05	6/22/06	BM	BF BF	DR
27	Roosevelt Smith	Betty Blair	Robbery	10/28/05	1/26/06	10/19/07	BM	WF	DR
28	Christopher Devon Jackson	Eric James Smith	Robbery	12/5/05	4/27/06	3/30/07	BM	BM	DR
29	Dexter Darnell Johnson	Huy Ngo Maria Aparece	Rape Multiple Murders Robbery Kidnapping	6/18/06	9/20/06	6/13/07	BM	AM AF	DR
30	Antonio Lee Williams	Dion Barnes Christopher Harris Vincent Williams Yolanda Styles Terrell Ball	Multiple Murders Retaliation	6/17/06 8/5/06 8/5/06 8/5/06 9/1/06	12/13/06	12/11/07	BM	BM BM BM BF BM	DR

Panel B. Cases Indicted Prior to 2001, but Disposed Between 2001 and February 2008: Death Sentences Partially Attributable to the Rosenthal Administration										
Case	Defendant(s)	Victim(s)	Statutory Aggravator	Date Crime	Date Indict	Date Dispose	Defendant Race & Gender	Victim Race & Gender	Current Status	
31	Max Alexander Soffar	Tommy Lee Temple Steven Allen Sims Arden Alene Fisher	Robbery Multiple Murders	7/13/80	Retrial	2/22/06	WM	WM WM WF	DR	
32	Eugene Alvin Broxton	Larry Wayne Smith	Robbery	5/16/91	Retrial	11/14/03	BM	WM	DR	
33	Howard Paul Guidry	Farah Fratta	Remuneration	11/9/94	Retrial	2/22/07	BM	WF	DR	
34	Yosvanis Valle	Jose Martin Junco	Burglary	6/7/99	8/21/00	4/24/01	HM	HM	Executed	
35	Robert L. Woodard	Achamma Mathai Thankachan Mathai	Multiple Murders Robbery	2/12/00	5/18/00	3/8/01	BM	AM AF	DR	
36	Corey James Jennings	Quy Quang Lam	Robbery	3/6/00	5/18/00	3/30/01	BM	AM	Removed from DR	
37	Kerry Dimart Allen	Kienna Lashay Baker	Child Under 6 Rape	5/10/00	8/24/00	5/5/01	BM	BF	DR	
38	Gilmar Alexander Guevara	Tae Youk Gerardo Yaxon	Multiple Murders Robbery	6/2/00	8/31/00	5/30/01	HM	AM HM	DR	
39	Perry Eugene Williams	Matthew Carter	Robbery Kidnapping	9/7/00	11/16/00	6/7/02	BM	WM	DR	

Notes:

- Abbreviations: WM (white male), WF (white female), BM (black male), BF (black female), HM (Hispanic male), HF (Hispanic female), AM (Asian male), AF (Asian female), DR (death row).
- The following inmates were removed from death row: Jesus Flores (suicide), Robert Aaron Acuna (commuted to life in prison because he was 17 years old at the time of the crime), and Corey James Jennings (died of natural causes).
- During the process of collecting information about the cases that resulted in a death sentence, the following discrepancies arose: Juan Reynoso is sometimes spelled Juan Reynosa; Christina Harris is sometimes spelled Kristina Harris; and the date of Max Alexander Soffar's crime is sometimes listed as 7/14/80 rather than 7/13/80.



Table 1 also reports the race/ethnicity of the defendants and victims in each case. Data regarding the defendant's race/ethnicity were drawn from the Texas Department of Criminal Justice (TDCJ) website.<sup>18</sup> To determine the race/ethnicity of the victim, a research assistant collected the *Houston Chronicle* newspaper articles and the online appellate opinions about each case.<sup>19</sup> Because the articles and opinions include the victim's name, data regarding the victim's race/ethnicity were drawn from name-identified mortality records provided by the Harris County Institute of Forensic Sciences (formerly the Harris County Medical Examiner) and the Texas Department of Health through an open-records request.<sup>20</sup> To avoid the cumbersome term "race/ethnicity," the shorthand term "race" is used throughout the remainder of the paper. In addition to the race of the parties, Table 1 includes information regarding: the statutory aggravators in each case,<sup>21</sup> the date of the crime,<sup>22</sup> the date of the indictment,<sup>23</sup> the date of the disposition,<sup>24</sup> and the current status of the defendant.<sup>25</sup>

Reasonable people could disagree about which cases in Table 1 should be included in the subsequent analysis. Clearly, the cases in Panel A are fully attributable to the Rosenthal administration. But should the cases in Panel B that were inherited from the Holmes administration also be included? Fortunately, the question does not need to be resolved. As Table 2 reveals, the racial distribution of death sentences is almost identical regardless of whether one examines the thirty cases in Panel A or the thirty-nine cases in Panels A and B. Focusing on the key groups considered in the subsequent analysis: 50% of the cases in Panel A

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18. *Offenders on Death Row*, TEX. DEP'T OF CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_offenders\\_on\\_dr.html](http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html) (last visited Sept. 8, 2012).

