

The Prevailing Injustices in the Application of the Missouri Death Penalty (1978 to 1996)

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Introduction

GREGG *v.* GEORGIA (1976) APPROVED THE CONSTITUTIONAL CRITERIA OF GEORGIA statute, Ga. Code Ann., 26–1101 (a) (1972) as a model for the rewriting of state capital punishment laws, one of them Missouri’s present revised death penalty statute (§ 565.020 R.S.Mo. 2000). The majority opinions in *Gregg* assured Americans that “arbitrary and capricious” sentencing was an element of the racist past and that if the provisions in *Gregg* were followed by lawmakers and practiced by the courts, fair and equitable treatment was possible in the overwhelming majority of cases.

This article will argue that the procedural remedies in *Gregg* have failed to rectify those inequities and that in the instance of the State of Missouri, arbitrary and capricious sentences of death have proceeded in numbers that are exceptional in proportion to its population (Radelet, 1998). This analysis of one state’s resumption of capital sentencing over an 18-year period (1978 to 1996) will demonstrate that defendants in capital trials did not receive equal protection under the law and that their fates are still subject to extralegal elements that constitute arbitrariness and capriciousness in Missouri. Second, this article will illustrate that although *Gregg* (1976) sought to remedy the circumstances that precipitated a significant interruption in the executing of death sentences in the United States via *Furman v.*

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Georgia (1972), these remedies have not alleviated the problem of disparate treatment of minorities. Specifically, we maintain that judicial proceedings in Missouri capital cases after 1976 have not been the sources of arbitrariness *Gregg* sought to remedy. Instead, the actual charging of suspects and prosecutor's plea bargaining with defendants have systematically facilitated harsher outcomes for the alleged assailants of white victims and closely resembles what Paternoster (1983) calls "low-visibility" decision-making. Furthermore, this analysis will support a view that Missouri's death penalty has changed very little in its essential character from pre-*Furman* conditions, in that executions continue to be symbolic events with a racist character similar to the legal conditions prevailing in that state before the Civil Rights Movement. Such a system of institutional racism reserves its harshest sanctions for offenders with white victims while unscrupulously waiving the heaviest penalties (e.g., death or life without parole) when the victim is nonwhite.

*Data Description and Empirical Analyses*¹

Data were collected from several sources, the primary one being Missouri Circuit Court Trial Judge Reports (TJR) for the years 1978 to 1996 ($n = 574$). TJRs are questionnaires that are mandated by statute and completed by the trial judge in a capital or death-eligible case originating in one of Missouri's 45 judicial circuits. Questions range from offender information (e.g., name, social security number, age, ethnicity, years of education completed, and criminal record), circumstances of the crime (usually a narrative description of the events, method, weapon used, and statement of the accused), statutory aggravating and mitigating factors, victim information (age, ethnicity, possible relation to the offender, and reputation in the community), and character of the trial (length in days, legal representation of the defendant, etc.). TJRs varied regarding the companion data (psychological reports, victim impact statements, face sheet from department of corrections, and criminal histories collected by pre-sentence investigations). All reports were provided by the Missouri Supreme Court and processed by the Missouri Office of the Public Defender.

In addition, Federal Bureau of Investigation Supplemental Homicide Reports (SHR) were consulted for Missouri data. TJRs were selected for content applicability and because recognized research comparing Missouri TJRs and SHRs (Wallace and Sorensen, 1994) found them to be the most complete and accurate data available, with no significant sampling bias found between the two data sets.

A data set, constructed from TRJs, was designed and analyzed to isolate three stages of the judicial process, in that homicides must move through three stages before a defendant can be selected for death. At each stage, cases were examined using binary logistic regression techniques for significant predictor variables that demonstrated an increased likelihood that a given defendant would be condemned.

Stage 1: *Defendant is selected by the prosecutor for capital murder prosecution.*

Of all the reported homicides in Missouri from 1978 to 1996 ($n = 9,857$), only 574, or 5.8%, were selected for prosecution as capital murder offenses (Federal Bureau of Investigation, 1978–1996; Missouri TJRs, 1978–1996).

