

April 2014

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Recommended Citation

Scheb, John M. II and Wagers, Kristin A. (2014) "Radical Discrimination in the Death Penalty in Tennessee: An Empirical Assessment," *Tennessee Journal of Law and Policy*. Vol. 5 : Iss. 1 , Article 3.

Available at: <https://trace.tennessee.edu/tjlp/vol5/iss1/3>

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ESSAY

**RACIAL DISCRIMINATION IN THE DEATH
PENALTY IN TENNESSEE: AN EMPIRICAL
ASSESSMENT**

John M. Scheb II & Kristin A. Wagers***

The intense media coverage of the United States Supreme Court's recent decisions in *Baze v. Rees*¹ and *Kennedy v. Louisiana*² highlights the ongoing saliency of the death penalty in American politics. In this article, we use empirical evidence to shed light on this controversy. Our analysis utilizes data from 1,068 first-degree murder convictions rendered in Tennessee between 1977 and 2007.³ The questions animating our research are: 1) *What factors led prosecutors to seek the death penalty?* and 2) *What factors led juries to impose it?* In particular, we are interested in the role that race plays in these decisions. Does the system operate in a racially-neutral fashion, or is it hopelessly infected with discrimination, as some prior studies in other states have suggested?

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¹ *Baze v. Rees*, 553 U.S. __; 128 S. Ct. 1520 (2008).

² *Kennedy v. Louisiana*, 554 U.S. __; 128 S. Ct. 2641 (2008).

³ This data is taken from reports submitted by trial judges across the state in compliance with Supreme Court Rule 12, which requires judges to complete detailed reports on cases in which defendants are convicted of first-degree murder. SUP. CT. R. 12.

Race and the Death Penalty

In *Furman v. Georgia*, the Supreme Court invalidated Georgia's death penalty statute and effectively imposed a five-year national moratorium on capital punishment.⁴ Concurring in *Furman*, Justice William O. Douglas characterized capital punishment in Georgia as being "pregnant with discrimination."⁵ Early social science research has found substantial racial disparities in the administration of the death penalty.⁶ "These studies found that blacks were indicted, charged, convicted, and sentenced to death in disproportionate numbers"⁷ However, these early studies were criticized for failing to utilize adequate statistical controls.⁸ Modern social science research has found less evidence of discrimination due to the race of capital defendants, but considerable evidence of discrimination based on the race of murder victims.⁹

⁴ 408 U.S. 238, 238-40 (1972).

⁵ *Id.* at 257 (Douglas, J., concurring).

⁶ *See, generally*, CHARLES S. MANGUM, JR., *THE LEGAL STATUS OF THE NEGRO 368-70* (University of North Carolina Press 1940); Harold Garfinkel, *Research Note on Inter-and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949); Elmer H. Johnson, *Selective Forces in Capital Punishment*, 36 SOC. FORCES 165, 169 (1957).

⁷ WILLIAM J. BOWERS & GLENN L. PIERCE, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, 69-70 (Northeastern University Press 1984).

⁸ *See* Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 786-92 (1981).

⁹ *See, e.g.*, Sheldon Eklund-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade After Furman in Texas*, 69 SOC. SCI. Q. 853, 853 (1988); Richard Lempert, *Capital Punishment in the '80s: Reflections on the Symposium*, 74 J. CRIM. L. & CRIMINOLOGY 1101, 1106-07 (1983); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 590-91 (1985); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of*

Encapsulating this research, one author concluded that “the death penalty is between three and four times more likely to be imposed in cases in which the victim is white rather than black.”¹⁰ Intersecting the race of defendants with that of victims, researchers have found that black defendants accused of killing white victims are most likely to be sentenced to death.¹¹ Some argue, however, that apparent racial differences in the administration of the death penalty can be explained in terms of other factors—that racial differences disappear when appropriate statistical controls are introduced.¹² Such control variables include the number of victims, the defendant’s criminal history, the relationship

Louisiana, 15 J. CRIM. JUST. 279, 280 (1987); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 J. CRIM. L. & CRIMINOLOGY 483, 487-88 (1988).

