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# Hispanics and the death penalty: Discriminatory charging practices in San Joaquin County, California

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## Abstract

Following reinstatement of the death penalty after the Supreme Court's decision in *Gregg v. Georgia* (1976), social scientists carefully documented evidence of racial and gender bias against defendants and victims at all stages of the death penalty system, from charging to conviction and sentencing. Despite these consistent findings, questions remained. One crucial unknown was whether or not racial bias uncovered in investigations of African Americans and Whites also negatively impacted members of other minority groups, in particular the largest minority group in the U.S.—Hispanics. Are Hispanics, as both victims and defendants, treated more like non-Hispanic Whites or African Americans? This research examined all death-eligible homicides in San Joaquin County, California from 1977 through 1986. Using logistic regression analysis, the investigation uncovered patterns of racial and gender bias, finding defendants in Hispanic victim cases were less likely to face a death-eligible charge than defendants in White victim cases. Evidence of discrimination may have implications for how Hispanic integration and race and ethnicity are understood and for evaluating the success of statutory reforms designed to insure fairness and constitutionality of the death penalty.

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## Introduction

Debates over fairness and constitutionality of the death penalty recently reentered the political and media limelight. Governor George Ryan of Illinois, for example, generated a political firestorm when he commuted the death sentences of all of the state's death row inmates before leaving office in January 2003, citing concerns over error in determining guilt and sentencing in death penalty cases. Stories about innocence and claims of wrongful convictions may grab the headlines, yet what social scientists have carefully and quietly documented over the last three decades was evidence of racial and gender bias against defendants and victims at all stages of the death

penalty system, from charging to conviction and sentencing. Despite these consistent findings, questions remained. One crucial unknown was whether or not racial bias uncovered in investigations of African Americans and Whites also negatively impacted members of other minority groups, in particular the largest minority group in the U.S.—Hispanics.<sup>1</sup> Are Hispanics, as both victims and defendants, treated more like non-Hispanic Whites or African Americans?<sup>2</sup> This study was the first to answer this question.

How Hispanics fare in the criminal justice system with respect to the death penalty may have broad implications for understanding race and ethnicity in the United States. The death penalty system's treatment of Hispanics may indicate how the color line in the U.S. is being drawn as their numbers rise. Historians of race and ethnicity showed that throughout the nineteenth and first half of the twentieth centuries, the color line in the U.S. was

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drawn between White/non-White (Jacobson, 1998; Roediger, 1991). What mattered and was privileged was whiteness. Following the rise of post-1965 immigration from Asia and Latin America, some immigration scholars suggested that the color line is now between Black/non-Black (Foner, 2005; Lee, Bean, & Stevens, 2003). Lee et al. (2003) found that Hispanics and Asian Americans were more likely than African Americans to marry Whites. Their children were also discovered to identify more often as “multicultural,” while children of Black/White unions were more likely to identify as Black or African American. Foner (2005) and Lee et al. (2003) argued that what mattered now was the distinction between Black and non-Black. An understanding of how Hispanic victims and defendants were treated by the criminal justice system will not provide a definitive explanation of the process of racialization nor how racialized groups interact. An empirical investigation, nevertheless, of how Hispanics fared in the criminal justice system may help social scientists to consider potentially broader changes taking afoot with respect to race and ethnicity in the United States.<sup>3</sup>

Finally, as patterns of prosecutorial or jury discretion have led to capricious outcomes, legal scholars and social scientists must question whether the comparative–proportionality review process, instituted by states that sought to address concerns raised in the Supreme Court’s overturning of existing death penalty statutes in *Furman v. Georgia* (1972), were adequately resolved by the Court’s decision in *Gregg v. Georgia* (1976).<sup>4</sup>

This article considers these questions by examining death-eligible cases that arose in the period immediately following the reinstatement of the death penalty in California.<sup>5</sup> Specifically, the study investigated homicide cases from August 1977 through 1986 in San Joaquin County, California.<sup>6</sup> An exploration of this place and time are interesting for two important reasons. The study enabled an examination of the death penalty system in the post-*Gregg* era. This research also demonstrated the role of race and ethnicity in death penalty cases, involving Hispanics and not just Black and White defendants and victims. This permitted an analysis of whether or not discriminatory practices that affected African American victims and defendants, which had been documented by prior research, similarly impacted other minority groups. In previous death penalty studies, researchers mainly made Black/White racial comparisons since many of the studies were conducted for litigation in which the defendants were African American and/or there were insufficient numbers of other minorities in the data utilized. A large Hispanic population in San Joaquin County provided the opportunity to focus on Hispanics.<sup>7</sup>

### Post-*Furman* reforms and prior death penalty studies

Following the *Furman* decision, state legislatures responded by first limiting the category of crimes that were death-eligible. Second, states statutorily designated a list of aggravating circumstances, specifying which murders were death-eligible. Finally, a bifurcated trial system and state review process were instituted. California adopted all of these reform measures.