Stage 2: Defendant is taken forward to trial to face the death penalty. Of the defendants charged with capital murder in Missouri between 1978 and 1996 ($n = 551$, with 23 cases eliminated due to insufficient data), only 281, or 51%, were taken forward to a capital murder trial, while 270, or 49%, received waivers for the death penalty or pled guilty to a lesser charge. Analyses sought out consistent patterns and predictive characteristics in cases in which defendants might face the imposition of the death penalty and those granted waivers of death.

Stage 3: Defendant is selected for imposition of the death penalty. Of the 281 defendants taken to trial, 152, or 54%, were sentenced to death, while 125, or 46%, received “life without parole” (LWOP). Analyses were designed to reveal patterns or case characteristics in jury selection criteria leading to death sentences.

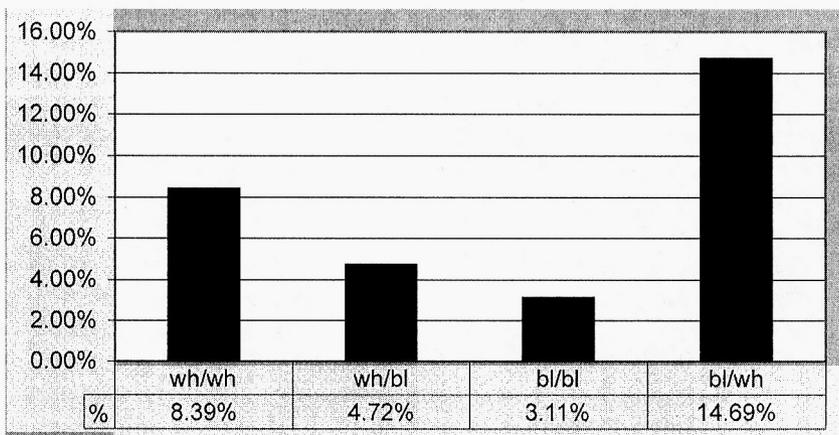
Since various dynamics and factors can influence outcomes in the three stages, the study design sought to expose general tendencies of decision-makers (e.g., prosecutors and juries) at each stage of the process (charging, plea bargaining, and sentencing). Proceeding on the premise that “the selection of homicide defendants for death is the cumulative result of a series of decisions and evaluations” (Radelet and Pierce, 1985: 617), examinations of each stage in the selection process were undertaken to understand and demonstrate factors in the data that predict whether a given defendant will be charged with capital murder in Stage 1; whether a case will proceed to trial in Stage 2; and which offenders will be selected for the death penalty in Stage 3. The same independent variables were retained throughout the analysis, but each stage had different dichotomous dependent variables. Stage 1 examined prosecutorial discretion in deciding the type of charge brought. Specifically calculated for each variable was the percentage of Missouri homicide cases that were charged as a capital offense. Stage 2 examined the likelihood that defendants would receive a waiver from the death penalty from the prosecutor (coded as “0”) and those cases proceeding to trial under the death penalty (coded as “1”). Stage 3 examined patterns of discretion in juror’s sentencing verdicts, with death coded as “1” and LWOP as “0.”

Stage 1 is examined through two overlapping data sets. The primary data set was developed from the TJRs filed on Missouri Capital Murder cases between 1978 and 1996 ($n = 574$). These data overlap with the FBI’s Supplemental Homicide Report (SHR) that contains all reported Missouri homicide cases for the years 1978 to 1996. The TJR capital murder cases were reported within the SHR listings of all reported Missouri homicides, but the SHRs did not identify the individual cases or the charges brought against defendants. Therefore, the TJRs

were a specific subset of all cases reported in SHRs. Knowing the frequencies of selected variables in both data sets, prosecutorial discretion could be examined, specifically in the decision of which defendants were charged with capital murder through the patterns of those selected for capital murder charges. This is Stage 1 of the analysis. The following independent variables fell into five general categories and were examined in Stage 1:

1. Offender/victim race characteristics:
 BLACKBL = Black Offender/Black Victim
 BLACKWH = Black Offender/White Victim
 WHITEBL = White Offender/Black Victim
 WHITEWH = White Offender/White Victim
2. Offender age characteristics:
 LESS21 = Defendant a minor or not at time of offense (less21 and 21up).
 (Note: Twenty-one was selected as a logical cutoff because of the very small number of offenders under age 17.)
 LESS30 = Defendant under the mean age of offender (less30 and 30up);
3. Sex of either offender or victim:
 SEXDUM = sex of offender (male/offender and female/offender)
 VSEXDUM = sex of victim (male/victim and female/victim)
4. The types of weapon used (e.g., gun, knife, hands, or other):
 GUN, KNIFE, HANDS, OTHERW
5. Relationship of the offender to the victim:
 STRANGER = (str/nstr)

