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VICTIM CHARACTERISTICS AND VICTIM IMPACT EVIDENCE IN SOUTH CAROLINA CAPITAL CASES

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INTRODUCTION

The use of victim impact evidence (VIE) has been a standard feature of capital trials since 1991, when the Supreme Court lifted the previously existing constitutional bar to such evidence.¹ Legal scholars have almost universally condemned the use of VIE, criticizing it on a variety of grounds.²

Yet little empirical analysis exists that examines how VIE influences the course and outcome of capital trials. Moreover, the handful of empirical analyses that do exist rely on data gathered in simulation studies. Although valuable contributions have emerged from these experimental studies, such studies have often-rehearsed limitations that stem primarily from a lack of verisimilitude. To begin to complement the experimental findings with real-case data, we analyze the influence of VIE based on interviews with over two-hundred jurors who sat on capital trials in South Carolina between 1985 and 2001.

We pursue three VIE-related topics. First, we describe the VIE introduced at sentencing trials, using a subset of the interviews that posed questions directly focusing on VIE. Second, we analyze a factor closely related to, and influenced by, VIE—a factor we refer to as *victim admirability*. We find evidence of a strong correlation between victim admirability and VIE use. Victim admirability substantially increases with the increased use and refinement of VIE. In addition,

¹ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

² See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77; Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17 (2000); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999) [hereinafter Logan, *Past*]. But see Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863 (1996).

we find some correlation between victim admirability and jurors' perceived seriousness of the crime.

Both increased victim admirability and increased crime seriousness might be expected to push jurors toward imposing death sentences. Our third topic therefore focuses on sentencing outcomes. We study the relation between capital sentencing outcomes and VIE itself, as well as the relation between victim admirability—found to be influenced by VIE—and capital sentencing outcomes. We find no significant relation between increased victim admirability and juror capital sentencing votes, nor do we find a significant relation between the introduction of VIE and sentencing outcomes.

We proceed as follows: Part I describes the data and changes in the law governing VIE's introduction in South Carolina. Part II reports how VIE is used in South Carolina. Part III reviews the legal and empirical literature on VIE and formulates testable hypotheses about VIE's effects. We formulate these hypotheses based on empirical claims made in normative critiques of VIE, and on prior experimental studies. Parts IV and V report our empirical tests of the hypotheses set forth in Part III.

I DATA

A. Data Collection

The data analyzed here were gathered as part of the Capital Jury Project (CJP), a National Science Foundation-funded, multistate research effort.³ Prior to the CJP's efforts, empirical analyses of capital jury decision making were based primarily on mock jury studies.⁴ Data gathered from jurors who had actually served on a capital jury were generally unavailable.⁵ The CJP's research is filling the void.⁶

³ For an overview of the CJP, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995). The CJP began collecting data nationwide in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation. *Id.* at 1043 n.1.

⁴ See *id.* at 1071–73.

⁵ See *id.* at 1073.

⁶ For quantitative analyses of CJP data, see Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011 (2001) (multistate data); John H. Blume et al., *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY (Stephen P. Garvey ed., forthcoming 2002) (manuscript at 144–77, on file with authors) (multistate data); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999) (multistate data); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) [hereinafter Eisenberg et al., *Remorse*] (South Carolina data); Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward*

Our analysis uses data gathered from jurors in South Carolina, the state with by far the largest share of the CJP's total data. Moreover, published research based on nationwide CJP data suggests that South Carolina jurors behave much like jurors in other states.⁷ With one exception, our interviews cover cases brought from enactment of the South Carolina Omnibus Criminal Justice Improvements Act of 1986 through the summer of 2001.⁸ We randomly sampled jurors who sat in sixty-three cases, with a goal of four juror interviews per case.⁹ The sample includes thirty-three cases resulting in death verdicts and thirty cases resulting in life verdicts.¹⁰ The total number of

the Death Penalty, 30 J. LEGAL STUD. 277 (2001) [hereinafter Eisenberg et al., *Forecasting*] (South Carolina data); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) [hereinafter Eisenberg et al., *Responsibility*] (South Carolina data); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371 (2001) [hereinafter Eisenberg et al., *Deadly Paradox*] (South Carolina data); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) [hereinafter Garvey, *Aggravation and Mitigation*] (South Carolina data); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) (South Carolina data); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) [hereinafter Sundby, *Absolution*] (California data); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) [hereinafter Sundby, *Empathy*] (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data).

For qualitative analyses of CJP data, see Joseph L. Hoffmann, *Where's The Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995) (Indiana data); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (Georgia data).

⁷ See, e.g., Eisenberg et al., *Responsibility*, *supra* note 6, at 354 (noting similar pattern of responses between multistate CJP data and South Carolina CJP data); Garvey, *Aggravation and Mitigation*, *supra* note 6, at 1575–76 (same).

⁸ The Omnibus Criminal Justice Improvements Act of 1986, 1986 S.C. Acts 2955. The 1986 Act changed the standards of parole in capital cases and provided a natural starting point for the collection of data. See *id.* at 2983 (changing parole eligibility for defendants convicted of capital murder with an aggravating circumstance, but not sentenced to death, from ineligibility for twenty years to ineligibility for thirty years). The one exception involved a trial conducted in 1985. A later amendment to the South Carolina death penalty statute provided that capital defendants not sentenced to death would be ineligible for parole for life. See Act of June 7, 1995, 1995 S.C. Acts 545, 557. Although courts resentenced a few defendants in the cases sampled as a result of errors in the initial sentencing trial, the data used here are from the initial trials.

⁹ One juror was interviewed in five cases, two jurors were interviewed in six cases, three jurors were interviewed in twelve cases, four jurors were interviewed in thirty-nine cases, and five jurors were interviewed in one case. Our regression analyses account for the varying number of interviews per case.

¹⁰ Our primary interest when we began collecting data was in the final sentence of the jury, not the first votes of individual jurors. Consequently, we tried not to include any cases

jurors interviewed was 214. We made efforts to randomize the jurors interviewed for each defendant. Post-trial relocation of jurors to unknown addresses and declinations to be interviewed often limited our randomization efforts. The results therefore include only those jurors who were selected randomly, who were reachable, and who were willing to be interviewed.

The CJP designed and tested the interview instrument, and trained interviewers administered it.¹¹ Questions covered all phases of the guilt and sentencing trials. The data include facts about (1) the crime; (2) racial, economic, and other characteristics of the defendant, the victim, and their families; (3) the process of jury deliberation; and (4) the conduct of the case by defense counsel, the prosecutor, and the judge. The interviews also included questions about the demographic characteristics of the jurors, as well as their views on the death penalty. The result is a data set containing over 750 variables.

Several questions that we asked help analyze VIE. Although the original survey instrument contained several questions relating to victims, it contained no questions designed directly to probe the use of VIE in capital trials. Consequently, beginning in the summer of 2000, the South Carolina segment of the CJP modified the instrument to

in which jury deliberations ended in deadlock, which under South Carolina law would result in the automatic imposition of a sentence of life imprisonment. *See* S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. 1985 & Supp. 2001) ("If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment."). South Carolina judges make considerable effort to avoid hung juries in capital cases, and studies generally suggest that hung juries are relatively rare. *See, e.g.*, REID HASTIE ET AL., *INSIDE THE JURY* 27 (1983) ("A survey of trial judges found that 5.6% of trials resulted in deadlocked juries when unanimous verdicts were required, and the rate dropped to 3.1% when majority verdicts were allowed."); *see also* PAULA L. HANNAFORD-AGOR ET AL., NATIONAL CTR. FOR STATE COURTS, *ARE HUNG JURIES A PROBLEM?* 41 tbl.4.1 (2002) (reporting that 7.5% (27 of 360) juries in noncapital criminal cases in four large metropolitan jurisdictions—Los Angeles, Maricopa County, the Bronx, and the District of Columbia—hung on all counts, 9.6% (36 of 374) juries hung on Count 1, which was typically the most serious count, and 12.8% (46 of 360) juries hung on at least one count). Our best estimate is that no more than a handful of the juries in our sample failed to reach unanimity on either life or death.

The sampling in later years is less comprehensive than in early years. Life sentences were over-sampled relative to death sentences. The statistical models we construct account for these different sampling rates. With few exceptions, we interviewed more than one juror per case. *See supra* note 9. The models also account for the fact that these juror responses are not independent of one another. *See generally* C.J. Skinner, *Introduction to Part A*, in *ANALYSIS OF COMPLEX SURVEYS* 23–58 (C.J. Skinner et al. eds., 1989) (describing procedures for reducing standard errors that may result from false assumptions of independence).

¹¹ *See* Justice Research Ctr., Coll. of Criminal Justice, Northeastern Univ., *Juror Interview Instrument, National Study of Juror Decision Making in Capital Cases* (1997) (unpublished document, on file with authors).

include questions designed to assess VIE's operation in that state.¹² The questions asked, for example: (1) how many, if any, of the victim's family or friends testified during the penalty phase; (2) who testified; (3) what generally they testified about; (4) how the jurors reacted emotionally to such testimony; and (5) how important, if at all, such testimony was in the jurors' sentencing deliberations.¹³ These questions supplement victim-related questions asked prior to the introduction of the VIE questions. Since adding the VIE-specific questions, we have conducted twenty-seven additional interviews. Our analysis relies in part on these recent interviews, but much of it also uses the complete data set.

We discuss elsewhere the limitations inherent in the data.¹⁴ These include possible lack of candor by some interviewees, erroneous recall, and the fact that interviews are conducted after jurors have rendered their verdict.¹⁵ As a check on our results, and to address some of the data limitations, we also analyze VIE's impact in South Carolina using federal data sets on death sentences and murders as described below.¹⁶ These data sets do not rely on interviews. A limitation worth emphasizing stems from this study's finding that little evidence exists of a relation between the use of VIE and sentencing outcomes. We explore VIE's influence on outcomes primarily by looking at case outcomes over time. Our models may understate VIE's influence on case outcomes insofar as other factors, not accounted for in our models, may have masked VIE's effect.