¹⁰ Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 47 (2000) (citations omitted).

¹¹ See, e.g., David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 707-10 (1983); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 157-65 (1986); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 766-78 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC’Y REV. 437, 450-70 (1984).

¹² See, e.g., PUBLIC POLICY AND STATISTICS: CASE STUDIES FROM RAND (SALLY C. MORTON & JOHN E. ROLPH eds., 2000); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 498-500 (2002–2003); Alfred B. Heilbrun, Jr. et al., *The Death Sentence in Georgia, 1974–1987: Criminal Justice or Racial Injustice?*, 16 CRIM. JUST. & BEHAV. 139, 151 (1989); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 44 (1991-1992).

of the defendant to the victim, the method of killing, the location of the murder, the vulnerability of the victim, and the “atrociousness” of the murder.¹³

Indeed, some have argued that the way to minimize the prospect of racial discrimination in the death penalty is to ensure that it is applied only in the most atrocious crimes.¹⁴ Dissenting in *McCleskey v. Kemp*, Justice John P. Stevens observed that

. . . there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If [the State] were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.¹⁵

Justice Stevens’ view, at least until recently,¹⁶ was that an infrequently administered death penalty, limited to only the

¹³ See, e.g., PUBLIC POLICY AND STATISTICS: CASE STUDIES FROM RAND (SALLY C. MORTON & JOHN E. ROLPH eds., 2000); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 498–500 (2002–2003); Alfred B. Heilbrun, Jr. et al., *The Death Sentence in Georgia, 1974–1987: Criminal Justice or Racial Injustice?*, 16 CRIM. JUST. & BEHAV. 139, 151 (1989); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 44 (1991–1992).

¹⁴ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹⁵ *Id.* at 367 (Stevens, J., dissenting).

¹⁶ See *Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring).

most heinous of murders, could be purged of racial discrimination.¹⁷

The Tennessee Data

We turn now to an examination of the death penalty in Tennessee. We must stipulate at the outset that the database we have employed in this research is far from perfect. Evidently, some first-degree murder convictions are not included in the database.¹⁸ Also, there are variables within the database for which a nontrivial number of cases are missing.¹⁹ It should be recognized, though, that in the “real world” of social science research, datasets built from official records are often less than perfect. After working closely with these data for the past year, we do not believe that these problems pose a serious threat to the validity of our findings.

An initial examination of the data reveals that Tennessee prosecutors sought the death penalty in 34% of the 1,068 cases. In those 361 capital trials, juries returned death sentences 44% of the time (160 cases). Thus, 15% of the first-degree murder convictions we studied resulted in sentences of death. In looking at these outcomes over time, what is most striking is the decline in the proportion of cases resulting in death sentences (see Table 1). Between 1977 and 1990, prosecutors sought the death penalty in

¹⁷ James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1646 (2006).

¹⁸ John Shiffman, *Missing Files Raise Doubts About Death Sentences*, *THE TENNESSEAN*, Jul. 22, 2001, available at <http://www.hwylaw.com/CM/Articles/Missing%20files%20raise%20doubts%20about%20death%20sentences%2007.22.01.pdf>.

¹⁹ For example, the race of 26 defendants contained in the database is currently unknown. With respect to the race of the victim, the race of 65 victims contained in the database is currently unknown. However, with a large number of observations, the missing data have relatively little impact.

53% of cases that resulted in first-degree murder convictions. During the same period, juries returned death sentences 55% of the time, so that 29% of first-degree murder convictions led to sentences of death. By contrast, in the period from 2001 to 2007, the rate at which prosecutors sought the death penalty declined to 24% and the rate at which juries returned death sentences dropped to 30%; thus only 7% of convictions in the 2001-2007 resulted in the death penalty.