Figure 1: Percent of All Missouri Homicides Charged with Capital Murder by Offender/Victim Race, 1978–1996



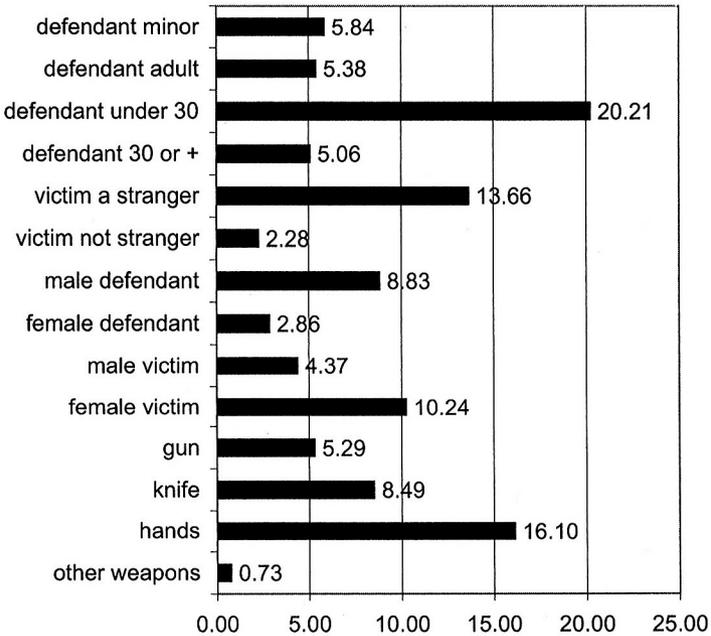
Stage 1 Findings: Charging Patterns

The following two figures and table show the percentages of selected variables that were charged with capital murder.

Table 1:
Ethnic Characteristics of Homicides

Offender/Victim Characteristics	Total Charged	Total Homicides	% Capital of Murders
Whites killing whites	274	2,945	8.39
Whites killing blacks	12	254	4.72
Blacks killing blacks	188	6,045	3.11
Blacks killing whites	88	599	14.69
Missing cases	12	14	5.80
Total	574	9,857	

Figure 2: Percent of Missouri Homicides Charged with Capital Crimes by Social Variables



Stage 2 and 3 Findings: Logistical Analysis of Prosecutorial Discretion and Trial Outcomes

In Stage 2, binary logistic regression analysis was conducted with the TJR data set and two dichotomous or dummy variables were created from a continuous variable, offender age (LESS21 and LESS30). Two additional variables were included: defendant represented by a public defender or a private attorney (PDDUM) and the presence of a previous criminal conviction on the defendant's record (PVCDUM). These were regressed on dichotomous dependent variables. Stage 2 used defendant variable TRIALDUM, case taken forward to trial = 1, $n = 551$. In Stage 3, a logistical analysis was repeated with the same dummy variables regressed on TRIALOUT, defendant sentenced to death = 1, $n = 281$. The binary logistical regression was used because of its applicability to a "categorical data problem, with each explanatory variable combination being unique with two categories for the response" (Press and Wilson, 1978: 700; Cleary and Angel, 1984: 340-345; Jennings, 1986: 987; Morgan and Teachman, 1988: 929-936; Lucas, 1999: 172-189). The full logistical model for Stage 2 and 3 analysis was constructed by excluding 20 cases that had missing data, and three cases in which defendants were convicted of second-degree homicide, $n = 551$ cases.

In Stage 1, a major difference was noted in the findings on age dependence, as the analysis dichotomized defendants at 21 or 30 years of age. This analysis departs from traditional age breakdowns (defendants having less than 18 years), which only bring to view the impact of age in a small number of cases. Dichotomizing age at 21 does not significantly alter the trends found when using less than 18, and provides a broader examination of the impact of youth and social standing in the death penalty process. Models were created with controls using age breakdowns of 21 and 30, so that each could be reviewed and a determination made as to which of the breakdowns provided the most explicative model.