19. The articles and opinions are available from the author upon request.

20. In the small number of cases in which the victim was killed prior to 1990, data regarding the race/ethnicity of the victim were drawn from the Texas Department of Criminal Justice (TDCJ) website. See *Offenders on Death Row*, *supra* note 18.

21. The statutory aggravator(s) were coded from the newspaper articles and appellate opinions collected about each case in Table 1, which have been compiled and are on file with author.

22. The date of the crime was drawn from the TDCJ website. See *Offenders on Death Row*, *supra* note 18.

23. The date of the indictment was drawn from the Harris County Justice Information Management System, to which the author subscribes.

24. The date of disposition was included in the data provided by the Harris County District Clerk in response to my open records request. The data was compiled by and is on file with author.

25. The current status of the defendant was drawn from the TDCJ website. See *Offenders on Death Row*, *supra* note 18.

include a white victim compared to 49% of the cases in Panels A and B, and 27% of the cases in Panel A include a white female victim compared to 26% of the cases in Panels A and B. The remaining groups are also quite similar. Because either set of cases would produce the same findings and conclusions, I focus on the thirty cases in Panel A that are unquestionably attributable to the Rosenthal administration.

<b>Table 2. Racial Distribution of Death Sentences During the Rosenthal Administration</b>				
	<b>30 Cases from Table 1, Panel A: Cases Fully Attributable to the Rosenthal Administration</b>		<b>39 Cases from Table 1, Panel A/B: Expanded to Include Cases Inherited from the Holmes Administration</b>	
	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>
<b>Panel A. Victim Race</b>				
White	15/30	50%	19/39	49%
Black	10/30	33%	11/39	28%
Hispanic	6/30	20%	8/39	21%
Asian	2/30	7%	5/39	13%
American Indian or Alaskan Native	0/30	0%	0/39	0%
<b>Panel B. Separating White Victims By Gender</b>				
White Female	8/30	27%	10/39	26%
White Male	8/30	27%	11/39	28%
<b>Panel C. Defendant Race</b>				
White	8/30	27%	9/39	23%
Black	17/30	57%	23/39	59%
Hispanic	5/30	17%	7/39	18%
Asian	0/30	0%	0/39	0%

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American Indian or Alaskan Native	0/30	0%	0/39	0%
<b>Panel D. Holding Victim Race Constant</b>				
White kill White	6/30	20%	7/39	18%
Minority kill White	9/30	30%	12/39	31%
Notes:				
1. Focusing on the 30 cases from Table 1, Panel A, the number of victims sums to 33 (15+10+6+2) because three cases have multiple victims of different races.				
2. Focusing on the 39 cases from Table 1 Panel A/B, the number of victims sums to 43 (19+11+8+5) because four cases have multiple victims of different races.				

Before closing the discussion of the racial distribution of death sentences, it is important to mention two caveats. To begin, three of the thirty cases in Panel A include multiple victims of different races.<sup>26</sup> In order to accommodate such cases, the victim race codes are not mutually exclusive. For example, a case can be coded as including a white victim and a Hispanic victim.<sup>27</sup> Thus, the cases were coded according to the presence or absence of each victim race group. Such an approach accurately reflects the racial complexity of capital murder.<sup>28</sup> Also, Asian and American Indian or Alaskan Native (AIAN) defendants and victims are included in the tables to be comprehensive but are not discussed in the text because there are too few cases to conduct a systematic analysis.

26. See *supra* Table 1, Panel A (noting that the murders committed by Anthony Shore and Ray Freeney, as well as the murder committed by Joubert and Brown, involved multiple victims of different races).

27. See, e.g., *supra* Table 1, Panel A, Case 3 (involving three Hispanic females and one white female).

28. See *supra* Table 2, nn.1–2 (noting that four cases in panels A and B involve multiple victims of different races).

DEATH-ELIGIBLE CRIMES THAT OCCURRED DURING THE  
ROSENTHAL ADMINISTRATION

To determine the racial distribution of death-eligible crimes that occurred during the Rosenthal administration, I turned to Supplementary Homicide Reports (SHR).<sup>29</sup> Collected as part of the FBI's annual Uniform Crime Report, the SHR data provide detailed information on all homicide incidents reported to the police (including the race of the suspect and victim).<sup>30</sup> I then narrowed the data to Harris County for the years 2001 through 2007.