By defining standards, state legislatures hoped to identify meaningful differences between death-eligible and non-death-eligible homicide cases. In California’s bifurcated trial process, the first phase determines guilt or innocence. If the defendant is found guilty of a death-eligible murder charge, a penalty trial ensues. The jury that finds the defendant guilty must decide if the defendant should receive the death penalty. By pushing for a death-eligible murder charge at the early stage of the process, the prosecutor demonstrates his or her belief in the seriousness and/or importance of the case, highlighting the value they attach to particular homicide cases as well as how much “law” is given to a victim. Donald Black (1976) argued that law was a form of “governmental social control,” which included activities such as reporting of the crime and the police’s investigational efforts. Black claimed that victims and sites of victimization that occupy lesser positions in social life received a lesser response from law than victims and victimization areas of higher status. Arguing that law was quantifiable, he wrote that some victims and cases received more law (Black, 1976, p. 3).<sup>8</sup>

In the study period, both the prosecutor and jury could consider a list of special circumstances, whose attachment to a murder charge made it death-eligible and a list of mitigating circumstances that lessened the charge or sentence.<sup>9</sup> Death penalty advocates hoped that the concerns over arbitrariness and excessiveness were resolved while preserving prosecutorial and jury discretion. Most states, including California, adopted a state review process in which each death penalty case could be reviewed to assess whether the sentence was disproportionate. If patterns of prosecutorial and jury discretion existed, however, the review process could fail to recognize and catch arbitrary outcomes. A comparative–proportionality review by the state Supreme Court could not recognize that a death sentence was excessive if the pool of possible cases was tainted by prosecutorial discretion, which led to death-eligible charges against some defendants but not others, based on nonlegal factors such as race or sex of the victim.

This study considered what resulted following death penalty reforms in California, considering how the

comparative–proportionality review process and perhaps the entire death penalty system were affected. This article, therefore, addresses important legal concerns raised by Justice White in his concurring opinion in *Gregg v. Georgia* (1976). Justice White worried that in the comparative–proportionality review, the Georgia Supreme Court could not look at cases that avoided death sentencing by being charged with a lesser offense based upon prosecutorial discretion. The system of appeal and review of the death penalty in Georgia could be muddied by prosecutorial discretion. In the end, Justice White argued that because the legislated statute outlined standards for death-eligible cases, prosecutors would press for death-eligible charges only against defendants in cases in which juries themselves would find the defendants guilty of the same standard (*Gregg v. Georgia*, 1976). Following *Gregg*, however, studies proved otherwise.

Research established that there were discriminatory patterns at all levels of the death penalty system, including the charging stage (Berk, Weiss, & Boger, 1993; Paternoster, 1983; Radelet & Pierce, 1985; Weiss, Berk, & Lee, 1996), sentencing phase (Bowers & Pierce, 1980; Gross & Mauro, 1989), or both (Baldus, Woodworth, & Pulaski, 1990; Berk & Lowery, 1985). The most consistent and significant findings were race–of–victim effects. The victim’s race was an important factor in determining which defendants were charged or sentenced to death. Researchers uncovered that in cases involving White victims, defendants faced much greater odds of receiving a death-eligible charge or a death sentence. While important to varying extent, controlling for case characteristics such as the commission of a contemporaneous felony, victim’s gender, relationship between defendant and victim, weapon(s) used, and the number of victims could not explain away the race–of–victim effects (Baldus et al., 1990; Berk & Lowery, 1985; Bowers & Pierce, 1980; Gross & Mauro 1989; Paternoster, 1983; Paternoster et al., 2003; Radelet & Pierce, 1985).