Reviewing Variables Across Models

Age of Defendant: Traditionally, "the youth of the defendant at the time of the crime" (Bedau, 1997: 205) is named as a statutory mitigating circumstance intended to moderate the culpability of a convicted offender at sentencing (§ 565.020 R.S.Mo. 2000). In Stage 1, 5.84% of all murder cases involving minor offenders were charged with capital murder, compared to 5.38% of adult offenders. Charging patterns seem to reflect the opposite effect, with age acting as an aggravator. Youth under 21 are more likely to be charged with capital murder than those 21 and over. Though the spirit of the law sought to shield the very young from the harshest sanctions, a given defendant's adolescence may increase the severity of the charges brought. However, if one thinks of age in relation to social reputation, youth and maturity will be conceived of differently. Individuals above 30 years of age generally are more established in their careers and within the community. A defendant's social

standing in the community may affect the type of homicide charge that is brought. In Stage 1 data, 20% of defendants under 30 are charged with capital murder, in contrast to five percent of those above 30. Clearly, youth was not acting to mitigate a defendant’s culpability as the *Gregg* provisions stipulated.

In Stage 2, logistical analysis of TRIALDUM concluded that youth acted as mitigation. Defendants under age 30 have a 30% decreased likelihood of their case going forward to trial, as opposed to those 30 and older. Defendants less than 21 are 61% less likely to be taken to trial, compared to defendants 21 and older. As prosecutors were determining waivers of death penalties, youth in both cases (>30 or >21) was acting as mitigation.

Table 2:
Probability of Proceeding to Trial, Age = LESS21 (n = 551) Model Sig. .0000

Variable	B	S.E.	Wald	df	Sig.	R	Exp (B)	% Prob-ability
BLACKBL	-.9210	.2183	17.8011	1	.0000	-.1438	.3981	-60
BLACKWH	.4089	.2786	2.1533	1	.1423	.0142	1.5051	51
WHITEBL	.7603	.7396	1.0569	1	.3039	.0000	2.1389	114
LESS21	-.9430	.2389	15.5831	1	.0001	-.1334	.3895	-61
SEXDUM	.5292	.4137	1.6365	1	.2008	.0000	1.6976	70
VSEXDUM	-.5140	.2141	5.7623	1	.0164	-.0702	.5981	-40
KNIFE	.8228	.2566	10.2797	1	.0013	.1041	2.2770	128
HANDS	.0388	.2539	.0234	1	.8785	.0000	1.0396	4
OTHERW	.7862	.5793	1.8419	1	.1747	.0000	2.1950	120
PVCDUM	.6865	.2038	11.3482	1	.0008	.1106	1.9868	99
PDDUM	-.1127	.2116	.2838	1	.5942	.0000	.8934	-11
STRANGER	.4428	.2207	4.0256	1	.0448	.0515	1.5571	56
CONSTANT	-.5521	.4361	1.6027	1	.2055			

In Stage 3, the logistical analysis of whether a jury decided to implement the death penalty indicates that, after controlling for all other variables, being less than 21 was not a mitigating factor. Since defendants under 21 years of age are only two percent less likely to get the death penalty (sig. 0.96), the probability is close to 50:50. However, when one views youth relative to social standing, defendants in the under 30 years group are 48% less likely to receive a death sentence (sig. .02) than those 30 or older. Adults lacking sufficient social capital to influence the type of charge brought against them tend to be those with the least: the poor, prior offenders, drug addicts, and drifters. They consequently receive less consideration throughout the process.

Table 3:
Probability of Proceeding to Trial, Age = LESS30 ($n = 551$) Model Sig. .0000

Variable	B	S.E.	Wald	df	Sig	R	Exp (B)	% Probability
BLACKBL	-.8810	.2183	16.2875	1	.0001	-.1368	.4144	-59
BLACKWH	.4448	.2800	2.5238	1	.1121	.0262	1.5601	56
WHITEBL	.7673	.7193	1.1379	1	.2861	.0000	2.1539	115
LESS30	-.3593	.2016	3.1772	1	.0747	-.0393	.6981	-30
SEXDUM	.4052	.4089	.9818	1	.3217	.0000	1.4996	50
VSEXDUM	-.5279	.2118	6.4484	1	.0111	-.0763	.5840	-42
KNIFE	.8492	.2565	10.9602	1	.0009	.1083	2.3378	133
HANDS	.0510	.2514	.0411	1	.8393	.0000	1.0523	5
OTHERW	.7465	.5711	1.7087	1	.1912	.0000	2.1097	111
PVCDUM	.8344	.1980	17.7620	1	.0000	.1437	2.3034	130
PDDUM	-.1193	.2083	.3279	1	.5669	.0000	.8875	-11
STRANGER	.4308	.2228	3.7379	1	.0532	.0477	1.5385	54
CONSTANT	-.5104	.4366	1.3662	1	.2425			