B. Governing Law

The fall and rise of VIE in the U.S. Supreme Court is a story that has been often told. We will, therefore, keep our rendition short. The Court first examined VIE in *Booth v. Maryland*, decided in June 1987.¹⁷ The prosecutor in *Booth* read a "victim impact statement" to the jury during the penalty phase of the trial. The information contained in the statement, which had been prepared by the state probation and parole department based on interviews with the victim's surviving family members, fell into three general categories: information "describ[ing] the personal characteristics of the victims,"¹⁸ infor-

¹² See Cornell Capital Jury Project, Cornell Law School, Juror Interview Instrument, Juror Decision Making in Capital Cases (2001) [hereinafter *Survey*] (unpublished document, on file with authors).

¹³ *Id.*

¹⁴ See, e.g., Eisenberg et al., *Forecasting*, *supra* note 6, at 281-82. We address the possible influence of the timing of the interviews in *infra* Part V.C.

¹⁵ See Eisenberg et al., *Forecasting*, *supra* note 6, at 281-82.

¹⁶ See *infra* Part V.

¹⁷ 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

¹⁸ *Id.* at 502.

mation describing the "emotional impact of the crimes on the family,"¹⁹ and information "set[ting] forth the family members' opinions and characterizations of the crimes and the defendant."²⁰ The Court held that such "information is irrelevant to a capital sentencing decision and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."²¹

At least some South Carolina prosecutors construed *Booth* narrowly, reading it to bar them from introducing testimony about the victim from the victim's family members, but not from commenting themselves about the victim in closing arguments. The South Carolina Supreme Court rejected this practice.²² The U.S. Supreme Court affirmed, holding in *South Carolina v. Gathers* that "[w]hile in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement [at issue here] is indistinguishable in any relevant respect from that in *Booth*."²³

In June 1991, two years after *Gathers* was decided, the Court reversed itself and overruled both *Booth* and *Gathers*. The Court held in *Payne v. Tennessee* that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."²⁴ Each state was therefore left to decide for itself whether it would follow *Booth* and *Gathers*, or *Payne*. The South Carolina Supreme Court gave its answer in October 1991, when it adopted as state law the *Payne* decision.²⁵ Of the 214 jurors we interviewed, 103 sat on cases tried after October 1991.

Of course, even before the Court lifted the constitutional ban on VIE in *Payne*, capital jurors would often hear basic biographical information about the victim during the guilt phase of the trial—victims never remained completely faceless. After *Payne*, however, the prosecution was free to admit into evidence detailed information about the victim's life, as well as information about the impact of the victim's death on others.

19 *Id.*

20 *Id.*

21 *Id.* at 502-03.

22 *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988), *aff'd*, 490 U.S. 805 (1989).

23 490 U.S. 805, 811 (1989), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

24 501 U.S. 808, 825 (1991).

25 *State v. Johnson*, 410 S.E.2d 547, 555 (S.C. 1991).

II

AN OVERVIEW OF THE USE OF VIE IN SOUTH CAROLINA

During Timothy McVeigh's trial, the government called some thirty-eight victim impact witnesses, a small percentage of those available to testify.²⁶ The McVeigh trial was (at the time) unique in many ways, not least of which was the number of victims involved. Yet by all accounts VIE has been a routine part of most capital trials since the Supreme Court's 1991 decision in *Payne*. We asked several questions designed to give a general overview of how VIE is used in South Carolina capital trials.

VIE is indeed a routine part of capital trials in South Carolina in the post-*Payne* era. Of the twenty-seven jurors of whom we asked specific questions regarding VIE, all but one said that at least one member of the victim's family or one friend of the victim presented his or her views during the penalty phase. However, because a majority of the jurors in each case indicated that such testimony occurred, the one juror not reporting such testimony may well have been incorrect.

When we asked more specifically about the relationship between the VIE witnesses and the victim, the victim's spouse, child, or parent were the most common witnesses that jurors identified, followed by siblings and friends, all of whom testified orally. Of the jurors who reported the use of VIE, ten indicated that the victim's spouse testified, ten indicated that a parent of the victim testified, ten indicated that a child of the victim testified, eight indicated that a sibling of the victim testified, and three indicated that a friend of the victim testified.

Interviewers asked the jurors about the general content of the victim impact testimony. Table 1 summarizes the responses. Two kinds of VIE—testimony about the personal qualities of the victim and about the impact of the victim's death on the witness—dominated. However, 12% of the jurors (three of twenty-four) indicated that the witness or witnesses also testified about what kind of punishment the witness wanted the defendant to receive. The Court's decision in *Payne* is reasonably construed to proscribe such testimony.²⁷

Three questions probed the importance of the VIE witnesses' wishes. The first question, included on the questionnaire from the year 2000 onward, asked how important it was "in determining the defendant's sentence to follow what you thought were the wishes of the victim's family and friends?"²⁸ Most jurors (twenty-one of twenty-four responding) indicated that it was "not important at all" or "not

²⁶ See Logan, *Past*, *supra* note 2, at 155.

²⁷ See 501 U.S. at 830 n.2; *id.* at 835 n.1 (Souter, J., concurring).

²⁸ *Survey*, *supra* note 12, at 67 (Question X.A.13).

TABLE I
WHAT KINDS OF THINGS DID THE VIE WITNESSES TALK ABOUT?
(PERCENT RESPONDING)

	Yes	No	<i>n</i>
How the crime affected them financially	4	96	24
How the crime affected them emotionally	92	8	24
How they needed professional help to cope	29	71	24
What kind of person the victim was	92	8	24
What the victim's future aspirations and plans were	67	33	24
How much they miss the victim	96	4	24
What punishment they wanted to see the defendant receive	12	88	24

Source — Juror interviews in South Carolina capital cases, 1996–2001.

very important” to follow what they believed were the wishes of the victim’s friends and family in determining the defendant’s sentence. Three jurors indicated the wishes were “somewhat important” and one indicated that they were “most important.”

Before and after 2000, we asked all jurors about the extent to which juror discussions focused on thirty-eight topics of possible relevance to the sentencing decision.²⁹ Table 2 shows, on a 1 to 4 scale, the jurors’ responses with respect to victim-related topics. The first numerical column shows the mean response for cases tried in 1988, 1989, 1990, and 1991. These years form the period when *Booth’s* prohibition on VIE should have led to its reduced use. The second numerical column shows the mean response for post-1991 cases, tried after *Payne* authorized the use of VIE, and when greater use of VIE might have caused jurors’ focus to be more victim oriented. The number of respondents is 182.

The third numerical column, labeled “Significance,” shows the significance level, often also referred to as the *p*-value, of a test of the hypothesis that the responses before and after 1991 are from the same distribution. For example, the “Reputation or character of the victim” row indicates a significance level of 0.230. This means that approximately 23 chances in 100 exist of observing by chance a difference between the pre- and post-1991 responses as strong or stronger than the observed correlation. At conventional levels of statistical significance ($p = 0.05$), we cannot reject the hypothesis that no difference in the pattern of responses to this question exists between the two periods.³⁰

²⁹ *Id.* at 30 (Question III.D.2).

³⁰ One can view Table 2 as exploring the hypothesis that the pre- and post-1991 samples of responses are from the same distribution. By convention, the hypothesis being tested is called the null hypothesis. GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, STATISTICAL METHODS 64 (8th ed. 1989). The reported significance levels are the probability of rejecting the null hypothesis when it is true. That is, the significance levels provide an

TABLE 2
 FOCUS OF JUROR DISCUSSIONS RELATING TO THE VICTIM
 IN CAPITAL CASES

How much did the discussion among the jurors focus on the following topics?
 (1 = great deal 2 = fair amount 3 = not much 4 = not at all)

Discussion items relating to the victim	Mean 1988-1991 (<i>n</i> = 86)	Mean post-1991 (<i>n</i> = 96)	Significance (<i>p</i> -value)
Reputation or character of the victim	2.52	2.34	0.230
Loss or grief of victim's family	2.14	1.94	0.088
Punishment wanted by victim's family	3.08	2.94	0.448
Victim's role or responsibility in the crime	2.69	2.81	0.463
Innocence or helplessness of the victim	1.81	1.70	0.307
Pain or suffering of the victim before death	1.91	1.69	0.048
Way in which the victim was killed	1.47	1.32	0.116

Source — Juror interviews in South Carolina capital cases, 1988-2001.

Table 2's pattern of responses supports exploring possible VIE effects on capital case processing. The direction of the change in jurors' responses is the same for six of the seven victim-related questions: the post-1991 mean is lower than the earlier period's mean. That downward shift in means indicates a shift toward increased discussion of victim admirability, victim-family loss, and increased victim suffering. Moreover, the change in responses to two of Table 2's questions, standing alone, are unlikely to have happened by chance. Both the discussion of the loss or grief of the victim's family and the discussion of the victim's pain or suffering noticeably increased after 1991. The first increase is marginally statistically significant, with $p < 0.1$, and the second is statistically significant, with $p < 0.05$.

The only topic that was discussed less on average by jurors in the post-1991 period than in the earlier period is the "victim's role or responsibility in the crime." Yet this change is consistent with the pattern of change for the six other questions. The fact that jurors discussed the victim's role or responsibility in the crime less in the post-1991 period corresponds to an improved image of the victim.

Table 2 also shows that, of the seven victim-related topics, juror discussion focused least on the punishment wanted by the victims' families. This is true for both time periods, before and after 1991.

inverse measure of the likelihood that the difference in responses between the two periods shows a real difference rather than mere random variation. The smaller the significance level, the more unlikely it would be to observe the difference if the tested hypothesis were true. *See id.* By arbitrary convention, results that are significant at or below the 0.05 level are described as statistically significant. *See, e.g.,* THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 197 (Stephen E. Fienberg ed., 1989). The significance levels in Table 2 are based on the Mann-Whitney test. *See* SNEDECOR & COCHRAN, *supra*, at 142-44.

Moreover, the difference between the focus of discussion on what the victim's family wanted before and after 1991 is not statistically significant. Jurors also tended to discuss the victim's suffering, reputation, or other topics to a substantially greater degree than the punishment wanted by the victim's family in both time periods. The difference between reported discussion of the punishment wanted by the family and the next-most-discussed topic is highly statistically significant in each period ($p < 0.0001$).³¹

Jurors' de-emphasis of victims' families' wishes emerges again in response to a question about how important several considerations were in deciding punishment.³² Using the same 1 to 4 scale and cases as in Table 2, the punishment the family wanted received a mean response of 3.10, with a slight but statistically insignificant decrease in importance after 1991. The importance of the victim's pain and suffering received a mean response of 1.62, with slightly more importance after 1991, but that difference is not statistically significant. Jurors said that the families' punishment wishes were among the least important factors considered in sentencing.