Of the 2,697 homicide incidents that occurred in Harris County during the time period in question, which were eligible for the death penalty under Texas law? The Texas capital murder statute lists several aggravating circumstances that elevate a homicide to a capital murder.<sup>31</sup> The SHR data indicate whether one (or more) of the following statutory aggravators was present in a homicide incident: multiple murders; the murder of a child under six years of age; murder during the commission of a robbery, burglary, or rape; and murder by arson.<sup>32</sup> Although the SHR data do not specify whether a homicide incident involved the killing of a police officer, I used the "Officer Down Memorial Page" website to identify four such crimes during the time period in question.<sup>33</sup>

Unfortunately, the SHR data do not indicate whether any of the remaining statutory aggravators was present in a homicide

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29. SHR data has been used in numerous studies to examine racial disparities in the administration of the death penalty. *Uniform Crime Reporting Program Data: Supplementary Homicide Reports, 2009*, U.S. DEPT OF JUST., <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/30767/detail> (last visited Sept. 8, 2012). Other scholars have contributed pioneering works in this area. See generally SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 35, 109–10 (1989) (concluding from SHR data that there has been racial discrimination in the use of the death penalty); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 591–99 (1980) (compiling data from the local SHR and discussing the findings in terms of the difference in frequency of the death penalty based on the race of the victim and offender); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 596, 601 (1985) (interpreting from SHR data that cases involving white victims and cases involving white victims and black defendants were more likely to be upgraded to the death penalty).

30. *Uniform Crime Reporting Program Data: Supplementary Homicide Reports, 2009*, *supra* note 29.

31. TEX. PENAL CODE ANN. § 19.03 (West 2011).

32. See, e.g., *Uniform Crime Reporting Program Data: Supplementary Homicide Reports, 2009*, *supra* note 29 (follow "Uniform Crime Reporting Data Series" hyperlink).

33. *Find a Fallen Officer*, OFFICER DOWN MEMORIAL PAGE, <http://www.odmp.org/search> (last visited Sept. 8, 2012) (listing nonaccidental gunfire as the cause of death for Houston Police Officers Reuben DeLeon, Jr. and Charles Clark and Harris County Deputy Sheriffs Joseph Dennis and Barrett "Barry" Hill).

incident (such as whether a homicide incident included kidnapping, remuneration, or obstruction/retaliation). Although this might seem to be a significant limitation, the statutory aggravators that *are* included in the SHR data account for twenty-seven of the thirty death sentences attributable to the Rosenthal administration.<sup>34</sup> Put differently, the statutory aggravators that *are not* included in the SHR data almost never resulted in a death sentence in Harris County during Rosenthal's term as DA.

To bolster the reader's confidence that the statutory aggravators which are included in the SHR data account for virtually all death sentences in Texas, I also conducted a separate analysis based on a different data set. Focusing on the 265 inmates executed by the state of Texas from 2000 to 2010,<sup>35</sup> I used case descriptions from the Texas Execution Information Center website to code the statutory aggravators that were present in each capital murder.<sup>36</sup> Remarkably, 249 of the 265 inmates (94%) committed a capital murder that involved one (or more) of the statutory aggravators that *are* included in the SHR data.<sup>37</sup>

In sum, the SHR data do not include information on all the aggravators in the Texas capital murder statute. Nonetheless, the SHR data do include the small number of aggravators that account for almost all death sentences. Though imperfect, the SHR data come closer to defining the universe of death-eligible crimes in Texas than any other publicly available data source.<sup>38</sup>

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34. The exceptions are Cases 4, 6, and 12. *See supra* Table 1, Panel A.

35. The list of the 265 inmates executed from 2000 to 2010 was drawn from the TDCJ website. *See Executed Offenders*, TEX. DEP'T OF CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_executed\\_offenders.html](http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html) (last visited Sept. 8, 2012) (listing death row inmates executed in Texas).

36. TEX. EXECUTION INFO. CTR., <http://txexecutions.org/default.asp> (last visited Sept. 8, 2012) (on file with author).

37. Data for the 265 executions in question are available from the author upon request.

38. One might assume that the roster of death-eligible crimes excludes a large number of relevant cases because the SHR data do not specify certain statutory aggravators that occur on a somewhat regular basis. For example, the SHR data do not specify whether a homicide incident involved kidnapping. But the fact that the SHR data do not specify kidnapping does not mean that the roster of death-eligible crimes is missing all kidnapping cases. An unknown number of kidnapping cases also involve a statutory aggravator that is specified in the SHR data, such as: multiple murders, the murder of a child under six years of age, or rape. Although I cannot quantify the issue, the roster of death-eligible crimes is not missing as many relevant cases as one might assume based simply on the statutory aggravators that are not specified in the SHR data.