Dichotomizing the age variable at less than 30 and those 30 and older performs well in each stage and provides the best model of how a defendant's age, relative to his or her social standing, works throughout the process. As a mitigating factor, youth only performed in offenders under 21 in Stage 2. Hence, being a minor in Missouri tends act as an aggravator. For the remainder of the analysis, the probabilities from models using LESS30 (Tables 3 and 4) are presented in discussion since they contain the best overall modeling of the data (model sig. .0000 and .0164 respectively).

Defendants/Victims Racial Characteristics: Offender/victim racial characteristics indicate that blacks who kill whites are five times more likely to be charged with capital murder than are blacks who kill blacks. Whites with black victims are half as likely to be charged with capital murder than are whites who kill other whites. Prosecutorial selections of capital murder cases are consistent with previous studies, all of which find evidence of racial bias (Garfinkel, 1949; Myers and Hagan, 1979; Bowers and Pierce, 1980; Baldus et al., 1990; Radelet and Pierce, 1985; Luginbuhl and Burkhead, 1994). This pattern confirmed the suspicion that whiteness is valued over non-whiteness, and correctly predicted that the severest punishment would be visited on cases in which a nonwhite offender killed whites ([-/+ 14.69%), followed by a descending hierarchical structuring of the proportion of cases charged with capital murder based on racial characteristics: whites killing whites ([+/+ 8.39%), whites killing blacks ([+/- 4.72%), to the lowest, blacks killing blacks ([-/- 3.11%).

Table 4:
Stage 3 Sentencing Outcomes Age Control LESS30 (n = 281) Model Sig. .0164

Variables	B	S.E.	Wald	df	Sig.	R	Exp (B)	% Probability
BLACKBL	-.1017	.3303	.0948	1	.7582	.0000	.9033	-10
BLACKWH	-.2103	.3486	.3640	1	.5463	.0000	.8103	-19
WHITEBL	.0197	.7696	.0007	1	.9796	.0000	1.0199	2
LESS30	-.6601	.2798	5.5667	1	.0183	-.0959	.5168	-48
SEXDUM	.4087	.6339	.4157	1	.5191	.0000	1.5048	50
VSEXDUM	-.0779	.2766	.0793	1	.7783	.0000	.9251	-7
KNIFE	-.1625	.3150	.2662	1	.6059	.0000	.8500	-15
HANDS	-.2656	.3496	.5774	1	.4473	.0000	.7667	-23
OTHERW	-.8343	.7069	1.3930	1	.2379	.0000	.4342	-57
PVCDUM	.7820	.2966	6.9527	1	.0084	.1130	2.1858	119
PDDUM	.5498	.2919	3.5466	1	.0597	.0632	1.7329	73
STRANGER	.1930	.3037	.4039	1	.5251	.0000	1.2129	21
CONSTANT	-.6893	.6536	2.1119	1	.2917			

The logistical analysis demonstrates that defendant/victim racial characteristics remain an important factor in determining whether the defendant is taken forward to trial to face the death penalty, as shown below in Stage 2, Model 1.