This summary of juror responses to questions about VIE and discussion patterns is suggestive of what the analyses reported below reveal. The jurors' reported content of VIE evidence and their discussions suggest that VIE led to increased empathy for victims and their families. Nevertheless, VIE evidence does not appear to have been directed to, or to have had a direct and material effect on, sentencing outcomes. To the extent that VIE humanizes the victim and enhances juror information about victim status, VIE could well resonate with factors that influence sentencing decisions. We therefore turn from analyzing what jurors report about the content of VIE, and their discussion of victim-related topics, to more substantive issues related to VIE's effect on sentencing outcomes.

III

HYPOTHESES

We begin by reviewing some of the empirical hypotheses formulated in the legal and empirical literature dealing with VIE's use in capital cases. The hypotheses address VIE's effect both directly on the ultimate question of sentencing outcome, and on jurors' perceptions about victims' admirability, which might indirectly influence sentencing decisions.

³¹ These significance levels are based on the Wilcoxon matched-pairs signed-ranks test. See SNEDECOR & COCHRAN, *supra* note 30, at 141.

³² See *Survey*, *supra* note 12, at 34 (Question IV.1).

A. From the Empirical Literature

Four published studies explore the effect of information about victim characteristics on variables relevant to capital sentencing. Each of these studies is, however, a mock study. None involved real jurors who sat on real cases.

The earliest study, published in 1995 by James Luginbuhl and Michael Burkhead, used ninety-nine non-death-qualified undergraduate students at North Carolina State University, each of whom reviewed descriptions of two crimes.³³ One depicted a “[m]oderately [a]ggravated murder” in which the jury convicted the defendant of murder for shooting an innocent bystander during the course of a robbery.³⁴ The facts left unclear whether the killing was intentional. The other depicted a “[s]everely [a]ggravated murder” in which the jury convicted the defendant of murder based on the multiple stabbing of an elderly man, whom the defendant had tied to a chair during the course of a robbery.³⁵

The subjects were told that the defendant in each case was arrested, tried, and convicted of first degree murder.³⁶ Half of the subjects in each group then read a victim impact statement modeled after the statement admitted in *Booth*. The same statement was used for both crimes and described “the reactions of the victim’s children and grandchildren to the victim’s death, their description of the qualities of the victim, as well as some of their opinions about a person who would commit such a murder.”³⁷

Luginbuhl’s major hypothesis was that “the introduction of victim impact evidence would increase the number of subjects who voted for [the death penalty].”³⁸ His results supported that hypothesis. Overall, fifty-one percent of the students exposed to the victim impact statement voted for death, while only twenty percent of those not exposed voted for death.³⁹ The effect obtained for both the moderately and severely aggravated scenarios.⁴⁰

The other two studies, one conducted by Edith Greene and the other conducted by Greene and her colleagues, were published in

³³ See James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 6–7 (1995). “Death qualification is the process by which courts identify and exclude from capital juries those people whose views on the death penalty are . . . incompatible with the duties of capital jurors.” Samuel R. Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7, 7 (1984).

³⁴ Luginbuhl & Burkhead, *supra* note 33, at 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ See *id.* at 12 tbl.4.

1999 and 1998, respectively.⁴¹ Unlike the Luginbuhl study, neither of the Greene studies examined VIE's effect on sentencing outcome, focusing instead on VIE's relation to a variety of intermediate variables.

The 1998 study used eighty non-death-qualified participants who were recruited for the study through an advertisement placed in a local newspaper.⁴² Subjects learned that the defendant had been convicted of first-degree murder, robbery, and conspiracy. They were then shown one of two one-hour videotapes of the penalty phase proceeding, complete with opening and closing arguments and presentation of evidence by the prosecution and defense.⁴³ One videotape depicted the victims as a respectable elderly couple; the other depicted them as less respectable.⁴⁴ As in *Booth*, the VIE consisted of the testimony of a social worker who had prepared the statement.⁴⁵ Participants were then asked to complete a questionnaire that probed a variety of issues.

The study found that jurors who "heard VIE about highly respectable . . . victims . . . rated these victims as more likable, decent, and valuable; felt more compassion for the victims' family; believed that the emotional impact of the murders on survivors was greater; and rated the crime as more serious."⁴⁶ Although subjects in the high-respectability condition tended to attach less weight to the mitigating evidence presented than did subjects in the low-respectability condition, they attached no greater weight to aggravating evidence.⁴⁷

The 1999 study involved 182 participants "enrolled in psychology courses at an urban university," ranging in age from 19 to 58.⁴⁸ The study examined the effect not only of the personal characteristics of the victim, comparing high- and low-respectability, but also of the other two forms of VIE: evidence related to the impact of the crime on the victim's family and testimony involving survivors' opinions about the crime and the appropriate sentence.⁴⁹ Greene categorized these three forms of VIE: (1) "victim qualities" evidence, (2) "impact" evidence, and (3) "opinion[]" evidence.⁵⁰

⁴¹ Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL., CRIME & L. 331 (1999); Edith Greene et al., *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145 (1998).

⁴² See Greene et al., *supra* note 41, at 149.

⁴³ *Id.* at 150-51.

⁴⁴ *Id.*

⁴⁵ *Id.* at 151.

⁴⁶ *Id.* at 154.

⁴⁷ See *id.*

⁴⁸ Greene, *supra* note 41, at 337.

⁴⁹ See *id.* The study also asked the subjects whether they believed they should hear various forms of VIE. *Id.* at 339.

⁵⁰ *Id.*

In general, mock jurors who received all three forms of VIE had a more favorable view of the victim and the victim's survivors than did those who received only impact or opinion evidence, or no victim-related evidence at all.⁵¹ Moreover, the reactions of the mock jurors to the defendant were, consistent with the previous study, uniform across the various conditions.⁵² Finally, and again consistent with the previous study, the subjects in the high-respectability condition tended to think more highly of the victim and to rate more highly the suffering of the victim's survivors than did subjects in the low-respectability condition.⁵³

The final study, by Bryan Myers and Jack Arbuthnot, involved 416 undergraduate students enrolled in an introductory psychology course at Ohio University. The students were divided into four groups.⁵⁴ One group watched a videotaped version of a capital trial in which the court admitted VIE at the penalty phase, and in which the evidence of guilt was strong. A second group watched the videotape of the trial, with the same strong evidence of guilt, but without the VIE.⁵⁵ A third group watched a version of the trial in which the court admitted VIE, but in which the evidence of guilt was weak.⁵⁶ And a fourth group watched the version of the trial with weak evidence of guilt, but without VIE.⁵⁷ Jurors were grouped in forty-eight juries and asked to give their verdict on guilt and on sentence both before and after deliberating as a jury.⁵⁸

The authors concluded that "victim impact evidence . . . increased the likelihood that individual jurors would recommend the death penalty."⁵⁹ However, the authors noted that although "jurors who were exposed to the victim impact evidence tended to apply harsher sentences than jurors not exposed to the victim impact evidence, [that effect appeared] only after deliberating with other jurors."⁶⁰ The effect did not appear in the jurors' pre-deliberation responses. The authors speculated that deliberations may have increased jurors' confidence in the correctness of their verdict on guilt, and that "[a]s jurors become more confident in their verdicts following deliberation,

⁵¹ See *id.* at 340-41.

⁵² See *id.* at 342.

⁵³ See *id.*

⁵⁴ Bryan Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors*, 29 J. OFFENDER REHABILITATION 95, 99-100 (1999).

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* at 99, 102-03.

⁵⁹ *Id.* at 108.

⁶⁰ *Id.*

those who felt the defendant deserved the death penalty may have been more willing to express it.”⁶¹

B. From the Legal Literature

The legal literature on VIE in capital cases is almost uniformly critical.⁶² Some critics focus on the judicial process, arguing that the Court’s overruling of *Booth* and *Gathers* reflected nothing more principled than a change in the Court’s personnel.⁶³ Other critics argue that capital jurors should not be exposed to VIE because such evidence is irrelevant to the decision they are asked to make.⁶⁴ Whatever effects it may have on juror decision making, VIE simply has no legitimate role to play in a capital trial.

Other critics, however, assume that VIE does influence jury behavior. Their arguments therefore depend on VIE’s assumed effects.⁶⁵ These effects overlap with those explored in the experimental literature. We focus here on three such effects.⁶⁶

⁶¹ *Id.*

⁶² See sources cited *supra* note 2 and accompanying text.

⁶³ See, e.g., David R. Dow, *When Law Bows to Politics: Explaining Payne v. Tennessee*, 26 U.C. DAVIS L. REV. 157, 157 (1992).

⁶⁴ See, e.g., Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 118 (1997).

⁶⁵ Our data allow us to explore some of these effects, but not others. For example, some critics argue that VIE should not be admitted in capital trials because doing so will cause the proceeding to degenerate into an unseemly mini-trial on the life and worth of the victim. See, e.g., Beth E. Sullivan, Note, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 628–30 (1998). We have no simple way to test this hypothesis.

⁶⁶ Some critics build on prior research showing that the capital sentencing system tends to impose death sentences more often when the victim is white and less often when the victim is black. VIE can only be expected to increase the strength of this already-existing effect insofar as it increases the salience of the victim and the victim’s identity. Prior research conducted in South Carolina suggests that defendant and victim racial effects may help explain prosecutorial decisions to charge a defendant with a capital crime. See John H. Blume et al., *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1782, 1790, 1794 n.116 (1998) (collecting evidence of race-based “death-seeking” decision making on the part of solicitors in several South Carolina counties); 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, 764–65, 784 (1983) (concluding based on analysis of 321 capital murders in South Carolina between 1977 and 1981 that the “prosecutor’s decision to seek the death penalty is significantly related to the race of the victim”); Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences over the First Few Years*, 39 S.C. L. REV. 245, 278–79, 405 (1988) (concluding based on well-controlled analysis of 302 death-eligible felony murders—which constituted 97% of all death-eligible murders in South Carolina between 1977 and 1981—that “South Carolina prosecutors operated with a race-specific definition of homicide severity and were more tolerant of black-victim than white-victim killings”). But prior South Carolina research suggests that these racial effects do not persist at trial. Eisenberg et al., *Forecasting*, *supra* note 6, at 300–01 *tbl.6*.

