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# RACE OF VICTIM AND LOCATION OF CRIME: THE DECISION TO SEEK THE DEATH PENALTY IN SOUTH CAROLINA

RAYMOND PATERNOSTER\*

## I. INTRODUCTION

In 1972, in *Furman v. Georgia*,<sup>1</sup> the United States Supreme Court invalidated every death penalty statute in the United States. *Furman* was decided by a five to four margin and each justice wrote a separate opinion. Only two Justices, Brennan and Marshall, rejected capital punishment as *per se* unconstitutional.<sup>2</sup> In support of the eighth amendment challenge, the remaining three Justices of the majority, Douglas, Stewart and White, held that the statutory *processes* by which defendants were being sentenced to death were unconstitutional.<sup>3</sup> In his opinion, Justice Douglas noted the possibility of discrimination in existing capital punishment statutes, anchoring his objection to an implied equal protection component of the eighth amendment.<sup>4</sup> Justice Stewart, however, held that the death penalty as currently practiced was unconstitutional because of the capricious manner in which those who receive the death penalty were selected. Noting that there are many more "reprehensible" offenders than those sentenced to death, Justice Stewart concluded that those given death sentences "are among a capriciously selected random handful" and that therefore "death sentences

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<sup>1</sup> 408 U.S. 238 (1972).

<sup>2</sup> *Id.* at 257 (Marshall, J., dissenting).

<sup>3</sup> *Id.* at 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

<sup>4</sup> *Id.* at 255-57 (Douglas, J., concurring).

are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>5</sup> In his separate concurring opinion, Justice White emphasized the infrequent imposition of the death penalty and held that the special nature of the penalty requires a meaningful basis for separating capital and noncapital cases.<sup>6</sup>

Thus, the plurality’s holding in the *Furman* decision was that the *process* of death sentencing was unconstitutional, not the *result*. With only two Justices adopting a per se position in rejecting capital punishment, the composite message of *Furman* was that state legislators could draft a death penalty statute without the constitutional infirmities found by Justices Stewart, Douglas and White. But the task of drafting a death penalty statute which met the objections raised in *Furman* would not be an easy task. Although each Justice wrote a separate concurring opinion, these opinions are brief and not well-supported with detailed analyses. Despite the individual nature of the objections and the lack of detail in support of those objections, the common theme in Justice Douglas, Stewart and White’s opinions was that existing statutes provided no standards for sentencers in determining who should receive the death penalty: “Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12.”<sup>7</sup> The decisive objection in these opinions was that sentencers had too much discretion resulting in a pattern of application that was characterized as “capricious,” “freakishly rare” and “uneven.”<sup>8</sup> In his dissenting opinion, Chief Justice Burger suggested that the constitutional infirmities of death penalty statutes found in *Furman* could be remedied if the untrammelled discretion of sentencers was restricted:

Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court’s ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. If such standards can be devised or the crimes more meticulously defined, the result cannot be detrimental.<sup>9</sup>

In sum, *Furman* held that where a sentencer is provided with discretion in a matter so important and irrevocable as the death penalty, that discretion must be structured in some way so as to avoid the capricious and wanton imposition of capital punishment. After the *Furman* decision, state legislators attempted to meet the Court’s objections by plac-

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<sup>5</sup> *Id.* at 309-310 (Stewart, J., concurring).

<sup>6</sup> *Id.* at 310-13 (White, J., concurring).

<sup>7</sup> *Id.* at 253.

<sup>8</sup> *Id.* at 309-10 (Stewart, J., concurring).

<sup>9</sup> *Id.* at 400-01 (Burger, C.J., dissenting).

ing restrictions on sentencing discretion. These restrictions took the form of either mandatory death penalty statutes or guided discretion statutes. In mandatory death penalty statutes, sentencing discretion was to be restricted by having death as the mandatory penalty upon the conviction of a narrowly defined class of crimes. Guided discretion statutes were designed to structure, not eliminate, sentencing discretion by providing articulated standards for the sentencing decision. Typically, this has taken the form of enumerated statutory aggravating and mitigating circumstances which must be considered before a sentence of death may be imposed.

These revised death sentencing schemes were reviewed by the Supreme Court in the 1975 term. In three cases—*Gregg v. Georgia*,<sup>10</sup> *Jurek v. Texas*,<sup>11</sup> and *Proffitt v. Florida*<sup>12</sup>—the Court upheld the constitutionality of guided discretion statutes. The Court struck down mandatory death penalty statutes in *Woodson v. North Carolina*<sup>13</sup> and *Roberts v. Louisiana*.<sup>14</sup>

In endorsing the guided discretion structure of capital sentencing, the Court in *Gregg* and its companion cases noted that under these schemes arbitrariness and capriciousness would be eliminated by directing the attention of sentencers to specified characteristics of the offense and offender.<sup>15</sup> Further protections to capital defendants would be afforded under these statutes by automatic appellate review which would ensure that death penalties were being implemented rationally and evenhandedly.<sup>16</sup> Mandatory death penalty statutes, however, were rejected because they would not structure discretion nor would appellate review hold the promise of correcting errors in the imposition of death sentences.<sup>17</sup> By not providing specific guidelines for sentencers in their deliberations, the Court in *Woodson* noted that “mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.”<sup>18</sup> Furthermore, the Court noted the historical tendency of jury nullification under mandatory capital punishment procedures. In commenting on the North Carolina scheme, the Court explained:

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<sup>10</sup> 428 U.S. 153 (1976).

<sup>11</sup> 428 U.S. 262 (1976).

<sup>12</sup> 428 U.S. 242 (1976).

<sup>13</sup> 428 U.S. 280 (1976).

<sup>14</sup> 428 U.S. 325 (1976).

<sup>15</sup> *Gregg*, 428 U.S. at 195 (opinion of Stewart, Powell & Stevens, J.J.).

<sup>16</sup> *Id.*

<sup>17</sup> *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *Roberts v. Louisiana*, 428 U.S. 325, 334-36 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

<sup>18</sup> *Woodson*, 428 U.S. at 302.

[The] mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences.<sup>19</sup>

The Court's decision in *Woodson* makes it clear that the fatal flaw of mandatory death penalty statutes is that without specific standards the process of deciding who is to be sentenced to death is shielded from judicial review, making appellate level correction impossible. The critical nature of this fatal infirmity becomes even more clear when one considers the central role the Supreme Court gives appellate review of death sentences in ensuring consistency in capital sentencing. As revealed by the comments of Justice Stewart, the Court assumed that the process of appellate review would be the linchpin in curing the new statute of constitutional infirmities: "[T]o guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate."<sup>20</sup> Furthermore, in *Proffitt*, three Justices contended that sentencing standards would restrict arbitrary and capricious jury behavior and that "to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system."<sup>21</sup> Finally, the importance of appellate review can be seen in *Woodson* and *Roberts* where mandatory death penalty processes were struck down in part because "there is no meaningful appellate review of the jury's decision."<sup>22</sup>

While it is true that the Court has neither imposed any model of appellate review on the states nor made appellate review of death sentences a constitutional necessity, it considers some form of review an essential "check against the random or arbitrary imposition of the death penalty."<sup>23</sup> Appellate review is to act as the "ultimate supervisor of the

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<sup>19</sup> *Id.* at 303.

<sup>20</sup> *Gregg*, 428 U.S. at 198.

<sup>21</sup> *Proffitt*, 428 U.S. at 253 (Powell, J., announcing plurality opinion).

<sup>22</sup> *Roberts*, 428 U.S. at 335-36 (Stewart, J., announcing plurality opinion); *Woodson*, 428 U.S. at 303 (Stewart, J., announcing plurality opinion). In both *Woodson* and *Roberts* Justice Stewart rejected mandatory death sentences under a theory that gives appellate courts a central role in ensuring that death statutes meet constitutional requirements. See Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L. & CRIMINOLOGY 194, 196-97 (1979). In rejecting the North Carolina law, Justice Stewart held that by failing to provide a separate process of appellate review the statute "does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson*, 428 U.S. at 303. More generally, appellate review of the death sentencing process is probably a minimal condition for the constitutionality of death penalty statutes under Justice Stewart's analysis. See Palmer, *supra*, at 196-97.