Table 5:
Stage 3 Sentencing Outcomes Age Control LESS21 (n = 281) Sig. .0886

Variable	B	S.E.	Wald	df	Sig	R	Exp (B)	% Probability
BLACKBL	-.1937	.3254	.3541	1	.5518	.0000	.8239	-18
BLACKWH	-.4119	.3359	1.5041	1	.2200	.0000	.6624	-34
WHITEBL	.0800	.7583	.0111	1	.9160	.0000	1.0833	8
LESS 21	-.0163	.3695	.0020	1	.9647	.0000	.9838	-2
SEXDUM	.2604	.6249	.1737	1	.6769	.0000	1.2974	30
VSEXDUM	-.0901	.2745	.1077	1	.7428	.0000	.9138	-9
KNIFE	-.2808	.3096	.8227	1	.3644	.0000	.7552	-24
HANDS	-.2963	.3465	.7310	1	.3926	.0000	.7436	-26
OTHERW	-.5969	.6913	.7457	1	.3878	.0000	.5505	-45
PVCDUM	.8329	.2971	7.8574	1	.0051	.1229	2.3000	130
PDDUM	.5550	.2889	3.6917	1	.0547	.0661	1.7420	74
STRANGER	.0730	.2973	.0603	1	.8061	.0000	1.0757	8
CONSTANT	-.7938	.6445	1.5167	1	.2181			

Table 6:
Offender/Victim Relations and the Likelihood of Trial

Offender/victim	Exp (B)	(% = Exp (B)-1)	Sig.
black/black	.41	-59%	.0001
black/white	1.56	+56%	.1121
white/black	2.15	+115%	.2861
white/white (constant)			

In contrast to whites killing whites (WHITEWH), blacks whose victims are black (BLACKBL) are 59% less likely to be selected for trial; blacks who kill whites (BLACKWH), however, are 56% more likely than whites (WHITEWH) to be selected for trial. In the 12 cases in which whites victimized blacks (WHITEBL) and were charged with capital murder, such cases were 115% more likely to be taken to trial than was true for whites taking the lives of other whites.

In Stage 3, Model 1 of trial outcomes, defendant/victim racial characteristics have little effect and are of questionable significance in jury decisions in terms of imposing the death penalty. Baldus et al. (1990) in Georgia and Wallace and Sorenson (1994) in Missouri found offender/victim to be significant predictors of death sentencing in mid-range cases, in which there was not excessive evidence of aggravation. However, without similar controls, this analysis found that evidence of defendant/victim racial characteristics made a difference in outcomes only when the model examined prosecutorial discretion in charging (Stage 1) and proceeding to trial (Stage 2).

Victim a Stranger (stranger = 1): Radelet (1981) noted that when a homicide victim was a stranger to the defendant, the case was more likely to be charged as a capital offense. The killing of strangers apparently invoked more fear in juries than did "familiar homicides" and indicated "a more enduring and less differentiated propensity for violence, and the motive is more likely to be the realization of some deliberate objective" (Gross and Mauro, 1984: 67). Capital murder was charged in 13.6% of Stage 1 findings for all Missouri homicides in which the victim was a stranger. These cases were six times more likely to be charged with capital murder than were cases in which the defendant knew the victim, where only 2.3% were charged in the first degree. The offender as a stranger remained a strong predictor in Stage 2. "Stranger" defendants are 54% more likely to be taken to trial (sig. .05). The coefficients become questionable in Stage 3, with a 21% greater likelihood of a death sentence when victim and offender are estranged (sig. 0.53).

Sex of Defendant (m/d and f/d, male = 1): Sentencing research has consistently found that female offenders are treated more leniently than male offenders (Steffensmeier, 1998: 765). In Missouri, homicides with male defendants are three times more likely to be charged with capital murder (a rate of 8.8%) than is the case for

female defendants (2.9%). Stage 2 and Stage 3 modeling, controlling for all other variables, shows that the defendant's sex is significant. Males are 50% more likely to be taken to trial and to receive the death penalty, although the weight attributed to the coefficients was questionable (sig. 0.32 and 0.52 respectively).

Sex of Victim (m/v and f/v, male = 1): Previous analysis of the effect of the victim's sex in Georgia, Florida, and Illinois indicated that killing a woman more than doubles the probability of receiving a death penalty (Gross and Mauro, 1984: 62). In Missouri, cases involving female victims were twice as likely to be charged as capital murder (a rate of 10.2%) than was true with cases with male victims in Stage 1 (4.4%). This variable remained a strong predictor in Stage 2, controlling for all other variables, with male victims 42% less likely (sig. .01) to proceed to trial than cases with female victims. The effect and weight lent to the coefficient in Stage 3 is questionable: cases with male victims are seven percent less likely to receive death sentences (sig. 0.78).