1. *VIE Causes Differential Valuation of Victims*

First, some critics argue that VIE should be prohibited because admitting such evidence will prompt jurors to place greater value on the lives of some victims and less on the lives of others.⁶⁷ On this view, VIE will cause jurors to place more value on the lives of “respectable” victims and less on the lives of others.⁶⁸ This critique resonates with Greene’s empirical evidence that VIE may enhance the extent to which jurors admire or respect the victim.⁶⁹

2. *VIE Increases the Capriciousness of Capital Sentencing*

Second, some critics argue that this differential valuation of victims increases the capriciousness of capital sentencing. According to this view, the impression a juror forms about the value or respectability of the victim depends on a variety of factors, none of which is rationally related to the goals of capital sentencing. Moreover, jurors will rely on their valuation of the victim when they decide the defendant’s sentence.⁷⁰ This critique resonates with Luginbuhl’s findings that VIE increases death sentences.⁷¹

3. *VIE Will Increase Estimates of the Seriousness of the Crime and Reduce the Influence of Mitigating Evidence*

Third, some critics argue that VIE will focus the jury’s attention on the victim, and that jurors who focus on the victim will not focus on the defendant.⁷² Consequently, VIE will cause jurors to pay more attention to the harm the victim suffered and to assign that harm greater weight in their sentencing calculus. Conversely, VIE will cause jurors to pay less attention to any mitigating evidence that the defendant presents and to assign that evidence less weight in their sentencing calculus.⁷³ The concern about increased focus on harm to victims resonates with Greene’s findings that VIE can increase estimates of crime seriousness.⁷⁴ Likewise, the concern about VIE’s effects on mitigating evidence resonates with Greene’s finding that greater victim admirability can lead decision makers to attach less weight to mitigating evidence.⁷⁵

⁶⁷ See, e.g., Phillips, *supra* note 64, at 118.

⁶⁸ See *id.* at 106–07.

⁶⁹ See Greene et al., *supra* note 41, at 154.

⁷⁰ See, e.g., Dubber, *supra* note 2, at 86–87; Logan, *Past, supra* note 2, at 157–58.

⁷¹ Luginbuhl & Burkhead, *supra* note 33, at 9.

⁷² See, e.g., Bandes, *supra* note 2, at 366, 395; Matthew L. Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55, 78 (2000).

⁷³ See Engle, *supra* note 72, at 80–81.

⁷⁴ Greene et al., *supra* note 41, at 154.

⁷⁵ See *id.*

IV

EMPIRICAL RESULTS: VICTIM ADMIRABILITY AND ITS
INFLUENCE ON CRIME SERIOUSNESS, AGGRAVATING
FACTORS, AND MITIGATING FACTORS

The empirical and legal literature thus generate the following hypotheses: (1) VIE increases victim admirability or respectability; (2) VIE increases perceptions of crime seriousness; (3) VIE reduces the effect of mitigating evidence; and (4) VIE increases the likelihood of a death sentence. This Part explores the first three issues. Part V explores the relation between VIE and sentencing outcomes.

A. What Influences the Degree of Admiration for Victims?

The idea that VIE improves jurors' views of victims, with possible consequences on sentencing outcomes, is a common theme of the experimental and legal literature on VIE. Because VIE is nearly universally used in post-1991 cases, one cannot explore whether VIE improves victim admirability by comparing cases with and without VIE evidence in the same time period. However, before 1991, VIE was legally forbidden. Moreover, after 1991, prosecutors may have become more skilled in their use of VIE. Both of these considerations suggest the possibility of a time effect of VIE. That is, victim admirability should have increased once the Court allowed VIE, and as prosecutors refined their use of it over time.

To explore the relation between time and jurors' perceptions of victims, we need a measure of victim admirability or respectability. The juror interviews included two questions that directly addressed the victim's status. We use the answers to these questions as a proxy for victim admirability. One question focused on jurors' perception of the victim's status in the community: "In your mind, how well do the following words describe the victim?"⁷⁶ The words were "admired or respected in the community." The available responses were "very well," "fairly well," "not well," and "not at all,"⁷⁷ and used a 1 to 4 scale, with 1 corresponding to "not at all" and 4 corresponding to "very well."⁷⁸ The second question focused more on each juror's own reaction to the victim rather than the juror's perception of the community's attitude, asking whether the juror "admired or respected" the victim and calling for a "yes" or "no" response.⁷⁹

The jurors generally thought well of the victims. The mean response to the community-admiration question, 3.38 with 199 respon-

⁷⁶ *Survey, supra* note 12, at 13 (Question II.C.1).

⁷⁷ *Id.*

⁷⁸ *Id.* For convenience, this reverses the interview instrument's actual numerical coding.

⁷⁹ *Id.* (Question II.C.3).

dents, is between the two highest admiration rankings, and about 86% of the jurors responded with the two highest community admiration scores, 3 and 4. In response to the “yes-no” question about the juror’s own admiration or respect for the victim, 59% of the 195 responding jurors gave a positive response.

As suggested above, one question is whether the level of victim admiration changed over time. Figure 1 explores the relation between the year of trial and juror reports of victim admirability by the community. For each year, we compute the mean of juror responses to the community-admiration question. We also compute the number of juror interviews contributing to each year’s admirability mean. Figure 1 uses that annual count of interviews to identify the year’s mean.

For example, for 1989, the data point indicated by the number “20” represents the fact that 20 juror interviews comprised that year’s annual mean victim admiration rating. Those 20 interviews had a mean response on the 1 to 4 scale of victim admirability of a little over 3.5. In 1999, the figure indicates that 10 interviews contributed to the mean of 4 reported in the figure. Reporting the number of interviews comprising the mean suggests the relative weight that might be given to a particular year’s observations. For example, the years 1985 and 1994 seem to depart most from the overall trend of the data, but both those years contain relatively few observations, 4 and 5 interviews respectively.

The pattern over time is mixed until 1991, after which a generally increasing time trend in victim admirability appears. This result is consistent with VIE’s uncertain status through 1991, and then its constitutional endorsement that year. The figure suggests that, over time, either defendants are murdering a more admirable group of victims, or prosecutors, assisted first by permission to use VIE and later by increasing experience in using VIE, have been able to convince jurors of greater victim admirability. The pattern is similar if one plots the annual mean of the juror-admired victim question over time.

Figure 1’s suggestion of a time trend in victim admirability can be tested further by controlling for other factors about the victim. Although we lack detailed information about the victim, such as employment or income status, we do have information about objective victim characteristics that might influence victim admirability. These characteristics include the victim’s age, sex, and race. The same information is also available about jurors. Table 3 summarizes the variables reported in Table 4’s regression models of victim admirability. Two of the jurors’ personal characteristic variables—age and race—are insufficiently helpful in explaining victim admirability to warrant inclusion in Table 4’s regression models.

FIGURE 1
VICTIM ADMIRABILITY OVER TIME—SOUTH CAROLINA CAPITAL TRIALS

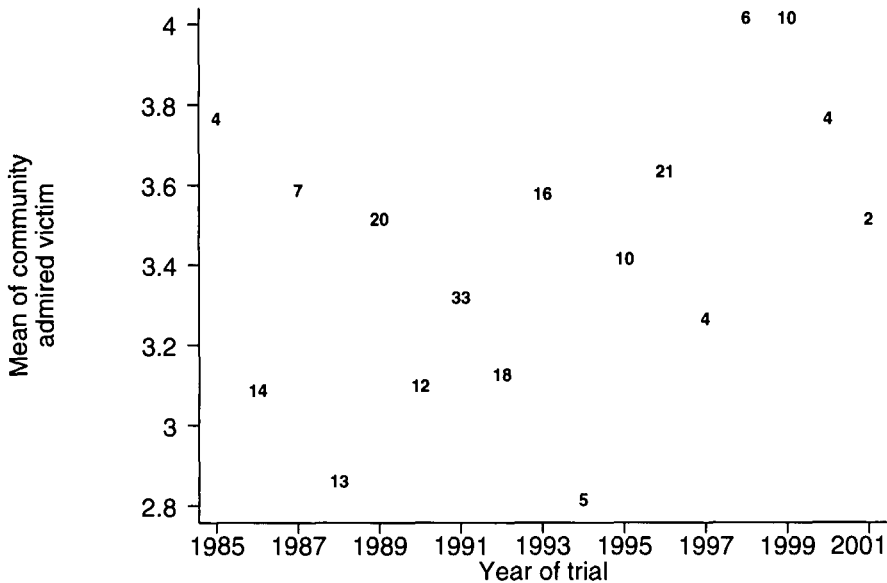


Table 4 combines the most salient variables in Table 3 into regression models of victim admirability.⁸⁰ Models (1) to (3) are of the community-admiration variable, with its scale of 1 to 4. Models (4) to

TABLE 3
DESCRIPTIVE STATISTICS OF VARIABLES USED TO MODEL
VICTIM ADMIRABILITY

Variable	n	Mean	Std.dev.	Minimum	Maximum
Year of trial	214	1992	3.90	1985	2001
Victim age (years)	211	35.72	17.50	2	86
Victim sex (female = 1)	213	0.48	0.50	0	1
Victim race (black = 1)	212	0.12	0.32	0	1
Juror age (years)	212	44.38	11.69	22	75
Juror sex (female = 1)	213	0.54	0.50	0	1
Juror race (black = 1)	212	0.17	0.37	0	1

Source — Juror interviews in South Carolina capital cases, 1985–2001.

(6) are of the dichotomous juror-admired victim variable. The most consistent result across the models is the statistical significance of the “Year of trial” variable. Victim admirability, at least in our sample, is increasing over time, a result consistent with jurors’ discussion pat-

⁸⁰ We used ordered probit regression models for the community-admiration question because that variable is ordinal and takes on more than two values. See generally ALAN AGRESTI, CATEGORICAL DATA ANALYSIS 102–04 (1990). We used probit models for the dichotomous juror admiration variable.

terns reported in Part II. As explained above, we cannot claim direct proof of the effect of VIE on victim admirability, but the trend is fully consistent with growing and improving use of VIE by prosecutors. Other results in Table 4 worth noting are the correlation between victim age and admirability for the community-admiration models and the significance of female jurors in model (6).