Based on the statutory aggravators that are included in the SHR data, I reduced the 2,697 homicide incidents to 632 death-eligible crimes. But the roster of death-eligible crimes must be reduced further, as the presence of a statutory aggravator is not sufficient for a death sentence. The police must also apprehend a suspect, and the defendant must be old enough to be sentenced to death.<sup>39</sup> Thus, I followed established research practice<sup>40</sup> by eliminating homicide incidents if no suspect was apprehended (as indicated by missing data regarding the suspect's race and sex in the SHR data) or if no suspect was old enough to be sentenced to death.<sup>41</sup> Eliminating such homicide incidents produced a final roster of 488 death-eligible crimes that occurred in Harris County during the time period in question.

Before turning to the findings, it is important to discuss the initial caveat mentioned above. SHR data are coded according to homicide "incidents." Of the 488 death-eligible crimes, twenty include defendants and/or victims of different races. To accommodate such crimes, I used the same approach. Specifically, the defendant and victim race codes are not mutually exclusive—the death-eligible crimes were coded according to the presence or absence of each defendant race group and each victim race group.<sup>42</sup>

#### DID RACE INFLUENCE DEATH SENTENCES DURING THE ROSENTHAL ADMINISTRATION?

Recall the central premise of the research: If the death penalty is administered neutrally then the racial distribution of

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39. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that sentencing a sixteen- or seventeen-year-old to death did not violate the Eighth Amendment), *abrogated* by *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005) (marking the age of eighteen as the new minimum for imposition of the death penalty under the Eighth Amendment).

40. For details regarding established research practice, see David Baldus, George Woodworth & Neil Alan Weiner, *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 159 (Charles S. Lanier et al. eds., 2009). See generally GROSS & MAURO, *supra* note 29, at 35–37 (employing similar methods of compiling data from the SHR and removing from the analysis those murders where the offender was not apprehended).

41. From January 2001 to February 2005, a defendant had to be seventeen or older at the time of the crime to be sentenced to death in Texas. TEX. PENAL CODE ANN. § 8.07(c) (West 1997). From March 2005 to February 2008, a defendant had to be eighteen or older at the time of the crime to be sentenced to death based on the Supreme Court's decision in *Roper v. Simmons*, which barred the execution of juveniles. *Roper*, 543 U.S. at 574.

42. For additional details, see Table 3 notes.

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death sentences should be comparable to the racial distribution of death-eligible crimes—death sentences should not be imposed disproportionately against, or on behalf of, any particular group.

Table 3, Panel A, examines whether the race of the victim influences death sentences, a consistent finding in prior research. The data suggest that white victims are overrepresented among the cases resulting in a death sentence (20% of the death-eligible crimes include a white victim, compared to 50% of the cases resulting in a death sentence), while Hispanic victims are underrepresented (39% compared to 20%) and black victims are at parity (38% compared to 33%). But it is important to delve deeper, as Table 3, Panel B, demonstrates that white victims are not a monolithic group. Specifically, a mere 5% of the death-eligible crimes include a white female victim, yet 27% of the cases resulting in a death sentence include a white female victim. Thus, death sentences were imposed on behalf of white female victims at more than 5 times the rate one would expect if the system were blind to race and gender. In comparison, death sentences were imposed on behalf of white male victims at almost two times the rate one would expect in a neutral system—15% of the death-eligible crimes include a white male victim, versus 27% of the cases resulting in a death sentence. In sum, the death penalty was more likely to be imposed on behalf of white victims, and particularly white female victims.

<b>Table 3. Did Race Influence the Death Penalty During the Rosenthal Administration?</b>				
	<b>30 Death Sentences Fully Attributable to the Rosenthal Administration</b>		<b>488 Death-Eligible Crimes in Harris County, 2001 to 2007</b>	
	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>
<b>Panel A. Victim Race</b>				
White	15/30	50%	97/487	20%
Black	10/30	33%	185/487	38%
Hispanic	6/30	20%	190/487	39%
Asian	2/30	7%	21/487	4%
American Indian or Alaskan Native	0/30	0%	1/487	<1%
(missing)	(none)		(1)	

<b>Panel B. Separating White Victims by Gender</b>				
White Female	8/30	27%	26/487	5%
White Male	8/30	27%	71/487	15%
(missing)	(none)		(1)	
<b>Panel C. Defendant Race</b>				
White	8/30	27%	64/488	13%
Black	17/30	57%	277/488	57%
Hispanic	5/30	17%	156/488	32%
Asian	0/30	0%	3/488	<1%
American Indian or Alaskan Native	0/30	0%	1/488	<1%
(missing)	(none)		(none)	
<b>Panel D. Holding Victim Race Constant</b>				
White kill White	6/30	20%	39/487	8%
Minority kill White	9/30	30%	65/487	13%
(missing)	(none)		(1)	
Notes:				
1. Focusing on the 488 death-eligible homicide incidents, the number of victims sums to 495 (97+185+190+21+1+1) because 7 crimes have multiple victims of different races.				
2. Focusing on the 488 death-eligible homicide incidents, the number of defendants sums to 501 (64+277+156+3+1) because 13 crimes have multiple defendants of different races.				
3. Panel A indicates that 15 of the 30 cases resulting in a death sentence included a white victim. Panel B indicates that 8 of the cases in question included a white female victim and 8 included a white male victim. The numerators in Panel B sum to 16 (rather than 15) because case 24 includes a white male victim and a white female victim.				