Table 1. Death Penalty Outcomes in Tennessee, 1977-2007

| | # of Cases | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|---------|------------|---|--|---|-----------------------------------|
| 1977-07 | 1068 | 100.0% | 33.8% | 44.3% | 15.0% |
| 1977-90 | 294 | 27.5% | 53.1% | 54.5% | 28.9% |
| 1991-00 | 379 | 35.5% | 29.3% | 42.3% | 12.4% |
| 2001-07 | 395 | 37.0% | 23.8% | 29.8% | 7.1% |

In Tennessee, 50% of the defendants convicted of first-degree murder were white; 45% were black.²⁰ Contrary to conventional wisdom, prosecutors were more likely to seek the death penalty against white defendants and juries were more likely to return death sentences in cases involving white defendants (see Table 2 below). Consequently, 19% of white defendants were sentenced to death, as compared with 11% of African-American defendants.

The story is somewhat different, however, with respect to the race of the murder victims. As Table 2 shows, prosecutors were considerably more likely to seek the death penalty in cases where victims were white. Although juries were only slightly more likely to return death sentences in these cases, the net result was that 18% of defendants who killed white victims were sentenced to death while only 10% of defendants whose victims were black received the death penalty.

²⁰ 5% of defendants were of another race or their race was not recorded; those cases will be ignored in this part of the analysis.

Table 2. Racial Classification of Defendants and Victims

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|-------------------------|--|---|--|--|
| White Δ^* | 50.4% | 38.5% | 48.8% | 18.8% |
| Black Δ | 44.9% | 28.1% | 37.8% | 10.6% |
| White V** | 64.0% | 39.4% | 44.7% | 17.6% |
| Black V | 33.0% | 23.1% | 41.0% | 9.5% |
| White Δ /White V | 52.4% | 39.4% | 51.8% | 19.0% |
| White Δ /Black V | 2.0% | 21.1% | 50.0% | 10.5% |
| Black Δ /Black V | 32.7% | 23.2% | 41.1% | 9.5% |
| Black Δ /White V | 12.9% | 37.9% | 29.8% | 11.3% |

Intersecting the race of defendants and victims produces some interesting results (again, see Table 2). Prosecutors were much more likely to seek the death penalty when victims were white irrespective of the race of the accused. Yet juries were much less likely to return death sentences in cases involving black defendants and white victims. The upshot is white defendants whose victims were white were almost twice as likely as other defendants to receive the death penalty. Obviously, other

* Δ = Defendant

** V = Victim

factors beyond race are in play here. We turn now to those other factors.

As shown in Table 3 below, there is an inverse relationship between the frequency of a type of homicide and the likelihood that it will result in a death sentence. For example, nearly 40% of the first-degree murder convictions involved killings committed in conjunction with burglaries or robberies; yet less than 20% of these convictions result in death sentences. Similarly, spousal or domestic killings account for 17% of first-degree murder convictions but only 12% of such convictions result in capital punishment. On the other hand, prison killings are very infrequent (less than 1% of our first-degree murder cases), yet half the convictions of this type result in death sentences. Killings by escapees are also rare types of first-degree murder cases; yet convictions of this type are the most likely to result in capital punishment.

There also appears to be a relationship between “atrociousness” and the death penalty. Thus, homicides stemming from sexual assaults on children and the elderly are more than four times more likely to result in death sentences than are drug-related killings and gang-related killings. Prosecutors and juries may mirror community attitudes in this regard—that murder victims who were involved in gang or drug activity deserve less sympathy or require less retribution than elderly persons and children killed during violent sexual assaults.