TABLE 4
ORDERED PROBIT AND PROBIT MODELS OF VICTIM ADMIRABILITY

	Model (1)	Model (2)	Model (3)	Model (4)	Model (5)	Model (6)
	Dependent variable = Community admired victim			Dependent variable = Juror admired victim		
Year of trial	0.072** (2.69)	0.071* (2.15)	0.073* (2.22)	0.081** (2.75)	0.084** (2.67)	0.092** (2.98)
Victim age		0.018** (2.74)	0.018** (2.79)		0.009 (1.48)	0.008 (1.31)
Victim sex (female = 1)		-0.182 (0.81)	-0.174 (0.79)		-0.104 (0.42)	-0.136 (0.55)
Victim race (black = 1)		-0.234 (0.80)	-0.246 (0.82)		-0.256 (0.54)	-0.314 (0.67)
Juror sex (female = 1)			0.097 (0.48)			0.466* (2.13)
Constant				-161.381** (2.74)	-167.152** (2.67)	-182.562** (2.98)
Observations	199	195	194	195	190	189
Probability > F	0.0091	0.0062	0.0104	0.0079	0.0684	0.0086

Absolute value of robust *t* statistics in parentheses

* significant at 5%; ** significant at 1%

Source — Juror interviews in South Carolina capital cases, 1985–2001.

Note — Models account for clustering at the case level.

One could argue that Table 4's models should include other variables. Accordingly, we have tested models that include combinations of victim and juror variables, including race and sex combinations, the seriousness of the crime, and the outcome of the sentencing proceeding (that is, whether a death sentence was imposed). The time trend survives in these models. We have also limited the sample to post-1991 years, and the time trend again persists. The time trend is, however, more sensitive to the inclusion of recent years. Although the coefficient on the "Year of trial" variable is consistently positive, corresponding to increasing victim admirability, it becomes statistically insignificant if one excludes the years after 1998. Given the relatively few capital cases in a given year, and the subset of cases chosen for juror interviews, the sensitivity of results to inclusion of recent years is an important cautionary note.

B. Victim Admirability and the Seriousness of the Crime

The preceding section is consistent with the claim that VIE enhances the victim's status in the eyes of the jury. Moreover, the victim's status can be a cause as well as an effect of certain case features. One such victim-status effect in Greene's studies can be directly tested with our data. Greene and her coauthors report a relation between the respectability of the victim and the subjects' rating of the seriousness of the crime.⁸¹ Jurors perceived crimes as more serious when they thought the victims were more respectable. Our juror interviews contained questions that serve as useful proxies for both the seriousness of the crime and the respectability of crime victims. We use the victim admirability variables discussed above as proxies for victim respectability.

We report elsewhere a summary of the interview variables relating to the seriousness of the crime and briefly summarize that discussion here.⁸² All murders are serious crimes, and capital murders are aggravated murders. Some capital murders, however, are worse than others, and a juror will more likely vote for death if she believes the crime is among the worst of the worst. To learn how each juror assessed the seriousness of the crime, we asked how well a particular word or phrase—for example, "vicious" or "bloody"—described the killing.⁸³ We provided the interviewed jurors with twelve words or phrases to describe the killing. As we reported elsewhere, several of the words or phrases used to describe the killing—"gory," "vicious," "depraved," "calculated," "cold-blooded," and "victim made to suffer"—bear a statistically significant association with whether jurors voted to sentence to death.⁸⁴ But only two words or phrases—"vicious" and "victim made to suffer"—retained their significance in models that controlled for other key variables, such as the juror's race, the juror's support for the death penalty, and the defendant's remorse. Accordingly, we previously used jurors' responses to how "vicious" the crime was as a proxy for the seriousness of the defendant's crime,⁸⁵ and do so here as well.

1. *Community Admiration and Crime Seriousness*

Table 5 summarizes the responses to the viciousness (reported in the table as "Crime Seriousness") and community admiration questions. The table's "Total" column suggests that jurors generally believed that the community admired the victims. As reported above,

⁸¹ Greene et al., *supra* note 41, at 154.

⁸² See Eisenberg et al., *Forecasting, supra* note 6, at 287–89.

⁸³ *Survey, supra* note 12, at 5 (Question II.A.2).

⁸⁴ Eisenberg et al., *Forecasting, supra* note 6, at 287–89.

⁸⁵ *Id.* at 289.

the mean response to the community-admiration question, 3.38, is between the two highest admiration rankings.⁸⁶ Table 5 also shows that most jurors thought "vicious" described the killing "very well," giving it the highest possible score of 4 (corresponding to "most serious" in the table). The mean viciousness ranking is 3.70 on the 1 to 4 scale with about 80% of jurors assigning the highest viciousness ranking.

TABLE 5
RELATION BETWEEN VICTIM ADMIRABILITY AND CRIME SERIOUSNESS

Community admired victim	Crime seriousness				Total
	1 least serious	2	3	4 most serious	
1 least admired	0 0.0%	0 0.0%	0 0.0%	7 0.0%	7 3.5%
2	0 0.0%	1 4.8%	5 23.8%	15 71.4%	21 10.6%
3	3 4.9%	1 1.6%	13 21.3%	44 72.1%	61 30.8%
4 most admired	2 1.8%	2 1.8%	13 11.9%	92 84.4%	109 55.1%
Total	5 2.5%	4 2.0%	31 15.7%	158 79.8%	198 100%

Source — Juror interviews in South Carolina capital cases, 1985–2001.

The results in Table 5 also suggest that viciousness and victim admiration move together. For the most admired victims, over 84% of the jurors ranked the crime most serious. For the next-most admired victims, 72% ranked the crime most serious. For the third-ranked score of victim admiration, equal to 2, 71% of the jurors ranked the crime as most serious. Among the seven jurors who ranked the victim as least admired, however, all ranked the crime as most serious. In general, the direction of the relationship is as Greene's research suggests: more-admired victims are viewed as the victims of more-serious crimes. The relationship between community admiration and crime seriousness is not, however, statistically significant ($p = 0.156$).⁸⁷

The pattern of responses in Table 5 raises the question whether, for purposes of comparison with Greene's experimental results, the

⁸⁶ See *supra* Part IV.A.

⁸⁷ Because the viciousness and community admiration variables are both ordered categorical variables, Kendall's tau is used to test the significance of their relation. See generally Alan Agresti, *The Effect of Category Choice on Some Ordinal Measures of Association*, 71 J. AM. STAT. ASS'N 49, 54 (1976). For more on ordinal measures of association, see ALAN AGRESTI, ANALYSIS OF ORDINAL CATEGORICAL DATA 75–76 (1984).

least-admired-victim category (Table 5's first row) causes the significance of the relation to be understated. All seven of the jurors who believed the community would least admire the victim ranked the crime as most serious. Given the small fraction of least-admired victim responses, 3.5%, it is reasonable to test the relation between victim admiration and crime seriousness for those victims not regarded as being the least admirable. Indeed, excluding those seven responses does yield a statistically significant relationship between victim admirability and crime seriousness ($p = 0.045$). Although Greene varied the victims' respectability across two scenarios, neither of her scenarios warranted ranking the victim's admirability at the lowest value on a four-point scale.⁸⁸ If one indulges in separate treatment of the least-admired victims, the significance of the relation between crime viciousness and victim admirability is reasonably robust, even surviving regression analysis that includes as an explanatory variable whether a death sentence was finally imposed.⁸⁹

2. *Juror Admiration and Crime Seriousness*

The relation between crime seriousness and victim admirability weakens if one shifts from the juror's estimation of the community's admiration of the victim to the juror's own assessment. The direction of the relation is as expected. Jurors who admired the victim assigned the crime a mean viciousness rank of 3.73, while jurors who did not admire the victim assigned the crime a mean viciousness rank of 3.66. But the relation is not statistically significant, and it remains insignificant after controlling for other factors, including sentencing outcome.

In sum, the real-case data generally support Greene's finding that victim respectability influences the level of crime seriousness. The relation is, however, noticeably more significant for jurors' perceptions of community admiration of the victim than it is for their own assessments of the victim's admirability.

C. Victim Admirability and Mitigating and Aggravating Circumstances

Greene and her coauthors found that mock jurors judging cases with more-respectable victims tended to attach less weight to some mitigating evidence than did mock jurors judging cases with less-respectable victims.⁹⁰ In contrast, they found no evidence that mock

⁸⁸ See Greene, *supra* note 41, at 338.

⁸⁹ The relation also remains statistically significant if one uses the juror's first vote as an explanatory variable.

⁹⁰ See Greene et al., *supra* note 41, at 153–54.

jurors differentially weighed aggravating evidence.⁹¹ To explore the effect of victim status on juror receptivity to mitigating evidence, we used a series of interview questions in which jurors were asked about mitigating factors that, according to the jurors' self-reports, influenced their vote on the defendant's sentence, or might have influenced their vote if the factor in question had been present, though in fact was not.

Table 6 lists a set of possibly mitigating factors extracted from the interview.⁹² If a juror reported that the presence of the mitigating factor did or would have made the juror more likely to vote for death, we coded the response as "1." If the juror reported that the presence of the mitigating factor did or would have made the juror "just as likely to vote for death," we coded the response as "2." If the juror reported that the factor did or would have made the juror less likely to vote for death, we coded the response as "3."⁹³

Table 6's first numerical column, labeled "Mean," reports the jurors' mean responses. A mean of less than 2 indicates that, on average, the factor's presence would make a vote for death more likely. A mean of more than 2 indicates that, on average, the factor's presence would make a vote for life more likely. The pattern of means indicates that almost all the factors reported here would have some mitigating effect. For example, the mean of 2.54 for "Defendant had a history of mental illness" suggests that this factor strongly influences jurors to vote for life.