Table 3, Panel C, examines whether the race of the defendant influences death sentences. At first glance, the data seem to suggest that white defendants are overrepresented



among the cases resulting in a death sentence (13% of the death-eligible crimes include a white defendant, compared to 27% of the cases resulting in a death sentence), while Hispanic defendants are underrepresented (32% compared to 17%) and black defendants are at parity (57% compared to 57%). Is the system biased against white defendants? Probably not—a more likely scenario is that white defendants were sentenced to death at a higher rate than one would expect because they were more likely to kill white victims. Indeed, 61% (39/64) of the white defendants who committed a death-eligible crime killed a white victim, compared to 15% (41/277) of the black defendants and 14% (21/156) of the Hispanic defendants.

To formally examine whether the system is biased against white defendants or biased on behalf of white victims, consider the patterns in Table 3, Panel D. Holding the race of the victim constant, the data reveal that whites who killed whites were sentenced to death at 2.5 times the rate one would expect in a neutral system (8% of the death-eligible crimes compared to 20% of the cases resulting in a death sentence) and minorities (blacks and Hispanics) who killed whites were sentenced to death at 2.3 times the rate one would expect in a neutral system (13% compared to 30%). Thus, the apparent bias against white defendants is illusory—the true bias occurs on behalf of white victims. Anyone who kills a white victim has an elevated chance of being sentenced to death, and white defendants are simply more likely to do so than minority defendants.

In sum, the findings suggest that the death penalty was more likely to be imposed on behalf of white victims, and particularly white female victims, during the Rosenthal administration.<sup>43</sup> But perhaps such victims were killed in an especially heinous manner. If so, then putative racial disparities might have a race-neutral explanation. To consider this possibility, I used the SHR data to examine whether white victims or white female victims were killed in death-eligible

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43. One could argue that an even smaller subset of cases resulting in a death sentence is fully attributable to the Rosenthal administration—cases in which the crime, the indictment, and the death sentence all occurred between 2001 and 2007. If Table 1, Panel A, is reduced to the twenty-three cases that meet the enumerated criteria (by eliminating cases 1 through 7) the substantive results are the same: Death was more likely to be imposed on behalf of white victims, and particularly white female victims. Specifically, 5% of the death-eligible crimes include a white female victim compared to 22% (5/23) of the death sentences, and 15% of the death-eligible crimes include a white male victim compared to 26% (6/23) of the death sentences.

crimes marked by a greater number of statutory aggravators, as compared to minority victims. For example, a death-eligible crime in which a single victim is robbed (one statutory aggravator) is less heinous than a death-eligible crime in which a single victim is robbed and raped (two statutory aggravators), which is less heinous than a death-eligible crime in which multiple victims are robbed and raped (three statutory aggravators). Table 4 displays the results of the analysis. Interestingly, the chance of being killed in a death-eligible crime with two or more statutory aggravators was the same for all the groups in question: 36% of minority victims were killed in such crimes (21% plus 15%), compared to 33% of white victims (23% plus 10%) and 35% of white female victims (31% plus 4%). But the chance of being killed in the most gruesome crimes—those with three or more statutory aggravators—was markedly higher for minority victims. The differences are arresting: 15% of minority victims were killed in the most horrific crimes, compared to 10% of white victims and just 4% of white female victims. Such a pattern suggests that the racial disparities detailed above provide a conservative estimate of the problem: Death sentences were more likely to be imposed on behalf of white victims, and particularly white female victims, despite the fact that minority victims were more likely to be killed in the most egregious crimes.