<sup>23</sup> *Gregg*, 408 U.S. at 206.

administration of the death penalty,"<sup>24</sup> ensuring that death sentences are not imposed because of passion or prejudice; that they are proportionate; and that they are consistently and evenhandedly imposed. The Court has further demonstrated that where "meaningful review" of death sentences is rendered impossible, as in a mandatory sentencing scheme, it will not be confident that the possibility of arbitrary and capricious application of the penalty will be removed and will therefore invalidate it.<sup>25</sup>

The decision to convict for first-degree murder under a mandatory death sentence is, of course, only one instance of a low visibility decision which may be pregnant with capriciousness and discrimination. Such low visibility decision points may exist within constitutionally approved guided discretion statutes as well, and their low visibility will shield them from all but the most rigorous appellate review. One such decision point in the guided discretion process of capital sentencing is the decision of the prosecutor to seek the death penalty in a given homicide. Although in any one year there are hundreds of homicides committed in a death penalty state which could be considered by statute a capital murder, in only a small proportion of those cases is the death penalty requested.<sup>26</sup> The decision to seek a death sentence is a charging decision within the jurisdiction of the prosecutor. Numerous factors go into this decision, some of which are legally relevant, such as the number of victims killed, the aggravated nature of the homicide or the vulnerability of the victim. Other factors, however, may enter into this decision, such as the race of the victim or the offender, or the location within the state where the homicide occurred. If the decision to charge—or not to charge—a homicide as a capital crime is discriminatorily or arbitrarily made,<sup>27</sup> there is little possibility for correction by appellate review under

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<sup>24</sup> Palmer, *supra* note 22, at 197.

<sup>25</sup> Roberts, 428 U.S. at 335.

<sup>26</sup> For example, in South Carolina, from the time the new death penalty statute was enacted on June 8, 1977 until December 31, 1977, death was requested in only 115 of a total of 1686 (7%) death eligible non-negligent homicides. See *infra* text accompanying note 46.

<sup>27</sup> This conceptualization of discrimination and arbitrariness draws upon Bowers and Pierce's earlier analysis of post-Furman capital sentencing statutes. See Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 572 (1980). They give a general meaning to arbitrariness as referring to "any departure from the retributive model requiring death as punishment to be strictly a function of statutory guidelines and evolving standards of practice." *Id.* at 572-73. Discrimination is a type of arbitrariness which occurs when the departure from the retributive model is produced by systematic extralegal influences such as the race of the offender, the race of the victim, or the size of the community where the homicide occurred. Although Bowers and Pierce refer to the first influence as discrimination and the second two influences as disparity (a form of discrimination), see *id.* at 574, in this Article all legally irrelevant characteristics of the crime, victim, or offender will be referred to as a kind of discrimination. Arbitrariness will refer to geographical variation.

current review practices.

In conducting their proportionality review to see if the penalty of death in a given case is proportionate to the penalty given in "similar cases," state supreme courts have restricted the universe of "similar cases" to those cases involving appealed death and life imprisonment sentences.<sup>28</sup> Importantly, such a restricted definition of similar cases excludes both unappealed capital convictions where life imprisonment is imposed and homicides which could have been charged as capital homi-

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<sup>28</sup> The Supreme Court has noted that effective appellate review should involve the comparison of particular sentences with those sentences in factually similar cases. *See Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 253; *Jurek*, 428 U.S. at 256-59. The Justices have not, however, stated any parameters as to the comprehensiveness of the proportionality review. On the one hand, Justice Stewart in *Gregg* alludes to an expansive universe of similar cases, noting that the process of proportionality review should be so thorough that each death sentence is compared with "similar cases, considering both the crime and the defendant." *Gregg*, 428 U.S. at 204 (emphasis added) (quoting GA. CODE ANN. §27-2537(c)(3) (Supp. 1975) (current version at O.C.G.A. § 17-10-35 (1982)). In a later footnote, however, Justice Stewart dismisses the petitioner's claim that the Georgia Supreme Court's practice of excluding from its proportionality review un-appealed life sentences and cases where a capital conviction was not obtained invalidates its review process. While he noted that the state supreme court does not have to include such cases in its universe of similar cases, Justice Stewart stated that it may do so of its own accord, and as normal practice does include appealed life sentences in its review. *Id.* at 204 n.56.

In describing the required proportionality review, the South Carolina capital punishment statute uses language almost identical to that of the Georgia statute commented upon by Justice Stewart in *Gregg*. The statute provides that in reviewing for error the Supreme Court of South Carolina shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstances . . . and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

S.C. CODE ANN. § 16-3-25 (Law. Co-op. Supp. 1982). The requirements for determining if the sentence was influenced by prejudice and not disproportionate to factually similar cases seem to demand a broad universe of cases and an expansive process of appellate review.

In a recent case affirming a death sentence, however, the South Carolina Supreme Court substantially restricted the range of its proportionality review. *State v. Copeland*, 300 S.E.2d 63 (S.C. 1982), *cert. denied*, 103 S.Ct. 1802 (1983). In comparing a particular death sentence with the sentences imposed in other similar cases, the court defined the universe of similar cases as those where a sentence of death was imposed and affirmed on appeal. 300 S.E. 2d at 74-75. At the time of the *Copeland* decision, approximately six years after the effective date of the capital punishment statute, there were five such cases making up the total universe of similar cases for the South Carolina proportionality review. Rather than compare a case where a death sentence was imposed with the large number of cases involving "similar cases considering both the crime and the defendant," the state supreme court compared it with other affirmed death cases. Not surprisingly, in affirming a particular death sentence the South Carolina Supreme Court found no other truly similar cases with which to compare it and subsequently decided that, given the crime and the defendant, it was neither excessive nor disproportionate. For a critique of this form of proportionality review, see Hubbard, Burry & Widener, *A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C.L. REV. 391 (1982).

cides but were not. If arbitrariness and discrimination afflict the charging decision, such low visibility practices will go unnoticed and uncorrected at the appellate level. This is precisely the process of capital punishment administration rejected by the Supreme Court in *Woodson* and *Roberts*.

Although the Court's attention in *Gregg* and its companion cases was directed at the sentencing stage of capital cases, it was not immune to the possibility that even with sentencing standards discrimination could be displaced to other points in the system, such as when the prosecutor charges the case. Petitioner *Gregg* indeed did contend that the post-*Furman* changes in the Georgia death statute were merely "cosmetic" and that unbridled discretion continued to be given state prosecutors.<sup>29</sup> In his concurring opinion, Justice White directly examined the possibility that prosecutors' behavior under guided discretion statutes might be arbitrary and standardless. He concluded (without "facts")<sup>30</sup> that the "[p]etitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts."<sup>31</sup> In explicating what would restrain prosecutors from behaving in a "standardless" manner and what effect it would have on the review process, Justice White suggested that it would be the same guidelines which structure the discretion of the sentencing jury:

Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence . . . . Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases. . . .<sup>32</sup>

In deciding to charge or not to charge a homicide as a capital homicide, Justice White assumed that sentencing guidelines will filter down and restrict the discretion of the prosecutor. Prosecutors will decide to seek the death penalty only in those cases where the composite of aggravating and mitigating circumstances warrant it. In such a model, homicide cases where a death sentence was not sought could be presumed to be less serious than those cases where it was requested, thereby leaving unaffected the universe of similar cases for "meaningful appellate review."<sup>33</sup>

Whether the prosecutor's charging discretion is structured by statu-

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<sup>29</sup> *Gregg*, 428 U.S. at 198.

<sup>30</sup> *Id.* at 225.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Roberts*, 428 U.S. at 335.



tory standards rather than by discrimination and arbitrariness is a question that can only be answered by empirical rather than legal analysis. The data collected to date does not provide much support for Justice White's confidence in the "competence" of prosecutors. In their study of a sample of Florida cases, Bowers and Pierce found that the probability of a first-degree murder indictment given a homicide charge was substantially greater in cases involving black offenders and white victims.<sup>34</sup> They also reported that the decision to charge an accompanying felony with the homicide (making the defendant eligible for the death penalty) was related to both the race of victim and the race of offender.<sup>35</sup> Bowers and Pierce also found that the probability that a first degree murder indictment would be returned given a homicide charge varied substantially between different areas in the state.<sup>36</sup> Evidence of arbitrariness in the charging of homicide cases was found for both felony and non-felony homicides.<sup>37</sup> Using data from selected Florida counties and focusing on homicides between strangers, Radelet found that murderers of whites were significantly more likely to be indicted for first-degree murder than were killers of blacks.<sup>38</sup> Unlike Bowers and Pierce, however, Radelet found no evidence of discrimination by race of offender once the victim's race was controlled.<sup>39</sup> Evidence of prosecutors' discriminatory behavior in their decision to seek death sentences also was found in South Carolina. Jacoby and Paternoster reported that the probability of a death sentence being sought was three times higher for those who killed whites than for those who killed blacks.<sup>40</sup> The prosecutor was four times as likely to request the death penalty in cases involving a black defendant and a white victim than in those involving black victims.<sup>41</sup>

The available empirical evidence about the behavior of prosecutors in their charging decisions suggests that arbitrariness and discrimination have not been removed from the capital sentencing process by post-*Furman* reforms. These findings, however, cannot be taken as unequivocal proof. As Bowers and Pierce have noted, evidence of differential treatment by race may reflect discrimination or it could "be the result of legally relevant differences in the kinds of crimes committed by and

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<sup>34</sup> Bowers & Pierce, *supra* note 27, at 610.