The question here, however, is not the absolute level of the mitigating factors' influences. Rather, it is the relation between victim admirability and the jurors' reports of a particular mitigating factor's effect. If VIE's primary effect is on victim admirability, it is natural to ask if admirability affects jurors' reactions to mitigating evidence. One can ask if each mitigating factor's importance increases or decreases with increased victim admirability, and whether that increase or decrease is statistically significant.

Table 6's third numerical column reports tests of the statistical significance of the relation between victim admirability and jurors' coded responses to each mitigating factor.⁹⁴ None of the tests yields a statistically significant result. Consequently, we cannot reject the hypothesis that victim admirability has no significant association with jurors' reactions to mitigating evidence. Nor can we confirm Greene

⁹¹ See *id.* at 153.

⁹² *Survey*, *supra* note 12, at 42 (Question IV.B.1).

⁹³ See *id.*

⁹⁴ Because the viciousness and community admiration variables are both ordered categorical variables, Kendall's tau is used to test the significance of their relation. See *supra* note 87 and accompanying text.

TABLE 6
RELATION BETWEEN VICTIM ADMIRABILITY AND
MITIGATING CIRCUMSTANCES

Potential mitigating factor	Mean (1-3)	<i>n</i>	Significance of relation between admirability and mitigating circumstance (<i>p</i> -value)
The killing was not premeditated but was committed during another crime, such as a robbery, when the victim tried to resist	1.98	150	0.922
The killing was committed while defendant was under the influence of an extreme mental or emotional disturbance	2.48	166	0.810
The victim was a known troublemaker	2.10	173	0.295
The victim had a criminal record	2.04	174	0.531
The victim was an alcoholic	2.03	172	0.255
The victim was a drug addict	2.04	171	0.486
Defendant had no previous criminal record	2.12	150	0.676
Defendant was mentally retarded	2.72	171	0.851
Defendant had a loving family	2.16	152	0.343
Defendant was under 18 when the crime occurred	2.36	173	0.756
Defendant had a history of mental illness	2.54	169	0.343
Defendant had a background of extreme poverty	2.15	162	0.223
Defendant had been seriously abused as a child	2.35	168	0.499
Defendant had been in institutions in the past but was never given any real help or treatment for his problems	2.43	153	0.366

Source — Juror interviews in South Carolina capital cases, 1985–2001.

Note — The table reports the relation between juror reports of victim admirability and whether the presence of listed items of possibly mitigating evidence would make the juror more likely to vote for death. Mitigating factors range from 1 to 3, with 1 indicating most likely to vote for death and 3 indicating least likely.

and her coauthors' experimental finding that jurors in cases involving more-respectable victims tended to assign less weight to some mitigating evidence. However, like Greene and her coauthors, we find, in results not reported here, no correlation between victim admirability and the weight accorded to aggravating evidence.

V

EMPIRICAL RESULTS: VIE'S EFFECT ON CASE OUTCOMES

A central concern about VIE is that it can unjustly affect the sentencing outcome by influencing jurors who might otherwise vote for life to vote instead for death. The hypothesis is that VIE enhances

victim status, or the perceived seriousness of defendant conduct, which in turn increases the likelihood that a juror will vote for death. Luginbuhl's experimental findings and the speculation of legal theorists both suggest that VIE influences sentencing outcomes. This Part explores the relation between victim status and juror votes as an *indirect* test of VIE's impact. If enhanced victim status does not increase the likelihood of a vote for death, VIE's effect on victim status might not translate into higher death sentence rates.

As discussed above, no constitutional ban on VIE existed at the national level before 1987. In 1987, the Supreme Court held in *Booth* that introducing VIE was unconstitutional.⁹⁵ In 1991, the Court in *Payne* reversed *Booth* and allowed each state to decide whether to allow VIE.⁹⁶ Most, if not all, states, including South Carolina, decided to allow VIE.⁹⁷ Consequently, VIE could generally have been used before 1987, used less or not at all between 1987 and 1991, and then used again after 1991.

Our previous work with the South Carolina CJP data and these national VIE developments allow for two tests of the relation between VIE and juror sentencing votes. First, we have previously reported reasonably successful models of juror voting patterns in South Carolina capital cases.⁹⁸ We now add to these models variables designed to test whether victim admirability increases the likelihood of a juror voting for a death sentence. As a second test, we examine South Carolina death sentencing time trends. If VIE substantially affects capital sentencing by promoting death sentences, one might expect death sentences to have declined from 1987 to 1991, and increased thereafter, or at least to have increased after 1991.

A. Victim Admirability and Jurors' Sentencing Votes

A variety of factors can influence how jurors vote in the penalty phase of a capital trial. As a result, studying the influence of victim admirability requires accounting for other factors known to influence juror votes. At one extreme, for example, if other factors completely determine the sentencing trial's outcome, then no room would remain for victim admirability to affect outcomes.

⁹⁵ See 482 U.S. 496, 502–03 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991); *supra* text accompanying note 21.

⁹⁶ See 501 U.S. 808, 825 (1991); *supra* text accompanying notes 24–25.

⁹⁷ Sullivan, *supra* note 65, at 624 (reporting that “[a] majority of jurisdictions now permit [VIE]”).

⁹⁸ See Eisenberg et al., *Forecasting*, *supra* note 6, at 298–302; Eisenberg et al., *Remorse*, *supra* note 6, at 1631–37.

Previous work using CJP South Carolina interview data develops several models of jurors' sentencing decisions.⁹⁹ That work identifies a number of case characteristics and juror characteristics as the key factors that shape a juror's first sentencing vote.¹⁰⁰ To assess the role of victim admirability on sentencing outcomes, one must control for these case and juror characteristics.

With respect to case characteristics, prior work shows that the viciousness of the crime, a defendant's remorse, and juror beliefs regarding defendant dangerousness all shape jurors' votes.¹⁰¹ The more vicious the crime, the more likely a juror will vote for death.¹⁰² The less remorseful the defendant, the more likely a juror will vote for death.¹⁰³ And the less time a juror believes a defendant will spend in prison if not sentenced to death, and therefore the greater the opportunity for the defendant to cause harm in the future, the more likely the juror will vote for death.¹⁰⁴

The importance of crime-seriousness (as measured by the variable "vicious") in shaping juror votes poses a methodological problem. If crime seriousness and victim respectability were independent of one another, we could test for each factor's effect without concern about their effect on each other. But Table 5 suggests that increased victim respectability can lead to increased perception of crime seriousness. Therefore, using the perceived seriousness of the crime as an explanatory factor may obscure the importance of the victim's admirability. We cannot completely avoid this problem, but we do offer a partial solution.¹⁰⁵ Some models discussed below exclude the crime seriousness variable and replace it with a victim admirability variable. If victim admirability strongly overlaps with crime seriousness, victim admirability should be nearly as important as crime seriousness in explaining juror sentencing votes.

With respect to the personal or demographic characteristics of jurors, characteristics such as race, sex, age, socioeconomic status, and religious affiliation, prior work shows that only race and religion substantially relate to a juror's first vote at sentencing.¹⁰⁶ Holding several other juror characteristics constant, black jurors were more apt than white jurors to cast their first sentencing vote for life, while Southern

⁹⁹ See Eisenberg et al., *Forecasting*, *supra* note 6, at 298-302; Eisenberg et al., *Remorse*, *supra* note 6, at 1631-37.

¹⁰⁰ See Eisenberg et al., *Forecasting*, *supra* note 6, at 282-94.

¹⁰¹ *Id.* at 287-91.

¹⁰² See *id.* at 287-89.

¹⁰³ See *id.* at 289-90.

¹⁰⁴ See *id.* at 290-94.

¹⁰⁵ A further refinement would be to model simultaneously crime seriousness and case outcomes in two equations.

¹⁰⁶ See Eisenberg et al., *Forecasting*, *supra* note 6, at 300-01 tbl.6.

Baptists were more apt than members of other religions to cast their first vote for death.¹⁰⁷

In addition to demographic information, interviewers asked jurors a variety of questions about their attitudes toward the death penalty and the criminal justice system more generally.¹⁰⁸ Responses to a question that asked jurors how strongly they supported the death penalty for convicted murderers helped explain juror voting patterns.¹⁰⁹ The five available responses ranged from death being the “only acceptable” punishment to death being an “unacceptable punishment.”¹¹⁰ The question allowed each juror to rank herself on an ordinal scale reflecting the strength of the juror’s support for the death penalty. The more a juror supported the death penalty, the more likely she was to cast her first vote for death.¹¹¹

We use the above-described variables in regression models to control for juror characteristics and the facts of the case while seeking to identify the effect of perceived victim admirability on a juror’s voting behavior. Table I in the Appendix reports descriptive statistics for each of these variables. Table 7 reports the regression results.

The first model is the model we report elsewhere,¹¹² but now including juror interviews conducted after publication of the prior results. Models (5) and (6) explore whether adding variables about the victim’s admirability improves this baseline model (1). Model (5) adds the dichotomous variable representing whether the juror admired the victim. Model (6) adds the ordinal responses to the question whether the juror believed the community admired the victim. Neither variable has a large coefficient, nor does either come close to achieving statistical significance.¹¹³

To address the concern that the “Seriousness of the crime” variable might mask the effect of the victim admirability variables, we explored models, not reported here, that replaced the “Seriousness of

¹⁰⁷ *Id.*

¹⁰⁸ *Survey*, *supra* note 12, at 55–57 (Questions VIII.0–7).

¹⁰⁹ *Id.* at 56 (Question VIII.3).

¹¹⁰ The question asked was: “For convicted murderers, do you now feel that the death penalty is” The available responses were: “the only acceptable punishment,” “the most appropriate of several punishments,” “just one of several appropriate punishments,” “the least appropriate of several punishments,” and “an unacceptable punishment.” *Id.*

¹¹¹ See Eisenberg et al., *Forecasting*, *supra* note 6, at 300–01 tbl.6.

¹¹² *See id.*

¹¹³ We include in some of the models, but do not report here, three additional variables that account for jurors who express no opinion about the expected prison term, and for possible changes in juror expectations about prison terms after the Supreme Court’s decision in *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (holding that “where the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible”). For models that report the effects of these variables, see Eisenberg et al., *Forecasting*, *supra* note 6, at 300–01 tbl.6.