**Table 4. Minority Victims Were More Likely to be Killed in the Most Heinous Murders**

	Number of Statutory Aggravators		
	1	2	3 or more
Minority Victim	65%	21%	15%
White Victim	67%	23%	10%
White Female Victim	65%	31%	4%

Interestingly, the findings in the current research conform to, and diverge from, prior research on race and capital punishment in Harris County. As mentioned above, Phillips found that the death penalty was more likely to be imposed against black defendants, and on behalf of white victims, during the period from 1992 to 1999 under the Holmes administration. Under the Rosenthal administration the race of the victim continued to matter, but the race of the defendant did not. Such a divergence is not necessarily unexpected. As

noted above, existing research suggests that the death penalty is more apt to be imposed on behalf of white victims in almost all places and time periods, but the disparate treatment of black defendants is limited to a small number of places and time periods. Taken together, the two studies of Harris County suggest that racial disparities have continued from the Holmes administration to the Rosenthal administration, albeit in a slightly different manner.<sup>44</sup>

Before concluding the discussion of findings, it is important to consider the strengths and limitations of the research. The primary strength of the research is that comparing death-eligible crimes to death sentences allows an aggregate estimate of the total impact of race across the stages of a capital case, including: the prosecutor's decision to charge a defendant with capital murder, the grand jury's decision to indict a defendant for capital murder, the DA's decision to seek the death penalty, and the jury's decision to impose a death sentence.<sup>45</sup> But the strength of the research is also a limitation, as I am unable to identify which stage produced the racial disparities. In one sense, identifying the problematic stage of the process (if the problem can be reduced to a single stage) is important, especially for those who want to reform the system. Yet identifying the problematic stage would not change the reality of the overall disparities.

I am also unable to control for potential confounders.<sup>46</sup> Yet the influence of victim race on death sentences would almost

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44. It is also possible that the divergence is a product of methodological differences between the studies. First, Phillips found that the death penalty was more likely to be imposed against black defendants than white defendants after controlling for numerous potential confounders in a multivariate logistic regression model, a statistical approach that is not possible in the current research. See Phillips, *supra* note 4, at 834–38; see also *infra* note 46 (discussing the difficulty in using multivariate logistic regression as a control in the present study). Second, Phillips focused on defendants who had been indicted for capital murder, whereas the current research focuses on the more expansive group of suspects who committed a death-eligible crime—who were also apprehended and old enough to be sentenced to death. Phillips, *supra* note 4, at 816–17.

45. It is also possible that the police tend to conduct a more thorough investigation when a white victim, and in particular a white female victim, is killed. If so, subsequent actors could be reacting in a race-neutral manner to differences in the strength of evidence across death-eligible crimes. In other words, the explanation for racial disparities in death sentences could be racial disparities in the collection of evidence.

46. Using multivariate logistic regression to control for potential confounders was not possible for two reasons: (1) The 23 death-eligible murders that were committed from 2001 to 2007 and resulted in a death sentence (cases 8 through 30 in Table 1, Panel A) could not be matched to the pool of death-eligible murders in the

certainly withstand heightened statistical scrutiny, if such scrutiny were possible. In fact, the impact of victim race during the Rosenthal administration is amplified once the heinousness of the crime is taken into consideration. Similarly, Phillips's prior research on the Holmes administration revealed that the impact of victim race was amplified after controlling for numerous potential confounders in a multivariate logistic regression model.<sup>47</sup> Thus, heightened statistical scrutiny appears just as likely (if not more likely) to suggest that the racial disparities reported here are an underestimate rather than an overestimate. Regardless, the simple percentages establish a strong prima facie case, and arguably shift the burden of proof to those who would question whether the racial disparities are real.

### CONCLUSION

The current research uncovered substantial racial disparities in the administration of the death penalty during Rosenthal's term as the DA in Harris County: The death penalty was imposed on behalf of white victims at more than twice the rate one would expect if the system were blind to race, and the death penalty was imposed on behalf of white female victims at more than five times the rate one would expect if the system were blind to race and gender. Such disparities are amplified by the fact that minority victims were more likely to be killed in the most heinous murders.

Yet numbers do not tell the entire story. Rosenthal was forced out of office in a scandal that included racist e-mails found on his computer.<sup>48</sup> Although I have no desire to dwell on

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SHR data for the same time period with sufficient confidence. As Baldus, Woodworth, and Weiner note, matching is problematic in large counties because multiple death-eligible murders in the SHR data could be a match to the death sentence case. (2) Even if the cases could have been matched with confidence, the number of death sentences is too small to control for a full array of potential confounders (although the number of death sentences is sufficient to control for a couple of potential confounders). See Baldus et al., *supra* note 40, at 135, 139. As Peduzzi and colleagues demonstrate, if there are only a small number of cases that have the outcome in question, e.g., a death sentence, and numerous control variables are included in a multivariate logistic regression, then the model can produce results that are inconsistent and unreliable. Peter Peduzzi et al., *A Simulation Study of the Number of Events Per Variable in Logistic Regression Analysis*, 49 J. CLINICAL EPIDEMIOLOGY 1373, 1379 (1996).