Table 3. Nature of Homicide

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|------------------------------------|---|--|---|-----------------------------------|
| Killing by an Escapacee | 1.3% | 76.9% | 90.0% | 69.2% |
| Prison Killing | 0.4% | 50.0% | 100.0% | 50.0% |
| Child Sexual Assault | 1.3% | 64.3% | 66.7% | 42.9% |
| Witness Killing | 2.0% | 57.1% | 75.0% | 42.9% |
| Killing Law Officer/Other Official | 2.1% | 54.5% | 75.0% | 40.9% |
| Convenience Store Killing | 1.9% | 60.0% | 66.7% | 40.0% |
| Elderly Sexual Assault | 0.5% | 60.0% | 66.7% | 40.0% |
| Rape Killing | 3.8% | 65.0% | 57.7% | 37.5% |
| Contract Killing | 2.3% | 41.7% | 90.0% | 37.5% |
| Kidnapping Killing | 4.2% | 61.4% | 51.9% | 31.8% |
| Elderly Killing | 10.1% | 57.1% | 45.0% | 25.7% |
| Torture/Depraved Killing | 2.3% | 25.0% | 100.0% | 25.0% |
| Burglary/Robbery Killing | 38.7% | 41.5% | 46.1% | 19.2% |
| Spousal/Domestic Killing | 16.7% | 26.0% | 46.7% | 12.1% |
| Drug Related Killing | 7.7% | 28.8% | 34.8% | 10.0% |
| Child Abuse Killing | 2.2% | 13.0% | 66.7% | 9.0% |
| Gang-Related Killing | 2.4% | 20.0% | 20.0% | 4.0% |

As Table 4 shows, the behavior of prosecutors and juries also varies according to the defendant's motive. Murders to escape apprehension or punishment, for sexual pleasure or other gratification, or to silence a witness are much more likely to result in the death penalty. On the other hand, homicides motivated by racial or religious bias, jealousy, or hatred of the victim are least likely to result in capital punishment.

Table 4. Motive

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|---------------------------------|---|--|---|-----------------------------------|
| Escape | | | | |
| Apprehension or Punishment | 3.4% | 66.7% | 75.0% | 50.0% |
| Sexual or Other Pleasure | 4.8% | 68.6% | 57.1% | 39.2% |
| Silence a Witness | 3.0% | 56.3% | 61.1% | 34.4% |
| Pecuniary or Other Gain | 40.0% | 41.7% | 52.2% | 21.8% |
| Revenge or Retaliation | 6.5% | 36.2% | 52.0% | 18.8% |
| Obsession, Control | 4.6% | 34.7% | 41.2% | 14.3% |
| Senseless Killing | 3.4% | 19.4% | 71.4% | 13.9% |
| Possible Drug Influence | 2.2% | 45.8% | 27.3% | 12.5% |
| Racial, Religious or Other Bias | 7.0% | 28.0% | 38.0% | 10.7% |
| Jealousy | 2.8% | 23.3% | 42.9% | 10.0% |
| Long-Term Hatred of Victim | 1.0% | 18.2% | 50.0% | 9.1% |

The method of killing also appears to be important (see Table 5 below). Shooting, by far the most common means of committing murder, is much less likely to result in the death penalty than most other methods of killing. Murders by drowning and throat slashing, which are relatively rare, are most likely to lead to death sentences.

Table 5. Method of Killing

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|------------------------|---|--|---|-----------------------------------|
| Drowning | 1.3% | 78.6% | 54.5% | 42.9% |
| Throat Slashing | 1.9% | 60.0% | 66.7% | 40.0% |
| Other | 1.1% | 50.0% | 66.7% | 33.3% |
| Strangling/Suffocating | 8.5% | 46.2% | 45.2% | 20.9% |
| Stabbing | 12.3% | 38.2% | 50.0% | 19.1% |
| Beating/Blunt Trauma | 16.5% | 34.7% | 49.2% | 17.0% |
| Shooting | 63.8% | 31.4% | 39.7% | 12.5% |
| Burning | 2.0% | 47.6% | 10.0% | 4.8% |

As shown in Table 6 below, the location of the homicide also affects the likelihood of capital punishment. Murders committed in a field, the woods or some rural area and those committed at the victim's workplace are most likely to result in death sentences; while homicides committed "on the street" and in vehicles are least likely to receive capital punishment.