<sup>35</sup> *Id.* at 613. This is my definition of discrimination. See *supra* note 27.

<sup>36</sup> This is my definition of arbitrariness. See *supra* note 27.

<sup>37</sup> Bowers & Pierce, *supra* note 27, at 616-19.

<sup>38</sup> Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 922-23 (1981).

<sup>39</sup> *Id.*

<sup>40</sup> Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 384 (1982).

<sup>41</sup> *Id.* at 384-85.

against blacks and whites."<sup>42</sup> To control for this possibility, they conducted separate analyses of felony-homicides (homicides committed in the course of an accompanying felony) and non-felony homicides.<sup>43</sup> In his analysis, Radelet controlled for the relationship between victim and offender and type of homicide (first-degree murder).<sup>44</sup> Jacoby and Paternoster controlled for legally relevant differences by studying only those homicides which included at least one statutory aggravating circumstance, thus making them all minimally "death eligible."<sup>45</sup> Although such efforts do offer some control over legally relevant differences in the kinds of homicides committed, only a few of the many possible legally relevant differences have been controlled. Nor has there been any attempt to control simultaneously for several possible factors.

The data presented in this Article is an attempt to refine the analysis of arbitrariness and discrimination in the charging of homicide cases. This study reports on the charging decisions made by local prosecutors in the state of South Carolina in the approximately 1,800 homicides committed from the time the new death penalty statute took effect on June 8, 1977 until December 31, 1981. The data will be used to test both a discrimination and an arbitrariness hypothesis in the charging of homicide cases. The analysis will try to account for the prosecutor's decision to seek the death penalty in a given case of homicide in terms of both legally relevant characteristics of the offense and offender, and legally irrelevant characteristics of the offender and victim. In addition, this Article presents data on the geographical variation of death requests by prosecutors throughout the state, and the relationship between that variation and differences in the characteristics of homicides committed in those geographical regions.

## II. METHODS

### A. DATA SOURCES

The unit of analysis in this research is the homicide act. A homicide act is defined as a distinct act of homicide committed by a single offender against one or more victims. If, for example, two offenders were to kill one victim there would be two acts of homicide, one for each offender. If one offender were to kill two victims there would be a single homicide, but one more serious than a homicide with only one victim. Between June 8, 1977, the effective date of the new death penalty statute, and December 31, 1981, there were 1,805 non-negligent homicide

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<sup>42</sup> Bowers & Pierce, *supra* note 27, at 597.

<sup>43</sup> *Id.*

<sup>44</sup> Radelet, *supra* note 38.

<sup>45</sup> Jacoby & Paternoster, *supra* note 40.

acts committed in South Carolina.<sup>46</sup> One hundred and nineteen of these cases (6.6%) were eliminated because there was no known offender. The remaining 1,686 cases constitute the first pool of homicide cases which are eligible for the death penalty.

Information on this pool of homicide cases was collected from three sources. An initial file was created from the data contained in the Supplemental Homicide Report (SHR). The SHR's are filled out by local police agencies and are submitted to the South Carolina State Law Enforcement Division (SLED) which codes and compiles the reports and forwards the data to the FBI's Uniform Crime Report Program.<sup>47</sup> SHR's were obtained for the years 1977 through 1981, and homicides committed before June 8, 1977 were deleted from the file. The SHR contains information about the characteristics of the victim and suspect (race, sex, age), if known, and the offense (type of weapon used, relationship between victim and offender, number of victims and offenders, felony circumstances). The information contained in the SHR, however, is limited for research purposes. It contains no information about the offender if there was no immediate suspect. In addition, other than demographic characteristics, it provides no detailed knowledge about known offender's mental capacity, emotional state at the time of the offense, general emotional-psychological well-being, duress, influence of alcohol or other drugs, or other similar circumstances. Moreover, it does not provide sufficiently detailed characteristics of the offense, such as the brutality of the crime, if torture was involved, if the victim precipitated the offense in any way, or other factors which could aggravate or mitigate the offense. Detailed data of this kind are critical to this and similar capital punishment research. If cases where the death sentence was requested or imposed are to be compared to *similar cases* where it was not, then an accurate reconstruction of the case must be made. Only by collecting detailed data can researchers be confident that they are really comparing similar cases.

In order to construct a more detailed account of both offender and offense, data were collected from a second source, the original police

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<sup>46</sup> SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, CRIME IN SOUTH CAROLINA 5 (1977-1981).

<sup>47</sup> Although the SHR constituted the primary data source it was supplemented by other data—the police incident and investigation report. If information on the SHR was missing or incorrect, in most cases it was available in the police reports. Also, since the principal investigator of this project did not rely on SLED to provide the incident reports but got them from the police agencies themselves, cases that were not reported to SLED and included in the SHR could be reconstructed and a SHR file made from the police reports. The combination of SHR and original police report thus assured virtually complete coverage of homicide cases. The police reports were obtained in some instances by the voluntary cooperation of police agencies, by Freedom of Information Act requests, or by subpoena in others.

incident report and subsequent investigation reports of the homicide. These reports are kept by local police agencies and include very detailed accounts of the crime scene and descriptive information on offenders either known at the time of the offense or discovered through subsequent police investigations. These police reports generally include information on how the homicide was committed, the precise nature of injuries received by the victim, any evidence of alcohol or drug use, and felony or non-felony offenses concurrent with the homicide. The police investigation report also may note any elements of the offender's motive, state of mind, or other personal attributes. Incident and investigation reports were obtained for approximately ninety-five percent of the homicide cases in the SHR file.

Data were collected from a third source for a subset of the homicide cases. If a homicide results in an arrest and subsequent indictment, a record is kept by the State Office of the Attorney General. This record consists of the docket number of the case; trial data; birth date; name, sex and race of the offender; judge; outcome of the trial; and sentence imposed. Indictment and disposition data were collected on all cases of murder and non-negligent homicide for the years 1977 through 1982. It was then possible to match the SHR and police incident reports with a criminal indictment and disposition record, and homicide acts were coded as to criminal indictment, trial outcome, and sentence disposition.

Although the prosecutor's decision to seek the death penalty in a given homicide case is a low visibility process, once that decision is made a public record is kept. When the prosecutor decides to seek the death penalty, he or she is required by statute to notify defense counsel of this intention at least thirty days prior to the date of the trial.<sup>48</sup> In addition, a mandatory administrative procedure requires that a prosecutor seeking the death penalty file a form with the South Carolina Court Administrator, who then forwards a copy to the state supreme court. The supreme court staff keeps an updated list of all homicide cases where death was requested. This information was provided by the supreme court staff, and cases were coded as either a homicide where death was requested or was not requested.

#### B. DATA BASE

Information from the above sources was collected on each of the 1,805 non-negligent homicides committed in South Carolina from June 8, 1977 through December 31, 1981. Although all of these cases involve homicides, the prosecutor is not free to seek a death sentence in any given homicide. The new capital punishment statute in South Carolina

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<sup>48</sup> S.C. CODE ANN. § 16-3-26(A) (Law. Co-op. Supp. 1982).

created a new class of murder—capital murder. A capital murder involves the commission of an act of murder plus at least one of seven statutory aggravating circumstances.<sup>49</sup> If at least one of these aggravating circumstances is not present, the murder is not a capital murder and the offender is not subject to capital punishment.<sup>50</sup> Rather than examine the decision to seek a death sentence using the total pool of all homicide cases, the analysis will focus primarily on statutorily defined “death eligible” cases. Of the 1,686 homicides with known offenders committed in South Carolina between June 8, 1977 and December 31, 1981, 321 (19%) were capital murders. The majority of the data analysis reported below is restricted to this pool of 321 capital murders.

### III. DATA ANALYSIS

This section reports evidence as to the existence of discrimination and arbitrariness in the decision of the prosecutor in South Carolina to request the death penalty in a given homicide. If discrimination and arbitrariness have been purged from the process of capital punishment under South Carolina’s constitutionally approved statute, the decision to seek the death penalty should be racially neutral and evenly applied throughout the state. If the prosecutor’s decision to seek the death penalty is informed and structured by the same statutory guidelines which structure sentencer discretion, then it is conceivable that cases where death is not sought are not “similar in relevant respects” to those where death is sought.<sup>51</sup> If, however, extralegal characteristics of the offense or

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<sup>49</sup> The South Carolina Code provides:

- (1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;
- (2) Murder was committed by a person with a prior record of conviction for murder;
- (3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or a device which would normally be hazardous to the lives of more than one person;
- (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
- (5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
- (7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

S.C. CODE ANN. § 16-3-20 (C)(a) (Law. Co-op. Supp. 1982).