In a recent study of the death penalty system in Maryland, Paternoster et al. (2003) discovered that prosecutors were more likely to pursue a death-eligible charge against defendants in cases involving White victims. They found that the probability of facing a death-eligible charge for defendants in White victim cases was 1.6 times higher than for defendants in cases involving African American victims, holding other crucial case characteristics constant. The researchers also reported that a death-eligible charge was more likely to “stick” (charge not withdrawn prior to trial) in cases involving White victims than in cases involving African American victims. The probability of death-

eligible charges being pursued to the trial phase was 1.5 times higher for defendants in White victim cases than for defendants in African American victim cases (Paternoster et al., 2003, p. 34). The study suggested that extralegal factors affected charging practices. Race was an important predictor of which cases received “more law” in the death penalty system.

In building upon these previous works, this study analyzed death-eligible charging in homicides involving Hispanic victims and defendants. Previous social science research suggested two different, possible outcomes. On one hand, given studies that argued that Hispanics were a racialized minority group, which faced similar disadvantages that African Americans did (Barrera, 1979; DeGenova & Ramos-Zayas, 2003), one could have expected that Hispanic victims, like African American victims, got “less law” than White victims in death-eligible cases. On the other hand, given research that stressed the social mobility and greater integration of Hispanics, particularly through intermarriage with Whites (Lee et al., 2003), one could have predicted that cases involving Hispanic victims were treated similarly to those with White victims. This article examines this sociological question and the legal concerns raised in *Gregg*.

## Data and methods

This research examined death-eligible charging in Superior Court or at the guilt/innocence stage. Other stages preceded the one investigated, and a study of death penalty charging practices can look at discretion and possible bias at these earlier levels. There may have been patterns of racial discrimination in who was apprehended for murder and who finally got charged with capital homicide.<sup>10</sup> There are also important steps that follow, including sentencing. While a research study with a longitudinal design is ideal for understanding the various levels and processes in the death penalty system, this study nevertheless provided useful information regarding possible bias in the death penalty system.<sup>11</sup>

Data on death-eligible homicide cases from San Joaquin County from August 1977, when California’s current death penalty statute became effective, through 1986 were gathered. There were 250 non-vehicular homicides between August 1977 and 1986. Of these 250 cases, seventy case reports could not be examined further. Reports for these seventy cases were missing key pages, in poor condition, or simply lost. There did not appear to be a pattern, however, to the seventy cases. They were not all cases, for example, from one time period or one city in the county. Of the 180 homicides,

128 cases were serious enough to warrant the *possibility* of a special circumstance attachment to the murder charge, which would have made it death-eligible. This means that a special circumstance such as multiple victims, killing of a police officer, or commission of a contemporaneous felony like kidnapping or robbery could have been added to the murder charge.<sup>12</sup>

Information about the victim, defendant, and crime was coded for each of the 128 cases.<sup>13</sup> The data came from two sources—defendants' probation or sentencing reports and the Bureau of Criminal Justice Statistics (BCJS). Probation or sentencing reports were compiled on each defendant after a final disposition but before sentencing. These reports provided characteristics of the crime as well as biographical information on the defendant. The BCJS data offered details on the victim, including his/her race, age, and relationship to the defendant. From both sources, data regarding weapon(s) used, method and location of killing, and court proceedings were also obtained. Significantly important features of the cases, identified in part by previous studies, were captured.

The unit of analysis for the study was the "homicidal act," defined as the involvement of an individual's action, which resulted in the death of another person or persons. A homicidal act resulted in a death-eligible charge if the defendant had to answer to a murder charge with one or more special circumstance attached in Superior Court. Multiple victim murders were treated as a single case, except when they were tried as separate cases. Each criminal case, with however many victims, was considered a unique case. The killing of one individual by two defendants was treated as two cases whereas the murder of two victims by one defendant was counted as one case since each defendant faced a criminal charge. Multiple victim cases were rare; there were four such cases in this study. Each of the four cases involved victims of the same race. Of the four, three cases had victims who were both of the same sex. One case had a male and a female victim. For this case, the victim's sex was coded female. Of these 128 cases, 122 defendants were men, whereas just six defendants were women. None of the women in the six cases were charged with a capital homicide. There were too few women defendants to provide sufficient variability and, therefore, were dropped, which reduced the total number of cases in the study to 122.

A multiple logistic regression analysis was conducted to determine what best explained which homicide cases resulted in a death-eligible charge, the dependant variable. In a multiple regression analysis, the effect of extralegal variables such as race or ethnicity of the defendant or victim can be evaluated while holding

constant other potentially important factors such as evidence or heinousness of the crime.