TABLE 7
 ORDERED PROBIT MODELS OF JURORS' FIRST CAPITAL
 SENTENCING VOTES

DEPENDENT VARIABLE = JUROR'S FIRST VOTE
 (1 = Life 2 = Undecided 3 = Death)

	Model (1)	Model (2)	Model (3)	Model (4)	Model (5)	Model (6)
Black juror (1 = yes)	-0.654* (2.38)	-0.812** (2.86)	-0.765** (2.78)	-0.707* (2.55)	-0.752* (2.63)	-0.712* (2.57)
Southern Baptist juror (1 = yes)	0.723* (2.45)	0.540+ (1.89)	0.443 (1.58)	0.580* (2.07)	0.655* (2.17)	0.606+ (1.99)
Support for death penalty (1-5 scale)	0.418** (2.83)	0.422* (2.51)	0.395* (2.51)	0.407** (2.75)	0.435* (2.62)	0.433** (2.83)
Seriousness of the crime (1-4 scale)	0.412* (2.35)	0.525** (2.89)	0.459* (2.32)	0.495* (2.60)	0.455* (2.62)	0.393* (2.09)
Defendant's remorse (1-4 scale)	-0.279** (2.90)	-0.304** (3.01)	-0.250** (2.81)	-0.302** (3.41)	-0.256* (2.43)	-0.212* (2.14)
Expected prison term (years)	-0.022* (2.20)	-0.010 (1.16)	-0.012 (1.27)	-0.011 (1.23)	-0.021* (2.19)	-0.024* (2.27)
Community admired victim			0.136 (1.05)			0.047 (0.37)
Juror admired victim		0.073 (0.28)			-0.042 (0.16)	
Post-1991 dummy		-0.301 (1.18)	-0.341 (1.44)	-0.306 (1.30)		
Observations	202	185	188	202	185	188
Probability > F	0.0003	0.0001	0.0006	0.0001	0.0002	0.0029

Absolute value of *t* statistics in parentheses.

+ significant at 10%; * significant at 5%; ** significant at 1%

Source — Juror interviews in South Carolina capital cases, 1985–2001.

Note — All models include a dummy variable, not reported here, for whether the juror did not report an expected prison term. Models (1), (5), and (6) include variables, not reported here, to account for the possible change in expected prison term after the U.S. Supreme Court's decision in *Simmons v. South Carolina*. Models account for clustering at the case level.

the crime" variable in model (1) with measures of victim admirability. The coefficients on the admirability variables were small and statistically insignificant. Thus, victim admirability may affect crime seriousness, as Table 5 suggests, but juror perceptions of crime seriousness help explain sentencing votes substantially more than do juror perceptions of victim admirability.

Models (2), (3), and (4) in Table 7 explore whether a time trend exists in jurors' first votes. The "Post-1991 dummy" variable corresponds with the Supreme Court's decision in *Payne* authorizing the use of VIE. If VIE increases the probability of obtaining death sentences, then the coefficient for this variable should be positive and

significant. Post-1991 murders should be more likely than pre-1991 murders to lead to death sentences. Instead, we find a negative and insignificant coefficient. Thus, to the extent that the year dummy variable captures increased use of VIE, we find little evidence that VIE affected juror votes or sentencing outcomes in South Carolina cases.

We also explored models using the same set of explanatory variables as models (5) and (6), but using the jury's final vote for life or death, instead of each juror's first vote, as the dependent variable.¹¹⁴ In those models, not reported here, the victim admirability variable coefficients show a negative correlation. This result suggests that increased victim admirability correlates with reduced likelihood of death sentences. These effects are not, however, statistically significant.

B. Time Trend in Death Sentence Rates

The absence of evidence of a relation between victim status and sentencing outcomes should be assessed in light of the substantial case selection effects that affect our capital-trial sample. We only observe those cases in which prosecutors sought death and in which a trial occurred. Focusing on the jurors' sentencing vote—a single decision that comes relatively late in the criminal justice process—entails relying on data that have been filtered by a highly discretionary selection process. Studying VIE's relation to sentencing outcomes using only trial data therefore raises a problem of sample selection bias.

For example, the Court's decision in *Payne* to allow the use of VIE might have emboldened prosecutors to seek death sentences in more cases than they would have otherwise. Thus, prosecutors may have sought death in a group of cases less death-worthy, on average, than the capital cases brought before *Payne*. Adding the less-death-worthy cases to the total mix could lead to more life votes on average over time. But an increasing *percentage* of life votes at trial does not necessarily mean VIE had no effect, because the *number* of death sentences might have increased despite the percentage time trend observed toward life. That is, prosecutors might have been less likely to obtain death sentences at trial, but more death sentences might nonetheless have been obtained because more murders were being tried as capital murders. Studying tried cases might therefore show a declining trend in juror votes for death, even though more death sentences were being imposed, and even though *Payne* had increased the overall death-obtaining rate by encouraging prosecutors to seek death more often.

¹¹⁴ For reports of such models, see Eisenberg et al., *Forecasting*, *supra* note 6, at 300–01 tbl.6.

To analyze further the absence of a post-1991 increase in death sentences, we explore a measure of death-sentencing patterns over time that is more “bottom-line” and not limited by our interview data. We examine the number of death sentences in South Carolina in each year and the number of murders. A substantial pro-death VIE effect should lead to an increased number of death sentences per murder. If the number of cases in which prosecutors seek death substantially increased after *Payne*, then one should observe increased death-obtaining rates after 1991 even if juries imposed death at a lower rate than before *Payne*.

Following Gross and Mauro’s use of available murder data,¹¹⁵ we examine the relation between death sentences and all South Carolina murders. Doing so provides a “death-obtaining rate” that measures the death-proneness of the state’s entire criminal justice process and limits the effects of selection bias inherent in studying a select group of capital trials. To compute South Carolina’s death-obtaining rate, we use two publicly available federal data sets. The first contains data on every person on death row in the United States.¹¹⁶ The second contains data on the vast majority of murders in the United States.¹¹⁷ By comparing death row populations with murder populations, one can detect a change in the rate at which the state imposes the death penalty over time.

1. *South Carolina’s Death Row Population*

The Bureau of Justice Statistics’ (BJS) database, *Capital Punishment in the United States*, tracks every person sentenced to death from 1973 to 1999.¹¹⁸ The BJS death row data include the state, year of sentence, and race of the defendant.¹¹⁹ This information allows one to compute, for each state, the number and race of persons entering death row from 1977 through 1999. We refine the sample by limiting to one observation those individuals who entered the death row data set, exited from it (perhaps because of a favorable court decision), and then reentered the sample. We limit the sample to those defendants sentenced after 1976, when the Supreme Court in *Gregg v. Geor-*

¹¹⁵ SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 35–36 (1989).

¹¹⁶ See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT IN THE UNITED STATES, 1973–1999 (Inter-Univ. Consortium for Pol. and Soc. Research No. 3201, 2001) [hereinafter BJS, CAPITAL PUNISHMENT].

¹¹⁷ See JAMES ALAN FOX, UNIFORM CRIME REPORTS [UNITED STATES]: SUPPLEMENTARY HOMICIDE REPORTS, 1976–1998 (Inter-Univ. Consortium for Pol. and Soc. Research No. 3000, 2000).

¹¹⁸ See BJS, CAPITAL PUNISHMENT, *supra* note 116.

¹¹⁹ See *id.* at 6.

gia¹²⁰ laid the foundation for the modern death penalty era. This leaves 138 individuals admitted to South Carolina's death row from 1977 through 1999.¹²¹

2. South Carolina's Murder Data

The individuals on death row are drawn from the population of South Carolina murderers. The FBI's Supplementary Homicide Reports (SHR) provide incident level data about murders.¹²² For each murder, the data include the year of the offense; the race, sex, and age of the victim and of the defendant arrested for the offense; the county in which the offense occurred; and data about the nature of the murder, including whether it was committed in the course of certain crimes such as robbery, rape, burglary, or larceny.¹²³ These murder data are among the most reliable crime data.¹²⁴ The data exclude negligent manslaughters and justifiable homicides.¹²⁵

The SHR data include unsolved homicides and obviously lack information about offenders in such cases.¹²⁶ Unsolved murders cannot lead to any sentence for murder—much less a death sentence.¹²⁷ If the data lack the offender's sex, we treat the case as unsolved, and therefore as if it did not produce a candidate for the death sentence. Accordingly, we eliminate it from the death sentence rate calcula-

¹²⁰ 428 U.S. 153 (1976) (plurality opinion). In *Gregg*, the Court approved several new death penalty statutes on the grounds that they addressed the problems of arbitrariness and discrimination identified in *Furman*. See *id.* at 198. By 1983, in cases such as *Zant v. Stephens*, 462 U.S. 862 (1983), and *Barclay v. Florida*, 463 U.S. 939 (1983), the Court had dismantled "most of the procedural restrictions that were imposed on capital sentencing by *Gregg* and the other 1976 death penalty cases." GROSS & MAURO, *supra* note 115, at 14 n.30.

¹²¹ See BJS, CAPITAL PUNISHMENT, *supra* note 116.

¹²² See FOX, *supra* note 117.

¹²³ See *id.*

¹²⁴ See John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1153 (1998) (citing David Cantor & Lawrence E. Cohen, *Comparing Measures of Homicide Trends: Methodological and Substantive Differences in the Vital Statistics and Uniform Crime Report Time Series (1933-1975)*, 9 SOC. SCI. RES. 121 (1980)); John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423, 1425 (1998); John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 14 (1998); Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 517 (1997) (book review); see also GROSS & MAURO, *supra* note 115, at 36 ("SHRs are an excellent source of data on reported homicides."). But see Michael G. Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 675-81 (1989) (suggesting that the SHR data over- and undercount homicides).

¹²⁵ See FOX, *supra* note 117, at 1.

¹²⁶ *Id.* at 1.

¹²⁷ See GROSS & MAURO, *supra* note 115, at 36.

tions.¹²⁸ For South Carolina, the SHR yield a total of 8,451 murders for the period 1976 through 1998.