Type of Weapon: The weapon, type of wounds, and the death scene itself are artifacts of the homicide and symbolize the suffering associated with the taking of a life. The array of weapons and methods of evidence collection may carry or construct meanings independent of the motive of the defendant. The type of weapon may be advantageous to prosecutors, and apparent murder weapons were coded into four categories: "gun," "knife," "hands" used in strangulation, asphyxiation, drowning, or beating of the victim, and "other" — a residual category of weapons (e.g., explosives, poison, and medications) whose incidence was insufficient to merit their own categories in the data set.

Data analysis in Stage 1 found 5.3% of gun homicides, 8.5% of knife homicides, and 16.1% of manual homicides were charged with capital murder. Preliminary hypotheses anticipated that a murder by knife would be more likely to be taken to trial than a homicide by gun, due to the narrative of violence upon the victim's body and the crime scene photos that are frequently offered as evidence.

We know violence and pain, in the first instance through its instrumentalities. Second, we know them through their effects. Here violence and pain are represented in the "wound," that is, the bodily damage that is pictured as accompanying pain...those engendered by particular weapons and those which leave visible marks on the body, may be more easily available to us (Sarat, 1993: 23).

The logistical analysis of Stage 2 indicated that defendants using knives as the murder weapons, rather than guns, were 133% more likely to proceed to trial (sig. .0009). It is easy to perceive why prosecutors apparently prefer knife murders when proceeding to trial given the images of violence in the trial evidence. Again, jury decisions examined in Stage 3 provided coefficients on types of weapons that contrasted with Stage 2. Knife murders were 15% less likely to receive the death sentence (sig. 0.61).

Previous Conviction (any prior felony = 1): The SHR does not provide data on whether a defendant had a previous conviction. The TJRs, in contrast, did provide a criminal history. In Stages 2 and 3, a previous conviction had a large and significant effect. Defendants with "any type of previous felony conviction" were 130% more likely to be taken to trial than were similar defendants without a previous conviction (sig. .0000). In addition, defendants with a previous felony conviction were 119% more likely to receive the death penalty (sig. .0084). A previous felony conviction stands as indisputable proof in the eyes of prosecutors and juries, as evidence of irredeemable criminality (Garfinkel, 1956), even if prior offenses were unrelated to the trials in question.

Public Defender (court appointed or public defender = 1): No data exists in the SHRs as to defendant representation by either private attorneys or publicly retained counsel. In Stage 2, the analysis demonstrated that representation of the defendant had only a small effect on the outcome. Defendants with public defenders were 11% less likely to be taken to trial (sig. .5669). However, in Stage 3, which focused on jury decisions regarding sentencing, defendants with a public counsel were 73% more likely to receive the death penalty (sig. .0597). This finding was consistent with previous research (Bright, 1994), indicating that indigent defendants do not receive defenses commensurate with those who retain private attorneys.

Of the 281 defendants taken forward to trial in this study, 199 (71%) were indigent and relied upon public defenders for legal representation. Among the 199 defendants represented by public defenders at trial, 151 (75%) also had a previous conviction. This second group faced the combined effects of previous conviction and public defender (PVC DUM and PDDUM). They were 192% more likely to receive death sentences than were defendants with a private attorney and no previous conviction. A defendant's legal representation and a previous conviction do not indicate anything about the facts of the crime at trial. Logistical analysis of trial outcomes, when restricted to legal representation and prior criminal history, finds coefficients correctly fitting 80% of the death sentences reported in the TJRs (model sig. .0005). The inference can be drawn that jury decisions on the imposition of death sentences have little to do with the actual facts of the crime and are more tailored to criminal history and the perceived economic feasibility of defendant representations.

Conclusions

The above results speak to several points made in *Gregg v. Georgia*, determinations that effectively empowered states such as Georgia, Missouri, Florida, Oklahoma, Texas, and Virginia to resume executions. These states, as of 2004, account for 67% of all executions since 1976. In general, the results of tri-part staging and controlling for age of the offender give a clearer picture of the discretionary field associated with charging, convicting, and sentencing in Missouri during the period extending from 1978 through 1996. Clearly, defendants convicted of taking the life

of a white victim are subjected to increased risk, not only of incurring a charge of capital murder, but also of proceeding forward to trial and eventually receiving a death sentence. It is also clear that cases involving black victims do not receive the same attention, particularly when whites are the offenders. Moreover, defendants with court-appointed attorneys or public defenders, and any type of prior criminal record, suffer a much higher probability of being put to death than do defendants with the means to secure private attorneys and no prior criminal record.