## Analysis and discussion

Sample characteristics are presented in Table 1. Most victims in San Joaquin County were White. Forty-five percent of the victims were White. Hispanics constituted the second largest group of victims with 28 percent of all cases. African American victims made up 23 percent of the total. The smallest group was Asian, accounting for just 6 percent of the sample. Victims were more likely to have been male in the study. Seventy-three percent of victims were men, whereas 27 percent were women.

Two-thirds of all defendants were White or Hispanic. Thirty-four percent of defendants were White, and 33 percent were Hispanic. Twenty-five percent of defendants were African American, while just 7 percent were Asian American. These defendants were accused of committing a contemporaneous felony in 26 percent of the cases.

Table 2 shows that twenty percent of all cases resulted in a death-eligible charge. It was expected that murders committed during the commission of a contemporaneous felony such as burglary or robbery led to a death-eligible charge since this is one of the aggravating factors that warrant a death-eligible charge. In cases where there was a contemporaneous felony committed, defendants in 59 percent of the cases received a death-eligible charge. In 94 percent of the cases in which there were no additional felonies committed, no death-eligible charges were filed.

Table 1  
Sample characteristics ( $N = 122$ )

<i>Victim's race</i>		
White	45%	(54)
Hispanic	28%	(34)
African American	23%	(27)
Asian American	6%	(7)
<i>Victim's sex</i>		
Female	27%	(33)
Male	73%	(89)
<i>Defendant's race</i>		
White	34%	(42)
Hispanic	33%	(41)
African American	25%	(31)
Asian American	7%	(8)
<i>Contemporaneous felony</i>		
Yes	26%	(32)
No	74%	(90)

Table 2  
Death-eligible charges made by case characteristics ( $N=122$ )

	Death-eligible charge made		Death-eligible charge not made	
All cases	20%	(24)	80%	(98)
<i>Contemporaneous felony</i>				
Involved	59%	(19)	41%	(13)
Not involved	6%	(5)	94%	(85)
<i>Victim's race</i>				
White	30%	(16)	70%	(38)
Hispanic	6%	(2)	94%	(32)
African American	9%	(5)	81%	(22)
Asian American	17%	(1)	83%	(6)
<i>Victim's sex</i>				
Female	48%	(16)	52%	(17)
Male	9%	(8)	91%	(81)
<i>Defendant's race</i>				
White	26%	(11)	74%	(31)
Hispanic	10%	(4)	90%	(37)
African American	29%	(9)	71%	(22)
Asian American	0%	(0)	100%	(8)

Table 2 also shows that White victim cases netted the most death-eligible charges. While 30 percent of White victim cases yielded a death-eligible charge, only 6 percent of Hispanic victim cases and 9 percent of African American victim cases led to a death-eligible charge. Defendants in 17 percent of Asian American victim cases faced a death-eligible charge, however, this was just a single murder case. Defendants were also more likely to face a death-eligible charge if the victim was female. In 48 percent of such cases, defendants were held to answer to a death-eligible charge, while defendants in just 9 percent of male-victim cases did.

Previous research suggested that the race of the defendant sometimes played a role in the charging outcome. A death-eligible charge was never levied against Asian American defendants. Death-eligible charges were brought up against 10 percent of Hispanic defendants. Black defendant cases had the highest rate of death-eligible charges with 29 percent, while White defendant cases had the second highest rate with 26 percent.

The bivariate relations presented in Table 2 indicated that there was a link between victim and defendant characteristics and the likelihood of being charged with capital homicide. Female and White victim cases and cases involving the commission of a contemporaneous felony, in particular, appeared to have greater proportions of death-eligible charges. Of particular legal concern was if there

were consistent and significant racial or gender differences in death-eligible charging. Did the commission of a contemporaneous felony or some other legal factor explain the observed association between race or gender and death-eligible charging? The only way to determine the relationship systematically and fully was with multivariate logistic modeling. Using a generalized linear model, logistic regression equations with the odds of being charged with capital homicide were estimated. Table 3 presents the results of a logistic regression model.