47. Phillips, *supra* note 4, at 834.

48. Lisa Falkenberg, *A Lonely Feeling in the DA's Office*, HOUS. CHRON., Feb. 7, 2008, at B1.

Rosenthal's fall from grace, given the nature of the research a discussion of the e-mails is unavoidable. In one e-mail entitled "Fatal Overdose," a black man is seen lying dead on a sidewalk next to slices of watermelon and a bucket of chicken.<sup>49</sup> Another e-mail suggested that former President Bill Clinton was like a black man because he "played the saxophone, smoked marijuana and receives a check from the government each month."<sup>50</sup> Indeed, media reports suggest that the office culture was compromised during Rosenthal's term as DA.<sup>51</sup> Lisa Falkenberg, a reporter for the *Houston Chronicle*, sat down with black prosecutors to hear their stories. The prosecutors told her that Hurricane Katrina evacuees were referred to as NFLs—"N[iggers] from Louisiana."<sup>52</sup> White prosecutors would also "talk down to or crack jokes about black defendants."<sup>53</sup> Even the black prosecutors were subject to racist (and sexist) remarks. One young prosecutor was working in a poorly lit room when a senior prosecutor walked in and said: "All I see is eyes and teeth. You need to turn the light on, girl."<sup>54</sup> The black prosecutors also spoke of being passed over for promotions. When asked if the office would have been open to a diversity council to address such concerns, one black prosecutor responded: "If you were to even mention that concept in our office, they would look at you like you had (expletive) on your face."<sup>55</sup>

The evidence suggests that a troubling combination of factors were at play during Rosenthal's term as the DA in Harris County—racist e-mails from the elected official who decides whether to seek the death penalty, a broader office culture of racist comments and jokes, and racial disparities in the distribution of death sentences. Such factors prompt a crucial moral question: Should the state of Texas be allowed to execute inmates who were sentenced to death in Harris

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49. Casimir, *supra* note 16.

50. *Id.*

51. *See id.* (highlighting a community call for a federal probe of the entire district attorney's office, quoting Houston Councilwoman Jolanda Jones that the DA's office exhibited systemic racism, and questioning whether "Rosenthal's e-mails speak to a larger problem in the prosecutor's office"); *see also* Falkenberg, *supra* note 48 (covering multiple instances of concern about racism from minority prosecutors at the DA's office).

52. Falkenberg, *supra* note 48.

53. *Id.*

54. *Id.* (internal quotation marks omitted).

55. *Id.* (internal quotation marks omitted).

County during the Rosenthal administration?

Some death-penalty scholars would argue that the answer is yes. Ernest van den Haag argues that the arbitrary administration of the death penalty does not undermine justice. (Although he had no reason to address the issue, the nature of van den Haag's position suggests that he would also argue that racist e-mails and a racist office culture are irrelevant.)<sup>56</sup> He begins with the premise that justice is the punishment a person deserves. So if Defendant A is executed for murdering a white victim, and Defendant B is spared the death penalty despite the identical murder of a black victim, the execution remains just—Defendant A deserved to die. Indeed, the only injustice is the mere incarceration of Defendant B who also deserved to die. Executing both would be ideal, but only executing Defendant A is better than executing neither: Some justice is better than no justice. Van den Haag's approach assumes that justice should be defined according to the characteristics of each case rather than the characteristics of the broader institution; racial disparities in the administration of capital punishment do nothing to alter the fact that Defendant A deserved to die. Indeed, van den Haag argues that racial disparities—no matter how profound—have no bearing on the morality of capital punishment.<sup>57</sup> He concludes succinctly: "Guilt is personal."<sup>58</sup>

Other death-penalty scholars would argue that the answer is no. In response to van den Haag, philosopher Daniel McDermott argues that justice cannot be reduced to the characteristics of each case. McDermott notes: "Implicit in the desert claim 'X deserves punishment *P*' is the claim that X deserves this punishment *from* a legitimate authority."<sup>59</sup> McDermott's argument has two essential components. To begin, he argues that a punishment can be morally legitimate only if it is inflicted by a morally legitimate authority.<sup>60</sup> Assume, for example, that Defendant A (described above)

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56. See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986) (opining that imposing the death penalty "irrationally discriminator[ily] or capricious[ly] . . . would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others").