<sup>50</sup> *Id.*

<sup>51</sup> A central feature of this analysis and a source of tension in much capital punishment post-conviction litigation is how the term “similar cases” is to be defined. The Supreme Court in *Gregg* provides an ambiguous standard—“similar cases, considering both the crime and the defendant.” 428 U.S. at 204. This proportionality standard arguably suggests a comparison of *factually* similar cases. See *supra* note 22 and accompanying text. The search for

offender influence the decision to seek death, then homicide cases where death is not sought which are factually similar to those where it is sought may be filtered out of the system unnoticed and uncorrected by appellate review.

#### A. EVIDENCE OF DISCRIMINATION

A substantial body of prior research has shown consistent evidence of differential application of the death penalty by race of offender and race of victim under pre-*Furman* capital punishment statutes.<sup>52</sup> More recent studies have found that the imposition of death sentences under post-*Furman* statutes is also influenced by the race of offender and victim.<sup>53</sup> Table 1 reports information on another decision-making point in the capital punishment process—the decision to seek the death penalty. The upper panel of Table 1 reports the number of homicide acts, death requests, and the probability of the death penalty being sought by offender/victim racial categories for all homicides where there was a known offender. When considering the race of the offender alone, little racial difference exists. In fact, what slight difference that does exist favors black defendants. The probability of the death penalty being requested for white offenders is .084 (53/634) and .060 (62/1042) for black offenders (ratio = 1.4 to 1,  $p > .05$ ). This initial look at the data suggests no significant racial disparity and is consistent with Kleck's conclusion in his recent review of racial discrimination in sentencing.<sup>54</sup>

When the race of offender and the race of the victim are considered together, however, a clear pattern of racial disparity emerges. As the top panel of Table 1 shows, the probability of the prosecutor seeking the death penalty for black offenders who kill white victims is .365 and for blacks who kill other blacks it is .009. Black offenders who cross racial lines are over 40 times more likely to have the death penalty requested than black killers of blacks. This large differential in the treatment of

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similarity should begin with a compilation of cases where the characteristics of the offense and offender are similar, rather than beginning with a pool of cases which are *dispositionally* similar. The result of a failure to begin with factually similar cases may be to hide significant sources of arbitrariness and discrimination. This is the position adopted throughout this Article.

<sup>52</sup> See MANGUM, *THE LEGAL STATUS OF THE NEGRO* (1940); Bowers & Pierce, *supra* note 27; Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949); E. Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165 (1957); G. Johnson, *The Negro and Crime*, 217 ANNALS (1941); Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975); Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 405 ANNALS 119 (1973).

<sup>53</sup> See Bowers & Pierce, *supra* note 27; Radelet, *supra* note 38; Jacoby & Paternoster, *supra* note 40.

<sup>54</sup> See generally Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence With Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

black homicide offenders is consistent with Bowers' and Pierce's findings for racial disparity at the sentencing level.<sup>55</sup> For white offenders, the difference by race of victim is less glaring and in the opposite direction. Whites who kill blacks are slightly more likely (1.6 times) to have the death penalty sought than white killers of whites.

**TABLE 1**  
 PROBABILITY OF PROSECUTOR SEEKING THE DEATH PENALTY BY  
 RACE OF OFFENDER AND VICTIM—FOR ALL HOMICIDES AND  
 CAPITAL MURDER CASES<sup>a</sup> ONLY

<u>ALL HOMICIDE CASES</u>					
Offender/Victim Combination	Number of Homicide Acts	Number of Death Requests	Probability of Death Requests	% That are Capital Murders	
Black Kills White	148	54	.365	75.0%	
White Kills White	580	46	.079	19.5%	
Black Kills Black	894	8	.009	8.5%	
White Kills Black	54	7	.130	29.6%	

<u>CAPITAL MURDER CASES</u>				
Offender/Victim Combination	Number of Capital Murders	Number of Death Requests	Probability of Death Request	
Black Kills White	111	54	.486	
White Kills White	113	44 <sup>b</sup>	.389	
Black Kills Black	76	8	.105	
White Kills Black	16	7	.438	

<sup>a</sup> Capital murder cases are the only homicide cases where the death penalty may be sought. They involve the commission of a willful homicide in conjunction with at least one other aggravating circumstance as defined by South Carolina's death penalty statute. *See supra* note 49.

<sup>b</sup> Two cases are missing here because neither the SHR nor police incident report could verify the existence of a statutory aggravating circumstance. In both cases guilty pleas were accepted in exchange for a life sentence and the death penalty request could have been a ploy in plea bargaining negotiations.

As other studies of capital sentencing have shown, the race of the victim is an important consideration in the prosecutor's decision whether to seek the death penalty.<sup>56</sup> Although the data do show significant racial disparity by race of victim, it is not at all clear that this difference is due to racial discrimination. As Bowers and Pierce made clear in their earlier work on capital sentencing, any observed racial dif-

<sup>55</sup> Bowers & Pierce, *supra* note 27.

<sup>56</sup> *See supra* note 50.

ferences in judicial treatment may "be the result of legally relevant differences in the kinds of crimes committed by and against blacks and whites."<sup>57</sup> Requests for the death penalty may be more likely in white victim cases, for example, because they are more likely to involve an aggravating circumstance, qualifying as capital murder under South Carolina's capital punishment statute. Such is indeed the case. As the final column of the top panel of Table 1 shows, 75% of the black offender/white victim homicides are capital murders while only 8% of the black offender/black victim homicides are capital murders. The greater probability of the prosecutor seeking a death sentence in the former cases is at least in part because a greater proportion of black offender/white victim cases are statutorily eligible for the death penalty.

To unambiguously examine the influence of race on the decision to seek the death penalty, it is necessary to limit the analysis to capital murders. The bottom panel of Table 1 reports the probability of a death request being made in capital murder cases by offender/victim racial combinations. As expected, for every offender/victim racial category the probability of a death request is higher than in the corresponding row of the upper panel. Although the race effect is less than that found for all homicides, substantial racial disparity continues to exist: blacks who kill whites have over a 4.5 times greater risk of having the death penalty sought than do black killers of blacks. As before, whites who kill blacks are only slightly more likely to have the death penalty requested than whites who kill other whites (.438 vs. .389, ratio = 1.12). Race of victim appears to be a more important consideration than race of offender.<sup>58</sup> The probability of a death sentence being requested for killers of whites is .438 and for killers of blacks it is .163, a 2.5 times greater risk for killers of whites. For white capital murderers, the probability of the prosecutor seeking the death penalty is .395 and for black capital murderers the probability is .332, a difference of only 1.19 times. When race of victim is ignored, then, there is an almost equal chance of the death penalty being requested for white and black offenders.

These data do not paint a very favorable picture of prosecutorial discretion in deciding when to seek the death penalty in a capital homicide case. The prosecutor sought the death penalty in only 115 (36%) of the 321 capital homicides committed in South Carolina between June 8, 1977 and December 31, 1981. The bottom panel of Table 1 suggests that one of the influences in the decision to seek a death sentence is the

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<sup>57</sup> Bowers & Pierce, *supra* note 27, at 597.

<sup>58</sup> Bowers & Pierce, *supra* note 27; Radelet, *supra* note 38; Jacoby & Paternoster, *supra* note 40.



race of the victim. Even if racial disparity exists among capital murder cases, it could reasonably be argued that not even all capital murders are equivalent and that white victim capital murders are more aggravated than black victim capital murders.

In order to be categorized as a capital murder, a homicide must include at least one statutory aggravating circumstance. Yet other aggravating factors that are not expressly defined by statute may influence the decision to seek a death sentence. Capital murders may differ, then, in the extent to which non-statutory aggravating circumstances are present. Table 2 reports the influence of several possible aggravating circumstances on the prosecutor's decision to seek the death penalty. The first four rows are for comparison and show the effect of victim's race and offender's race. As discussed in the preceding paragraphs, the race of the victim has a significant effect on the decision to seek death while the race of offender has almost no effect. Table 2 reveals that several other factors constitute aggravating elements in a homicide and influence the prosecutor's decision. The number of victims has a significant impact; multiple murderers are one and a half times more likely to have the death penalty requested than killers of single victims. The number of offenders also has a significant effect. Capital murders involving more than one offender are more likely death penalty homicides than single offender capital murders. Second in magnitude to the effect of the victim's race is the relationship between victim and offender. Similar to Radelet's findings,<sup>59</sup> these data show that murders involving strangers are more likely to be death penalty cases than murders among acquaintances or primary relations. Sex of victim and type of weapon used are two other significant influences on the prosecutor's decision; killers of women and killers using guns are significantly more likely to have the death penalty sought.