Table 6. Location of Crime

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|------------------------------------|---|--|---|-----------------------------------|
| Field, Woods, or Rural Area | 7.0% | 56.0% | 71.4% | 40.0% |
| Victim's Workplace | 5.0% | 52.8% | 71.4% | 37.7% |
| Jail or Prison | 1.1% | 41.7% | 80.0% | 33.3% |
| Commercial Establishment | 7.5% | 50.0% | 52.5% | 26.3% |
| Hotel or Motel | 1.6% | 35.3% | 66.7% | 23.5% |
| Victim's Residence | 31.9% | 31.4% | 44.9% | 14.1% |
| Defendant's Residence or Workplace | 5.4% | 25.9% | 40.0% | 10.3% |
| Park or School Grounds | 2.9% | 19.4% | 50.0% | 9.7% |
| Street, Sidewalk, or Parking Lot | 10.0% | 21.5% | 34.8% | 7.5% |
| Public or Private Vehicle | 2.5% | 22.2% | 16.7% | 3.7% |

The number of victims, too, has a substantial impact, especially on the prosecutor’s decision to seek the death penalty (see Table 7 below). The net result is that when there are three or more victims, the convicted murderer is roughly twice as likely to receive a death sentence than when there are only one or two victims.

Table 7. Number of Victims

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|------------|---|--|---|-----------------------------------|
| 1 Victim | 86.9% | 32.1% | 44.1% | 14.1% |
| 2 Victims | 10.3% | 38.2% | 47.6% | 18.2% |
| 3+ Victims | 2.8% | 73.3% | 40.9% | 30.0% |

Not surprisingly, the defendant's criminal history also plays a significant role (see Table 8 below) in the likelihood of receiving a death sentence. In particular, three or more prior felony convictions greatly increase the chances of a defendant receiving a death sentence. This is influenced more by jury behavior as opposed to prosecutorial decision making. Interestingly enough, when the prosecution sought the death penalty against individuals with no prior criminal history (the majority of all first-degree murder defendants), juries were least likely to sentence such defendants to death.

Table 8. Defendant's Criminal History

| | First-Degree Murder Convictions in Database | Cases in which Prosecutor Sought Death Penalty | Death Penalty Cases in which Jury Returned Death Sentence | Cases Resulting in Death Sentence |
|------------------------------|---|--|---|-----------------------------------|
| No Criminal Record | 24.6% | 26.6% | 30.0% | 8.0% |
| Juvenile Record | 10.8% | 23.5% | 51.9% | 12.2% |
| Record of Misdemeanors | 33.5% | 28.2% | 44.6% | 12.6% |
| One or Two Prior Felonies | 24.5% | 38.9% | 50.0% | 19.5% |
| Three or More Prior Felonies | 18.1% | 44.0% | 69.4% | 30.6% |

Conclusions

Ultimately, the best way to determine the impact of race, or any other independent variable, on the behavior of prosecutors and juries is to develop a multivariate model incorporating various controls simultaneously. That project is beyond the scope of this paper but will be the centerpiece of a paper currently in development. For now, based on the foregoing cross-tabulations, we can draw the following conclusions with respect to the role of race in the administration of capital punishment in Tennessee. First, there are racial discrepancies, both with regard to defendants and victims. However, the discrepancy with regard to defendants runs counter to conventional wisdom in that white defendants are significantly more likely to be selected for and to receive the death penalty. The discrepancy with respect to victims runs in the direction suggested by the literature—defendants whose victims are white are more substantially likely to be selected for capital punishment by prosecutors. However, juries appear to be less influenced by the race of victims in deciding which defendants will be sentenced to death. Second, the data suggest that numerous other factors influence prosecutors and juries with respect to the death penalty. It may well be, that once these other factors are incorporated into a multivariate model, the effect of race will be substantially attenuated.