There is convincing evidence that crimes affording prosecutors the opportunity to employ inflammatory evidentiary exhibits, such as crime scene photographs of knife wounds, play a significant role in the selection of cases for eventual capital trial. Second, persons committing homicide that have even minor records of nonviolent crimes afford prosecutors the opportunity for painting them as habitual criminals that deserve death sanctions. In total, this analysis found that prosecutors sought out the vulnerabilities in defendants and selected defendants for capital trials on the basis of their ability to convict, rather than on the facts of the crime. These data demonstrate that prosecutors have predictable patterns that are followed, selecting defendants or particular combinations of offender-victim that afford the greatest personal, social, and racial imbalance, and hence portray the offender in the worst comparative light. Consequently, the results of the statistical manipulations above demonstrate that the seat of prosecutorial discretion is also the location of, and the mechanism responsible for, the greatest racial disproportionality in Missouri capital sentencing. In the hands of prosecutors charged with selecting offenders and crimes for eventual capital consideration and sentencing, those elements of the process put in place factors that proportionate sentencing has sought to avoid. The evidence also indicates that jurors may be using the low social status of offenders to justify death sentences, rather than the facts of the case. Thus, remedies offered in *Gregg*, which focused on court proceedings and jury eligibility, composition, and instruction, have over time missed the mark, or the problematic components of overt discriminatory factors have shifted to an earlier phase of the trial process.

Conditions in Missouri and Content of Gregg

It is unfortunate that the United States Supreme Court selected *Gregg* as a test case for deciding on the resumption of executions in the U.S. The facts of the crimes for which *Gregg* was convicted and sentenced do not bear even a passing resemblance to the average homicide in Missouri since 1976, which are normally not execution-style shootings of persons as detached as *Gregg's* victims were. Second, adopting *Gregg* as a legal yardstick, specifically instituting the procedures and statute under which he was sentenced, offers little in the way of periodic checks on the operation of the capital sentencing. The Georgia statute, Ga. Code Ann., 26-1101 (a) (1972), as it operates in that state and as a sentencing template for other states, makes no binding provision for checking and confirming that systemic abuses, unanticipated by legislators and undetected (or ignored) by jurists, have not occurred. The above

research in Missouri identifies specific outcomes in a statutory environment modeled on the Georgia capital punishment law, and reasonably resembles proportionality studies (Baldus et al., 1990) that have seriously questioned the constitutionality of that state's use of capital punishment. Most troubling in the study of Missouri is the apparent bias employed by prosecutors that unconstitutionally sanctions the poor and allows greater sanctions for the assailants of whites. Regardless of the conformance of capital trials to the guidelines laid down in *Gregg*, states like Missouri have developed, perhaps unknowingly, another systemic problem that exposes the poor, the nonwhite, and the socially disdained to greater risk of state-sponsored death than their white counterparts, particularly when they have killed a white person.

The analysis of Missouri's post-*Furman* record of capital sentencing demonstrates a clear tendency to punish offenses against whites far more harshly than those crimes committed against nonwhites. Indeed, if proponents of the death penalty were correct in their assertion that executions deter further homicides, nonwhites in Missouri are clearly not receiving the equal protection that capital punishment might theoretically afford them. Offenders who victimize nonwhites are far less likely to suffer the maximum retribution of the state, as the data from TJRs demonstrate. Furthermore, this analysis locates the problems of arbitrary discretion within prosecutions (i.e., charging and plea bargaining), not in the litigation and jury performance that *Gregg* assumed were the critical locations of concern. One of the major failures of the U.S. Supreme Court in *Gregg* was its focus on litigatory proceedings and its reluctance to institute reforms within the auspices of legal policy operatives that have hitherto been exempt from official judicial remedy. *Gregg* fails in Missouri to eradicate arbitrary and capricious sentencing in part because its reforms touched only the roles of legal laypeople on juries and avoided the necessary labor of oversight among its own professional ranks.

NOTE

1. This statistical analysis appears in a different context and form in Michael Lenza's dissertation, "The Politics of Death: A Statistical, Theoretical, and Historical Examination of the Death Penalty in Missouri." Dissertation defense should transpire before publication of this article.

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