The data in Table 2 reveal several factors which influence the decision to seek the death penalty in capital murder cases. Although race of victim shows the greatest differential, it is not the only determinant of the prosecutor's selection of death penalty cases. The presence of other significant aggravating circumstances suggests that any observed racial disparity in the treatment of capital murders may be due to these non-statutory factors. Table 3 reports the number of capital homicides, death penalty requests, and probability of the death penalty being requested for black and white victim cases within categories of the number of victims and the victim-offender relationship. Of the non-statutory aggravating factors, the number of victims and victim-offender relationship showed the most significant effect on the decision to seek

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<sup>59</sup> Radelet, *supra* note 38.

**TABLE 2**  
**PROBABILITY OF PROSECUTOR SEEKING THE DEATH PENALTY BY CHARACTERISTICS OF OFFENSE AND OFFENDER—**  
**CAPITAL MURDERS ONLY**

Characteristic	Number of Homicide Acts	Number of Death Requests	Probability of Death Request	Ratio of Probabilities	Significance Level <sup>a</sup>
Race of Victim	227	98	.432	2.70	.001
	94	15	.160		
Race of Offender	129	51	.395	1.19	.254
	187	62	.332		
Number of Victims	48	26	.542	1.70	.003
	273	87	.319		
Number of Offenders	170	72	.424	1.56	.004
	151	41	.272		
Victim-Offender Relationship	196	84	.429	1.73	.002
	105	26	.248		
Sex of Victim	78	37	.474	1.51	.009
	243	76	.313		
Age of Victim <sup>b</sup>	155	57	.368	1.11	.509
	165	55	.333		
Weapon Used	223	87	.390	1.47	.031
	98	26	.265		

<sup>a</sup> All tests are two-sided tests.

<sup>b</sup> The age of victim was coded as 0 if the victim was either between the ages of 0 and 18 or over the age of 50, and 1 if between the ages of 19 and 49. This reflects the fact that age of victim had a curvilinear relationship for the probability of a death sentence being requested; for 0-18 year-old victims the probability was .667, for victims 50 years or older the probability was .322 and for victims between 19 and 49 years of age the probability of the prosecutor seeking the death penalty was .286.

TABLE 3

NUMBER OF CAPITAL MURDERS, NUMBER OF DEATH REQUESTS AND PROBABILITY OF DEATH BEING REQUESTED FOR BLACK AND WHITE VICTIM HOMICIDES BY NUMBER OF VICTIMS, AND RELATIONSHIP BETWEEN VICTIM AND OFFENDER

	MULTIPLE VICTIM HOMICIDES			NON-STRANGER HOMICIDES		
	<u>STRANGER HOMICIDES</u>	Number of Capital Homicides	Probability of Death Request	Number of Capital Homicides	Number of Death Requests	Probability of Death Request
Black Victim	3	2	.667	5	0	.000
White Victim	25	14	.560	13	8	.615
	SINGLE VICTIM HOMICIDES			NON-STRANGER HOMICIDES		
	<u>STRANGER HOMICIDES</u>	Number of Capital Homicides	Probability of Death Request	Number of Capital Homicides	Number of Death Requests	Probability of Death Request
Black Victim	38	7	.184	43	6	.140
White Victim	130	61	.469	44	12	.272

the death penalty (see Table 2). These were dichotomized into multiple/single victims and stranger/non-stranger homicides.

The findings reported in Table 3 show that even when these two other factors are controlled, there is still considerable disparity by race of the victim in the decision to request the death penalty. The data indicate that, in three of the four situations of number of victims/victim-offender relationship, the probability of a capital murder being treated as a death penalty case is higher for killers of whites than for killers of blacks. Only for stranger homicides involving multiple victims is the probability of a death penalty request greater for black victim cases, and here there are too few cases ( $n = 3$ ) to make definitive conclusions. The remaining categories demonstrate that as the homicide becomes more aggravated, the racial disparity becomes greater (1.94 for single victim/non-stranger homicides, 2.55 for single victim/stranger homicides, and .615/0 for multiple victim/non-stranger homicides).

The data presented thus far show a considerable difference in treatment by race of victim, a difference which cannot be accounted for by the effect of the number of victims or the victim-offender relationship. It is still possible, however, that this racial disparity could be due to the other non-statutory aggravating factors found to significantly influence the decision to seek the death penalty (see Table 2). Two homicide seriousness scales were constructed in order to fully address this possibility and provide a more exact test of the discrimination hypothesis. In the first scale, a score of 1 was assigned for each of the following aggravating factors: (1) homicide involving strangers, (2) multiple victims, (3) multiple offenders, and (4) female victims. A score of 0 was assigned for the absence of any factor, creating an aggravation scale ranging in possible value from 0 (no non-statutory aggravating factors present) to 4 (all four non-statutory aggravating factors present). A second scale was constructed along identical lines with the addition of a fifth aggravating factor. For this fifth factor a score of 1 was assigned if any of the following were present: the offender had a history of violent offenses; the offense involved post-mortem abuse or multiple efforts (i.e. stabbing and shooting victim); the murder was particularly brutal; there was a concurrent sex offense not including rape; the victim was shot more than once; the offender tried to bury or hide the body. The second aggravation scale ranged in value from 0 to 5, with 5 representing the presence of all five aggravating factors.

Using these homicide aggravation scales, a comparison can be made of the probability of a death sentence being requested in white victim and black victim cases at identical levels of homicide aggravation. Table 4 reports the results. The data show that the aggravation

TABLE 4

NUMBER OF HOMICIDE ACTS, NUMBER OF DEATH REQUESTS AND PROBABILITY OF DEATH BEING REQUESTED BY AGGRAVATION LEVEL OF THE HOMICIDE AND RACE OF VICTIM—CAPITAL MURDERS ONLY

Aggravation Level <sup>a</sup>	ALL CAPITAL MURDERS			BLACK VICTIM CAPITAL MURDERS			WHITE VICTIM CAPITAL MURDERS		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	Number of Homicide Acts	Number of Death Requests	Probability of Death Request	Number of Homicide Acts	Number of Death Requests	Probability of Death Requests	Number of Homicide Acts	Number of Death Requests	Probability of Death Requests
0	51	11	.216	24	3	.125	27	8	.296
1	93	25	.269	38	7	.184	55	18	.327
2	103	41	.398	19	1	.053	84	40	.476
3	42	25	.595	8	4	.500	34	21	.618
4	12	8	.667	0	0	—	12	8	.667
0	44	4	.091	22	1	.045	22	3	.136
1	81	18	.222	37	7	.189	44	11	.250
2	90	29	.322	18	3	.167	72	26	.361
3	57	38	.667	6	0	.000	51	38	.745
4	19	13	.692	6	4	.667	13	9	.692
5	10	8	.800	0	0	—	10	8	.800

<sup>a</sup> The coding scheme for the aggravation factors was as follows: Relationship Between Victim and Offender—(0) non-stranger, (1) stranger; Number of Victims—(0) single victim, (1) multiple victims; Number of Offenders—(0) single offender, (1) multiple offenders; Sex of Victim—(0) male, (1) female; Other Aggravating Factors—(0) none present, (1) at least one other aggravating circumstance present.

scales are reasonably valid indicators of homicide seriousness. Column 3 shows that for both scales there is a consistent increment in the likelihood of a death penalty request at increasing levels of aggravation. The ratio of probabilities between the highest and lowest aggravation level is 3 to 1 for the first aggravation scale and over 8 to 1 for the second. Further, there is an increase of at least .50 in adjacent levels of aggravation for both scales. The data also continue to show strong and consistent evidence of racial disparity in the selection of death cases by the prosecutor. The upper panel of Table 4 demonstrates that at each aggravation level the probability of the death penalty being requested is higher for white than black victim cases (compare columns 6 and 9). On the first aggravation scale, the ratio of white victim to black victim probabilities ranges from 1.4 to 1 (aggravation level 3) to 10.5 to 1 (aggravation level 2). An identical pattern emerges for the second aggravation scale. At each of the six different levels there is a greater likelihood of death being sought for killers of whites than killers of blacks.