3. *Connecting the Death Sentence Data and the Murder Data*

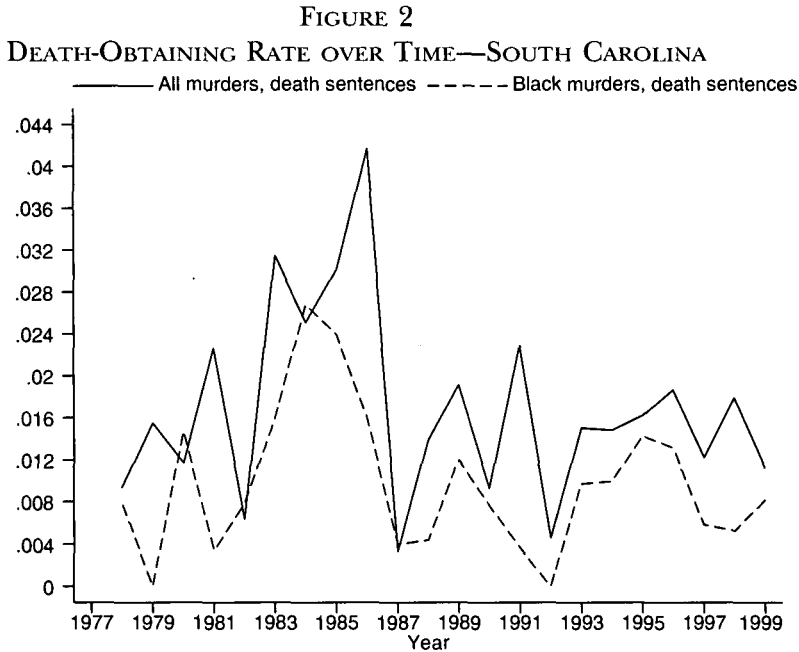
It remains to combine the death row population data with the data on murders. Doing so requires an assumption about the time from an offense until the time of sentence. Death sentences are imposed for crimes committed within a prior time span that is open-ended. Some crimes take a long time to solve. The mean time from offense to sentence in our South Carolina data is nineteen months, while the median time is fifteen months. We therefore make the simplifying assumption that death sentences tend to be imposed within two years of the crime. We thus treat the pool of potential cases leading to death sentences as the average of the number of murders committed in the prior two years. Our results do not materially differ if we regard the pool of potential cases leading to death sentences as the number of murders in the prior year.

Given a number of murders potentially leading to death, we compute the death-obtaining rate in each year by dividing the number of death sentences in a year by the average of the two prior years' murders. Figure 2 reports the results. It shows, for example, that in 1981 just under 2.4 percent of the average of the two prior years' murders led to death sentences. In 1991, that figure remained largely unchanged. The death-obtaining rate shows no systematic trend after about 1988.

Figure 2's second line tracks the time trend using only black murderers and black entrants onto death row. This separate analysis is warranted because of the substantial evidence of race effects in the capital punishment system. Race-of-victim effects are regularly reported in empirical studies,¹²⁹ and the vast majority of murders are intraracial. From 1976 through 1999, eighty-six percent of white murder victims were killed by whites; ninety-four percent of black homi-

¹²⁸ Gross and Mauro filtered out homicide cases in which age was missing. *Id.* at 37. The number of murders reported here is thus fewer than the number of murders reported in analyses that focus on the overall murder rate, rather than on murders that led to an offender arrest. To the extent that arrests are followed by release, the data overstate the number of offenders upon whom a death sentence might be imposed. We are primarily concerned with comparisons over time, rather than the absolute level of death sentence rates. Thus, erroneous murder arrests are of concern only if they vary unevenly over the time period studied.

¹²⁹ See, e.g., U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES No. GAO/GGD-90-57 (1990), reprinted in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 268-72 (Hugo Adam Bedau ed., 1997); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1658-62, 1658 n.61, 1660 n.69, 1742-45 (1998) (listing various studies).



cide victims were killed by blacks.¹³⁰ The figure suggests that the time trend for black murderers is not materially different than that for white murderers.

The federal murder and death row data indicate that failure to observe a time component in the CJP trial data, as shown in Table 7, is likely not an artifact of studying only tried cases. Within the tried-case sample, we found no VIE-related time trend. Likewise, in the broader sample of South Carolina murders and death sentences unaffected by case selection, we find no post-*Payne* time effect on death-obtaining rates. Thus, while we do have evidence that victim admirability increased over time, perhaps in response to VIE, we do not find evidence that VIE affected death sentence rates in South Carolina, either at the trial or aggregate level.

C. Accounting for Hindsight and Alternative Explanations

The post-trial interview methodology that the CJP employs is subject to at least one major limitation. Because jurors were interviewed after casting their sentencing votes, some may have wittingly or unwittingly tailored their answers to fit their already-cast vote.¹³¹ For example, a juror might have told us that she thought the crime was

¹³⁰ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: TRENDS BY RACE, at <http://www.ojp.usdoj.gov/bjs/homicide/race.htm> (last visited Oct. 4, 2002).

¹³¹ See Eisenberg et al., *Forecasting*, *supra* note 6, at 305–06.

especially vicious or the defendant especially remorseless because she voted for death, and not the other way around. We have discussed elsewhere the scope and effects of this limitation with respect to factors in Table 7, other than the newly added victim admirability variables and the time variable for post-1991 cases.¹³² We showed, for example, that the juror characteristic effects reported in Table 7—race, religion, and support for the death penalty—survive in models that include the sentencing outcome as an explanatory variable, and are consistent with data from other sources not subject to the interview methodology's hindsight limitation.¹³³ Thus we are skeptical that these effects are merely methodological artifacts.

With respect to the victim admirability and time variables introduced above, as well as the VIE-related effects we report, the timing of the interviews should not be a major concern. The effects we find (and fail to find) are based on changes or the absence of changes in juror responses over time. Consequently, jurors could successfully skew the results only if they were able to shape their responses in a way that accounted for the responses of jurors in trials occurring during other time periods. But of course jurors are unlikely to have any knowledge of interview results or case outcomes in other time periods. A spurious time effect would depend on jurors in one time period somehow being more affected by their sentencing vote than jurors in another time period.

Nevertheless, we cannot eliminate alternative explanations for some results. Greater victim admirability over time might be a consequence not of prosecutors making increased or better use of VIE, but of external forces shaping societal attitudes toward victims in many contexts, including capital trials. Without a study of victim admirability in nontrial contexts over time, a broad-based increase in attitudes toward crime victims could emerge in the CJP trial data, even if there had been no change over time in the law governing VIE.

Neither the CJP interview data nor the federal data sets on murders and death sentences generate evidence that victim admirability affects South Carolina sentencing outcomes. If the use of VIE since 1991 made it substantially easier to obtain death sentences, the post-1991 rate of death sentences per murder should have increased. We observe no such increase and believe that this evidence supports the straightforward interpretation of the CJP-based models: the insignificance of the victim admirability and post-1991 variables in Table 7 is evidence that VIE has a modest effect, if any, on sentencing outcomes. Either VIE failed to substantially shift the likelihood of death sentences being imposed, or factors not studied here muted what

¹³² See *id.*

¹³³ *Id.* at 300–01 tbl.6, 307–08.

would otherwise be an observable VIE effect on death sentence rates over time.

CONCLUSION

Victim status is a part of a crime's effect writ large. Killing a more prominent or nobler victim might be viewed as inflicting greater harm on society—a society that believes deeply in retribution.¹³⁴ Consequently, it might not be surprising to detect a strong VIE effect on sentencing outcomes. Our study's failure to detect such an effect could of course be due to the nature of its data or other methodological limitations.

But the absence of an effect in our far-from-trivial sample is also consistent with a substantial literature on the forces that shape case outcomes. Outcomes depend largely on facts,¹³⁵ with secondary factors such as juror characteristics usually having little importance.¹³⁶ In capital murder trials, unless the victim's behavior or status affects the nature or quality of the crime,¹³⁷ VIE's modest effects are consistent with jurors' historic emphasis on salient facts. The absence of a VIE effect in our data, as well as in the larger South Carolina murder and death row data sets, is also consistent with the descriptions jurors themselves give about what they discussed in their deliberations and what was important to them in deciding what sentence to impose.

¹³⁴ See, e.g., Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002).

¹³⁵ See JOHN GUINTEH, *THE JURY IN AMERICA* 102 (1988) ("Juries are evidence-oriented, both during the course of the trial and during deliberations . . ."); SALLY M.A. LLOYD-BOSTOCK, *LAW IN PRACTICE: APPLICATIONS OF PSYCHOLOGY TO LEGAL DECISION MAKING AND LEGAL SKILLS* 48 (1989) ("[T]he most important aspect of any case with very few exceptions tends to be the strength of the evidence."); MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 68 (1978) ("Indeed, the power of evidence is so well recognized by jury researchers that when studying processes other than evidence, they must calibrate the evidence to be moderate so that it leaves some variance to be influenced by the variables under study."); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 194 (1989) ("Typically the evidence, rather than extralegal or personal factors, drives juror decisionmaking."); Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1, 13-14 (1987) (emphasizing the importance of the evidence in comparison to extralegal factors).

¹³⁶ But see Eisenberg et al., *Forecasting*, *supra* note 6 (presenting evidence of the importance of race, religion, and juror attitude toward the death penalty in capital cases).

¹³⁷ Cf. Sundby, *Empathy*, *supra* note 6, at 128 ("A review of the Capital Jury Project data from California suggests that capital juries are influenced by victim evidence, at least to the extent that the evidence pertains to the victim's actions leading up to the crime.")

APPENDIX TABLE 1
 DESCRIPTIVE STATISTICS FOR VARIABLES USED IN TABLE 7

	<i>n</i>	Mean	Std. dev.	Minimum	Maximum
Black juror (1 = yes)	212	.165	.372	0	1
Southern Baptist juror (1 = yes)	214	.173	.379	0	1
Support for death penalty (1-5 scale)	212	3.49	.823	1	5
Seriousness of the crime (1-4 scale)	213	3.70	.646	1	4
Defendant's remorse (1-4 scale)	209	2.00	1.08	1	4
Expected prison term (years)	178	19.53	9.55	4	60
Community admired victim	199	3.38	.813	1	4
Juror admired victim	195	.590	.493	0	1
Post-1991 dummy	214	.463	.500	0	1

Source — Juror interviews in South Carolina capital cases, 1985-2001.