57. *Id.*

58. *Id.*

59. Daniel McDermott, *A Retributivist Argument Against Capital Punishment*, 32 J. SOC. PHIL. 317, 322 (2001).

60. *Id.*

committed the most horrendous capital murder imaginable and was sentenced to death. Assume, too, that Defendant A was then killed by another inmate who was already serving a life sentence, Defendant C, before the planned execution could be carried out. Even if Defendant A deserved to die for the crime in question, Defendant A's death at the hands of Defendant C does not represent a morally legitimate punishment—it was not imposed by a morally legitimate authority. Indeed, the argument is underscored by the fact that Defendant C would be eligible for the death penalty if the hypothetical scenario occurred in Texas.<sup>61</sup> McDermott frames the argument in the following manner:

It is not enough to observe, as van den Haag does, that any particular person deserved to be executed in order to conclude that his execution was just. When someone deserves punishment, he deserves a particular form of treatment, for a particular reason, *from* a particular authority. If the harm that the person receives does not satisfy these requirements—if, that is, it is the wrong form of harm, or is given for the wrong reason, or is inflicted by someone without the right to do so—then the punishment is unjust and cannot be justified by an appeal to retribution.<sup>62</sup>

Having argued that justice requires punishment from a legitimate authority, McDermott then argues that a criminal-justice system that imposes the death penalty in a racially disparate manner cannot be considered a legitimate authority. McDermott elaborates: “To say that an institution is morally legitimate is to say that its rule is just. And if racial discrimination is unjust, then any institution that practices racial discrimination is illegitimate, even if in the particular case in question racial discrimination is not the motive for its actions.”<sup>63</sup> Put simply, if a jurisdiction administers the death penalty in a racially disparate manner then the jurisdiction forfeits the legitimate authority to execute, regardless of

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61. See TEX. PENAL CODE ANN. § 19.03(6)(B) (West 2011) (indicating that an inmate who commits murder while serving a life sentence commits capital murder and may be sentenced to death). McDermott provides a similar hypothetical example in which prison guards kill the defendant before the scheduled execution. McDermott, *supra* note 59, at 322. My hypothetical example of the defendant being killed by another inmate further emphasizes the point about legitimate and illegitimate authority because the other inmate would be eligible for the death penalty under Texas law.

62. *Id.* at 318.

63. *Id.* at 328.

whether the disparate treatment is intentional and regardless of whether particular defendants otherwise deserve to be executed. (McDermott also had no reason to address the issue, but would presumably argue that racist e-mails and a racist office culture further erode legitimate authority.)

Scientific research methods can be used to document empirical patterns, such as the racial disparities reported in the current research. But scientific research methods cannot be used to answer moral questions. No scientific test can reveal the “truth” about whether the state of Texas should be allowed to execute inmates who were sentenced to death in Harris County during Rosenthal’s time at the helm. However, moral philosophers van den Haag and McDermott provide useful frameworks for contemplating such a profound question. Should justice be defined according to the characteristics of a particular case (van den Haag)? If so, heinous crimes warrant death. Or should justice be defined according to the characteristics of the broader institution of capital punishment (McDermott)? If so, heinous inequities warrant recourse.

For those who see capital punishment from an institutional perspective, what forms of recourse are available to address racial disparities? The most extreme form of recourse—abolition—has been rejected by the Supreme Court. In the landmark 1987 case of *McCleskey v. Kemp*, the Court ruled that racial disparities in the administration of the death penalty do not render the ultimate sanction unconstitutional.<sup>64</sup> The Court reasoned that statistical evidence of discrimination across thousands of cases, without evidence of discrimination in the case at hand, does not establish a constitutional violation.<sup>65</sup> For practical purposes, the court set an extraordinarily high—if not impossible—standard. How would anyone establish intentional discrimination in a specific case? People do not announce discriminatory intentions in modern society (and are not aware of unconscious biases). Rosenthal’s racist e-mails arguably come close to meeting the standard set in *McCleskey*, yet even inflammatory e-mails are not sufficient to prove intentional discrimination in a particular case.<sup>66</sup>

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64. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

65. *Id.* at 292–93, 296–97 (holding that the “Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*’s case acted with discriminatory purpose”).

66. *See id.* at 298 (stating that to prove a discriminatory purpose, one must



But there is a middle ground between the case perspective of retention and the institutional perspective of abolition. In 2009, North Carolina passed the Racial Justice Act (RJA).<sup>67</sup> The RJA explicitly allows the use of statistical evidence to establish that the race of the defendant or the race of the victim influenced death sentences in a particular region (county, prosecutorial district, judicial division, or state), or that race influenced the prosecutor's use of preemptory challenges to dismiss potential jurors.<sup>68</sup> Defendants who can demonstrate disparate treatment are commuted to life without parole.<sup>69</sup> If Texas were to pass such a law, then death row inmates could seek relief based on racial patterns. Such a law provides a compromise that accommodates concerns about cases and institutions—retribution remains, but racial disparities can be litigated and redressed.

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prove that an entity expected its actions to have a discriminatory effect and not merely that the entity acted with "volition" or "awareness of [the] consequences" of its action (quoting *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1978)).

67. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2034 (2010).

68. *Id.* at 2035; N.C. GEN. STAT. § 15A-2011 (2011).

69. Kotch & Mosteller, *supra* note 67, at 2113.