Thus, apparently "similar cases, considering both the crime and the defendant" are being handled differently by the prosecutor depending on the race of the victim. The evidence presented thus far of differential treatment by race of victim is very consistent and is strong enough to persist once other non-statutory aggravating factors are controlled. Although taken singularly each of these aggravating circumstances cannot account for the effect of the victim's race on the decision to seek the death penalty, it is possible that the racial effect may be explained by a combination of these other factors. A multivariate analysis of the data was performed to examine this possibility. Usually, when one wishes to look at the simultaneous effect of several explanatory variables on a dependent variable, multiple regression procedures are employed. Multiple regression cannot be used here, however, because of a dichotomous dependent variable. A logit analysis was conducted instead.<sup>60</sup> Using logit procedures, an analysis similar to that provided by multiple regression can be done. Various models to explain the decision to seek the death penalty can be compared to the data and a goodness-of-fit statistic (Likelihood Ratio Chi-square), which was calculated to determine which model provides the best fit to the data. Once an adequate model

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<sup>60</sup> The logit analyses were done using Goodman's ECTA (Everyman's Contingency Table Analysis) program. ECTA calculated log-linear fits for hierarchical models for contingency tables, and estimates the parameters of the model. Although the logit is usually defined as half of the log of the odds of the expected cell frequencies for the dependent variable, Goodman's ECTA analyzes the log of the odds. *See* D. KNOKE & P. BURKE, *LOG-LINEAR MODELS* (1980). ECTA estimates lambda coefficients for specified models and logit estimates analogous to multiple regression coefficients may be obtained by doubling the lambda value.

is found, effect parameters similar to regression coefficients can be estimated.

Table 5 reports the results of the logit analysis. In the logit equation the outcome variable is the decision to seek the death penalty and explanatory variables are the race of the victim, victim-offender relationship, and the number of victims. These particular explanatory variables were selected because they showed the greatest effect on the decision to seek the death penalty in the bivariate analysis (see Table 2).<sup>61</sup> The outcome and independent variables were all dichotomous.

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<sup>61</sup> The logit analysis reported in Table 5 uses three explanatory variables to explain the likelihood of a death request: race of victim, victim-offender relationship and the number of victims. In Table 2 the factors that had significant effects on the probability of the death penalty being sought and their significance level were: race of victim ( $p < .001$ ); number of victims ( $p < .003$ ); number of offenders ( $p < .004$ ); victim-offender relationship ( $p < .002$ ); sex of victims ( $p < .009$ ); and weapon used ( $p < .05$ ). Although six variables had a significant effect on death request, only the three variables showing the greatest difference in ratios and having the highest levels of significance were selected for the logit procedure. The analysis was done this way because with four dichotomous variables a  $2 \times 2 \times 2 \times 2$  way contingency is produced. Since there were only 321 capital homicides, some of the 16 cells were empty and others had only a few cases. To compensate for this a constant of .5 was added to every cell as Goodman recommends. Goodman, *The Multi-variate Analysis of Qualitative Data: Interactions Among Multiple Classifications*, 65 J. AM. STATISTICAL A. 226, 229 (1970). Although this is suitable for a 16-cell table, the addition of one other dichotomous explanatory variable produces a 32-cell table and the number of empty cells increases. Although the adjustment of adding .5 to each cell could again be made, this has the effect of underestimating the effect parameters and the significance of those effects.

Despite the conservative nature of this procedure it would still be desirable to simultaneously control for another explanatory variable to see if the race effect vanishes. A second logit analysis was done with four explanatory variables, adding the number of offenders (the factor with the strongest effect on the probability of a death request of the remaining variables). The results are virtually unchanged. The model of independence was rejected, suggesting that some of the independent variables were related to Death Request. A second model fit all the two-, three-, and four-way effects between the non-statutory aggravating factors and Death Request. This model, which excluded the two-way effect of Race of Victim on Death Request, provided an unacceptable fit to the data ( $X^2 = 16.01$ , 8 df,  $p < .05$ ). When the two-way Race of Victim-Death Request effect was fit to the model, the fit to the data improved significantly ( $X^2 = 4.11$ , 7 df,  $p > .50$ ), which indicates that the Race of Victims has a significant effect on Death Request. The next model tested which fitted all four two-way effects but no higher-order interactions is similar to Model 4 in Table 5 with the exception of one more two-way effect. This two-way effect model provided a good fit ( $X^2 = 5.14$ , 11 df,  $p > .50$ ). Although more parsimonious models with fewer two-way effects fit the data well, parameter estimates were estimated from this full two-way effect model for comparison. As expected, the parameter estimates from this five-variable model are smaller in magnitude than those from the four-variable Model 4 of Table 5. The substantive conclusion, however, remains unchanged. The beta coefficients were all negative, indicating that the odds of the death penalty being requested for capital murder are reduced for black victims, non-stranger offenders, single victims, and single offenders. Furthermore, the largest beta coefficient was found for the effect of Race of Victim ( $B = -.508$ ). The effect of Race of Victim on Death Request was over one and a half times that for the Number of Victims ( $B = -2.86$ ); twice as large as the effect for Victim-Offender Relationship ( $B = -.250$ ); and over three times the magnitude of the effect for the Number of Offenders ( $B = -.166$ ). Even after controlling for

**TABLE 5**  
**LOGIT MODEL FOR THE DECISION TO SEEK THE DEATH PENALTY IN**  
**CAPITAL MURDER CASES**

Model	Fitted Marginals <sup>a</sup>	Likelihood Ratio X <sup>2</sup>	df	Probability
1	[RVN] [D]	34.36	7	.000
2	[RVN] [VND]	17.97	4	.001
3	[RVN] [VND] [RD]	3.86	3	.276
4	[RVN] [RD] [VD] [ND]	4.18	4	.382
5	[RVN] [RD] [VD]	8.95	5	.111
6	[RVN] [RD] [ND]	9.11	5	.105
7	[RVN] [RD]	13.14	6	.041

EFFECT PARAMETERS<sup>b</sup> OF DICHOTOMOUS INDEPENDENT VARIABLES  
ON DEATH REQUEST FOR MODEL 4

Variable	Logit Estimate
Race of Victim	-.556
Number of Victims	-.356
Victim-Offender Relationship	-.304

<sup>a</sup> R = Race of Victim; V = Victim-Offender Relationship; N = Number of Victims; D = Death Requested.

<sup>b</sup> The effect parameters pertain to the case where the Race of the Victim is Black, Number of Victims is Single Victim, and Victim-Offender Relationship is Non-Stranger.

In looking at Table 5, note first that since this is a logit analysis (i.e., there is a specified outcome variable—Death Request) rather than a general log-linear analysis, the marginals for the explanatory variables [RVN] are always fitted. The first model presented in Table 5 is the model of independence. This model presumes that the outcome variable is unrelated to all of the explanatory variables. As can be seen, this model provides a very poor fit to the data ( $X^2 = 34.36$ ,  $p < .000$ ) which suggests that some of the explanatory variables are related to Death Request. The second model in Table 5 fits the three way marginal of Victim-Offender Relationship, Number of Victims, and Death Request. This model includes all the direct effects and interaction effects between the two non-statutory aggravating factors and the outcome variable. Race of victim is excluded from this model. By including all direct and interaction effects for the non-statutory aggravating factors but no ef-

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the effect of three other factors, the race of the victim in a capital homicide case still has a significant effect on whether or not the prosecutor seeks the death penalty.



fects for race of victim, the aggravating factors are allowed to have their maximum impact. Nonetheless, Model 2 also provides a very poor fit to the data ( $X^2 = 17.97$ ,  $p < .001$ ) and should be rejected. This is an important finding since it informs us that the outcome variable cannot be adequately explained without including the omitted explanatory variable—Race of Victim. Any subsequent model must therefore include the Race of Victim before it will provide a good fit to the data.

Model 3 confirms this. Model 3 is identical to Model 2 except that it adds the two-way effect of Race of Victim on Death Request. This model does provide an adequate fit to the data ( $X^2 = 3.86$ ,  $p = .276$ ). Although representing the data well, Model 3 may not be the most parsimonious model that could fit the data since it contains three two-way effects—[VD], [ND], [RD]—and one three-way interaction effect—[VND]. We already know that [RD] cannot be excluded from any model, and since a three-way effect is less parsimonious than two-way effects, Models 4 through 6 only fit combinations of two-way effects. Model 4 fits all two-way effects and provides a very good fit to the data ( $X^2 = 4.18$ ,  $p = .382$ ). Model 5 excludes the term [ND] (the effect of the Number of Victims on Death Request), and Model 6 drops the term [VD] (the effect of the Victim-Offender Relationship on Death Request). Both of these models still fit the data reasonably well in that the likelihood ratio is non-significant. One may be tempted to conclude that one of these two two-way effect models is best. In examining the difference in Likelihood Ratio from Model 4 to Models 5 and 6, however, the reduction in the Likelihood  $X^2$  relative to the loss of a single degree of freedom is significant.<sup>62</sup> This suggests that the two-way term [ND] not included in Model 5 and the term [VD] excluded in Model 6 are significant factors in explaining the outcome variable and should remain in the final model. The most appropriate model for these data, then, is Model 4 which contains two-way effects between Death Request and Race of Victim, Victim-Offender Relationship, and Number of Victims. Model 7 finds that the data cannot be explained by the Race of Victim alone ( $X^2 = 13.14$ ,  $p < .05$ ).

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<sup>62</sup> In deciding whether or not a particular factor has a significant effect on the outcome variable, the model with the term fitted is compared to an identical model where it is excluded. The statistical test is whether the decrease in the likelihood ratio  $X^2$  by adding the effect to the model is significant relative to the loss of degrees of freedom. For example, Model 4 in Table 5 fits three two-way effects [RD] [VD] and [ND]. Model 5 excludes the term [ND]. To determine if [ND] is a significant effect, subtract the two  $X^2$ 's and degrees of freedom and apply a regular  $X^2$  test:  $8.95 - 4.18 = 4.77$  (5 df - 4 df = 1 df). A  $X^2$  of 4.77 with 1 df is significant at  $\alpha = .05$  and so [ND] significantly improves the fit of the data and should remain in the model. For the effect of [VD]:  $9.11 - 4.18 = 4.93$  and it too is significant at  $\alpha = .05$  and 1 df. Thus, both effects are significant and together with [RD] make up the final model.

The bottom panel of Table 5 reports the effect parameters from the logit analysis. These effect parameters correspond to the final model accepted. It represents the full two-way effect model (Model 4 in the top panel of Table 5). The logit estimate is interpreted similarly to the additive coefficients of multiple regression. Positive logit values indicate that the explanatory variable increases the odds on the outcome variable, while negative logits indicate that the odds are decreased. The logit parameters here are negative, indicating that the effect of a black victim, single victim, and non-stranger offender is to decrease the odds of having the death penalty requested in a given capital murder. Since the logit estimates are in the standard form of odds ratios, the relative importance of the explanatory variables may be assessed by comparing the magnitudes of the betas. Importantly, of the three explanatory variables, the one with the greatest impact on the odds of a death request is the Race of the Victim ( $B = -.556$ ). This variable has a much greater direct impact on the outcome variable than either the Number of Victims ( $B = -.356$ ) or the Victim-Offender Relationship ( $B = -.304$ ). This finding is indeed disturbing. It indicates that there are significant amounts of racial disparity in the prosecutor's decision to seek a death sentence and that this differential treatment by race cannot be accounted for by type of homicide or several other legally permissible factors.

#### B. EVIDENCE OF ARBITRARINESS

In addition to being influenced by a climate of discrimination, post-*Furman* capital punishment statutes can fail to comport with the expectations of the Supreme Court in *Gregg v. Georgia*,<sup>63</sup> *Jurek v. Texas*<sup>64</sup> and *Proffitt v. Florida*<sup>65</sup> by being disparately applied within a state. Since capital punishment legislation involves the enactment of a *state statute*, it should be applied uniformly throughout the state, no matter where the homicide occurred. The decision to seek the death penalty in South Carolina is a decision made by the prosecutor in each of the sixteen judicial circuits within the state. Table 6 reports two sets of results on the geographical variation of homicides and death requests. The first set presents the total number of homicides, the number of death requests, and the probability of a death request for all homicides for each of the sixteen judicial circuits in South Carolina (columns 2, 4 and 5). The second set reports a similar analysis using only capital murders (columns 3, 4 and 6).

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<sup>63</sup> 428 U.S. 153 (1976).

<sup>64</sup> 428 U.S. 262 (1976).

<sup>65</sup> 428 U.S. 242 (1976).

TABLE 6

NUMBER OF HOMICIDES, NUMBER OF CAPITAL MURDERS, NUMBER OF DEATH PENALTY REQUESTS AND PROBABILITY OF DEATH PENALTY BEING REQUESTED BY JUDICIAL CIRCUIT

(1) Judicial Circuit	(2) Number of Homicides	(3) Number of Capital Murders	(4) Number of Death Requests	(5) Probability for All Homicides	(6) Probability for Capital Murders
1	57	9	4	.070	.444
2	66	15	4	.061	.267
3	80	14	6	.075	.428
4	95	12	2	.021	.167
5	132	30	6	.045	.200
6	34	5	2	.059	.400
7	63	10	7	.111	.700
8	62	9	4	.064	.444
9	124	45	11	.089	.244
10	75	5	5	.067	.800
11	43	15	12	.279	.800
12	59	14	4	.068	.286
13	144	30	7	.062	.300
14	47	17	10	.213	.588
15	58	15	13	.224	.867
16	46	16	9	.196	.563

Table 6 indicates that there is considerable variation across the sixteen judicial circuits in the likelihood of the prosecutor seeking the death sentence. Considering all homicides (column 5), the probability ranges from a high of .279 in the Eleventh Circuit to a low of .021 in the Fourth Circuit. Under the same law a homicide offender can run a 13 times greater risk of having the death penalty requested if the crime is committed in the Eleventh rather than the Fourth Circuit. Such variation in the probability of a death sentence request by the prosecutor may, of course, simply reflect the geographical distribution of capital murders throughout the state. Some judicial circuits may have a greater proportion of capital murders than others. A quick look at the probability of a death sentence request in capital murder homicides (column 6), however, still shows considerable geographical variation. In some circuits the prosecutor requests the death penalty in over 50% of the capital

**TABLE 7**  
 NUMBER OF HOMICIDES, NUMBER OF CAPITAL MURDERS, NUMBER  
 OF DEATH PENALTY REQUESTS AND PROBABILITY OF DEATH  
 PENALTY BEING REQUESTED FOR URBAN AND RURAL AREAS

(1) Location of Crime	(2) Number of Homicides	(3) Number of Capital Murders	(4) Number of Death Requests	(5) Probability for All Homicides	(6) Probability for Capital Murders
Urban <sup>a</sup>	400	102	31	.078	.304
Rural	838	169	84	.111	.497

<sup>a</sup> This area was made up of the fifth, seventh, ninth and thirteen judicial circuits, which include the SMSA's of Columbia, Spartanburg, Charleston, and Greenville respectively.

homicide cases (Seventh, Tenth, Eleventh, Fourteenth, Fifteenth and Sixteenth Circuits), while in other circuits it is sought in less than 30% (Second, Fourth, Fifth, Ninth, and Twelfth Circuits).

Given the makeup of South Carolina's judicial circuits, it is possible to categorize each district as either predominantly urban or rural. The state's four Standard Metropolitan Statistical Areas are found in four separate judicial circuits. These four circuits were combined to form an urban geographical area and the remaining twelve circuits were combined to form a rural geographical area. The distribution of death requests by urban and rural area is presented for both all homicides and capital murders separately in Table 7.

Several striking observations appear. First, similar to Bowers and Pierce's findings with respect to the imposition of the death penalty,<sup>66</sup> these data indicate that the prosecutor's decision to request a death sentence is significantly more likely in rural than urban areas (probabilities are .078 for urban and .111 for rural areas for all homicides,  $p < .05$ ). Second, also consistent with Bowers' and Pierce's data,<sup>67</sup> this is true even though a slightly greater proportion of homicides are capital murders in urban (26%) than in rural areas (20%). Table 7 shows that the disparity between the likelihood of a death request persists when only capital

<sup>66</sup> Bowers & Pierce, *supra* note 27, at 606-07.

<sup>67</sup> *Id.*

TABLE 8

COMPARISON OF URBAN AND RURAL GEOGRAPHICAL AREAS IN THE PERCENT OF CAPITAL HOMICIDE CASES HAVING NON-STATUTORY AGGRAVATING CIRCUMSTANCES

Location of Crime:	PERCENT OF CAPITAL MURDER HAVING:					
	White Victims	Stranger Victims	Multiple Victims	Multiple Offenders	Female Victims	Gun Homicides
Urban	65%	63%	18%	53%	27%	31%
Rural	76%	65%	14%	60%	23%	27%

murders are examined (column 6). The types of homicides in rural and urban areas, therefore, cannot account for the observed differential treatment.

As was the case with the race differential, any observed geographical variation in the prosecutorial handling of homicides may be due to the effects of non-statutory aggravating circumstances of the crime. Table 8 provides some information on the characteristics of urban and rural homicides and shows that rural capital murders are not substantially more aggravated than urban capital homicides. Although rural capital murders are slightly more likely to involve multiple victims, female victims, and victims of gun offenses, they are less likely to be characterized by other important aggravating factors such as stranger offenders and multiple offenders. Furthermore, an urban-rural differential remains when the aggravating factors characteristic of rural homicides are controlled. Table 9 shows that, in every case where these aggravating factors are controlled, there is a greater likelihood of a capital murder been treated as a death penalty case in rural than in urban areas. It would appear, then, that the documented differences in the prosecutor's decision to seek the death penalty by the location of the crime in the state cannot be accounted for by the characteristics of the crimes being committed in rural and urban areas.

The greatest difference between rural and urban capital murders is that rural murders are more likely to involve white victims than urban murders (76% vs. 65%, see Table 8). Table 9 examines the joint distribution of the geographical location of the crime and race of victim (column 5). A differential treatment by race exists in both urban and rural areas with racial disparity much greater in urban (ratio of probabilities =  $.439/.056 = 7.8$  to 1) than in rural areas (ratio of probabilities =  $.539/.317 = 1.7$  to 1). Table 9 also indicates that the greatest variation in the likelihood of a death sentence request is produced by race of victim characteristics than any of the non-statutory aggravating circum-

**TABLE 9**  
**PROBABILITY OF PROSECUTOR SEEKING THE DEATH PENALTY FOR CAPITAL MURDER BY NON-STATUTORY**  
**AGGRAVATING FACTORS AND GEOGRAPHICAL AREAS**

Location of Crime:	(1) NUMBER OF VICTIMS		(2) VICTIM/OFFENDER RELATIONSHIP		(3) SEX OF VICTIM		(4) WEAPON USED		(5) RACE OF VICTIM	
	Single (N)	Multiple (N)	Non-Stranger (N)	Stranger (N)	Male (N)	Female (N)	Gun (N)	Non-Gun (N)	Black (N)	White (N)
Urban	.284 (88)	.428 (14)	.212 (33)	.393 (61)	.262 (80)	.454 (16)	.373 (75)	.111 (27)	.056 (36)	.439 (66)
Rural	.446 (139)	.667 (30)	.317 (60)	.588 (102)	.444 (124)	.600 (45)	.509 (116)	.434 (53)	.317 (41)	.539 (128)

**TABLE 10**  
 PROBABILITY OF PROSECUTOR SEEKING THE DEATH PENALTY FOR  
 CAPITAL MURDER BY RACE OF VICTIM/OFFENDER AND  
 GEOGRAPHICAL AREA

Location of Crime:	(1) Black Kills		(2) White Kills		(3) Black Kills		(4) White Kills	
	White	(N)	White	(N)	Black	(N)	Black	(N)
Urban	.364	(33)	.531	(32)	.057	(35)	-	(0)
Rural	.636	(66)	.443	(61)	.200	(30)	.636	(11)

stances. If the ratio of highest to lowest death penalty request probabilities is calculated for each factor in Table 9, the variation by number of victims is 2.3 to 1 (.667/.284); for victim-offender relationship, it is 2.8 to 1 (.588/.212); for sex of victim 2.3 to 1 (.600/.262); for type of weapon, 4.6 to 1 (.509/.111) and for race of victim, the variation produced is 9.6 to 1 (.539/.056).

Table 10 reports death request probabilities by geographical area for combinations of race of offender/race of victim. The data show a striking variation in the probability of the prosecutor seeking the death penalty. Except for white killers of whites, the probability of a death request is consistently greater in rural than urban areas. Similar to Bowers' and Pierce's findings on death sentencing,<sup>68</sup> the effects of race of victim and geographical area operate independently of one another to produce glaring disparities in the likelihood of a death request. For example, a black offender who kills a white victim in a rural area of the state has an eleven times greater risk of having the death penalty requested than a black who kills a black victim in an urban area. This is true even though both offenses are capital murders subject to the same state statute!

#### IV. CONCLUSION

The intention of the Supreme Court Justices in *Gregg*, *Jurek* and *Proffitt* was clear: unbridled discretion in the application of capital punishment could be restricted by the articulation of sentencing standards. These standards would not only structure the decision of juries and judges to impose a death sentence but also the prosecutor's decision to seek the death penalty. The Court also expected appellate review to act as a supervisor of the capital punishment process, correcting legal and constitutional errors and curbing the influence of discrimination and ar-

<sup>68</sup> *Id.* at 605.

bitrariness. The managerial role of appellate review was made clear by the Court's ruling striking down capital punishment schemes that did not promise "meaningful appellate review."

In order to ensure meaningful review, however, appellate courts must monitor the full range of death penalty cases. This would include all "death eligible" cases, cases in which the death penalty was actually imposed, cases where it was requested but not imposed, and cases where it was not requested. If there is a systematic filtering out of cases, influenced by discriminatory attitudes of judges, juries or prosecutors, then appellate review holds little promise of correcting constitutional infirmities.

The data presented in this Article present a troubling picture of the post-*Furman* capital punishment statute in one death penalty state, South Carolina. It indicates that the prosecutor's decision to seek the death penalty is significantly related to the race of the victim. This differential treatment by race cannot be accounted for by the type of homicide committed or other possible aggravating factors. In fact, of several explanatory variables, the victim's race is the most important predictor of the prosecutor's decision. In addition to and independent of this racial disparity was a variation in the likelihood of a death request by geographical region. There was considerable variation in the probability of death being requested by local prosecutors across the sixteen judicial circuits in the state. When these sixteen circuits were reclassified into rural and urban geographical areas, we found substantially more death requests in rural than urban areas, even though a greater proportion of urban homicides were "death eligible" (capital murders). This geographical variation was found to persist even when some aggravating differences between urban and rural murders were controlled.

Although several factors were included as controls in the analysis, several other important considerations were not. Two of the most important are the criminal history of the defendant and the legal strength of the case. Although it is traditional to hedge one's conclusions with these research limitations as a backdrop, the possible role these excluded factors may play should be outlined. Before the results presented here can be attributed to excluded factors, these variables must, of course, be related to the variables under consideration. This suggests that killers of whites and rural killers should have more extensive criminal records than killers of blacks or murderers in urban areas. There is no reason to presume that those offenders who kill white victims have more extensive and/or more violent criminal histories than killers of blacks. Even if it is presumed that black offenders have more extensive criminal histories



than whites,<sup>69</sup> this cannot account for the finding regarding the greater likelihood of death penalty requests in white victim cases since, in this data, white capital murder victims are equally likely to be killed by white as by black offenders and black victims are more likely to be killed by black offenders. Nor is there any more reason to expect rural capital murderers to have more extensive violent criminal histories than urban murderers; in fact, given the opportunity and the distribution of offenses, offenders in urban areas may be more criminal than their rural counterparts.

Although the sufficiency of the evidence is surely a consideration in the prosecutor's mind in deciding to seek the death penalty since an aggravating circumstance must also be proven beyond a reasonable doubt, those factors that make for a convincing case are probably racially neutral. Although it may be argued that the crowded dockets in urban courts and experience of urban defense counsel make the urban prosecutor less willing to seek the death penalty than in rural areas, this may be counteracted by the experience of urban prosecutors and the resources at their disposal to put together a convincing case. Even if there is some variation in the legal sufficiency of white victim/black victim or rural/urban cases, it must be powerful enough to overcome the substantial racial and geographical variation observed here.

Thus, it should be clear that both race of victim and location of crime are independent influences on the prosecutor's decision to seek the death penalty in South Carolina. These findings have greater generality, however, since the South Carolina capital statute was modeled after the Georgia statute approved in *Gregg*. Other states have adopted similarly structured guided discretion statutes and there is little reason to doubt that the discrimination and arbitrariness in the capital punishment process observed here can be found in other states as well. At this low visibility decision point, cases which may be factually similar are being treated as death cases or non-death cases depending upon the race of the victim and the location in the state where the homicide occurred. Unless the review process extends its scrutiny to the far greater number of cases where the death penalty could have been sought but was not, there is little hope for "meaningful appellate review," and such statutes should face the same constitutional fate as those found by the Court in *Woodson* and *Roberts*.

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<sup>69</sup> Mulvihill, Tumin & Curtis, *A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence*, (U.S. Gov't Printing Off. 1969); M. WOLFGANG & F. FERRACUTI, *PSYCHOLOGICAL TESTING OF THE SUBCULTURE OF VIOLENCE: TOWARD AN INTEGRATED THEORY IN CRIMINOLOGY* (1973); Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. (1978).