Table 3 illustrates the race-of-victim effects. In a case where the victim was Hispanic or African American, the defendant was less likely to be charged with a capital homicide than if the victim was White or Asian, the reference group in this regression model.<sup>14</sup> The odds of being charged with capital homicide for defendants in African American victim cases were one-fifth the likelihood for defendants in White or Asian victim cases, holding constant the other variables in the model. Defendants in Hispanic victim cases had an even smaller likelihood of being charged with capital homicide. The odds for those defendants were one-twentieth the odds that defendants in White or Asian American victim cases faced. The coefficients for variables “victim African American” and “victim Hispanic” were marginally statistically significant at a p-value of 0.1. The coefficient for the variable “victim Hispanic” barely missed the cut-off for statistical significance at the 0.05 level (t-value of 1.943).<sup>15</sup> Given the small sample size, the failure to meet statistical significance at the 0.05 level was not surprising. Despite the marginal statistical significance, the overall story told by this model was that death-eligible charging varied given the race of the victim. Hispanic victims were treated more like African American victims than White victims, receiving “less law.”

Aside from race-of-victim effects, another victim effect was found. Strong gender effects were noted.

Table 3  
Defendant's odds of receiving death-eligible charge ( $N=120$ )

Variables	Coefficient	Standard error	Odds multiplier
(Intercept)	-1.633**	0.804	-
Victim Hispanic	-2.930*	1.508	0.053
Victim African American	-1.622*	1.294	0.197
Victim male	-3.787**	1.207	0.023
Contemporaneous felony committed	4.603**	1.277	99.748
Fingerprint found on weapon	3.532**	1.550	34.192
Murder planned	2.189**	0.980	8.926

\* p-value = .1.

\*\* p-value = .05.

Defendants in male victim cases were forty-three times less likely to face a death-eligible charge than those accused of killing a woman.

Consistent with previous research, no significant race-of-defendant effect remained once the race of the victim and commission of a contemporaneous felony were controlled. Other studies found important victim/defendant racial interaction effects. Paternoster et al. (2003), for example, found that African American defendants who killed White victims faced a higher probability of receiving a death-eligible charge than White defendants accused of killing White victims. This study examined these racial interaction terms, as well as the gender make-up of the victim/defendant dyads. Analysis was conducted to determine whether male defendants who killed female victims faced a higher likelihood of a death-eligible charge. Models with interaction terms were evaluated, yet given the relatively small sample size, the results were unstable and insignificant. These interaction terms were, therefore, dropped.

One possible explanation for the racial and gender effects was whether or not the murder involved a contemporaneous felony, such as rape, kidnapping, burglary, or robbery. Perhaps most of the White or female victim cases included another felony. Murder in the commission of a contemporaneous felony significantly raised defendants' chances of being charged with capital murder. The odds were nearly one hundred times larger for defendants who committed a contemporaneous felony during the murder than for defendants who did not.<sup>16</sup> This, again, was predicted since the commission of a contemporaneous felony was a possible special circumstance that could justify a death-eligible charge, although not all cases involving a contemporaneous felony resulted in a death-eligible charge. The racial and gender findings, nevertheless, could not be explained away by this variable.

Other possible legal factors included the strength or gravity of the case, which could have been indicated by whether the defendant's fingerprint was found on the murder weapon or whether the murder was planned. The defendant's fingerprints discovered on the murder weapon could have suggested strong weight of evidence, thereby boosting the prosecution's side. A planned murder was an aggravating factor. Both case characteristics could have provided plausible, legal justifications for the racial and gender outcomes if indeed most of the White or female victim cases involved premeditation or had greater or stronger evidence. Defendants had over thirty-four times larger odd of receiving a capital homicide charge in cases where their fingerprints were

found on the murder weapon. If the murder was premeditated, the defendant faced nearly nine times greater chance of receiving a death-eligible charge. These variables were statistically significant and including them into the model improved the fit of the data, but they could not erase the racial and gender effects.

Other logistic regression models were run with various configurations of variables noted above and countless others. They included the defendant's prior record, various indicators of heinousness or severity of the crime such as the number of victims, the nature of the relationship between the defendant and victim, and method of killing, and other variables measuring the weight of evidence, including incriminating statements. The goal was to see if, after controlling for alternative legal explanations, evidence of racial or gender bias remained in the charging practices of the San Joaquin County's District Attorney's Office. Many of the variables did not substantially improve the fit, nor were their coefficients statistically significant. Most importantly, they could not erase the racial or gender outcomes.

An asymptotic log-likelihood ratio test was performed, comparing the residual deviance of the model in Table 3 to the residual deviance of the model minus the race-of-victim variables. The residual deviance of the model was subtracted from the residual deviance of the same model without the variables victim Hispanic and victim African-American. Looking at a chi-square distribution, the difference of the two residual deviances corresponded to a p-value of 0.05, suggesting that the model with victim racial variables provided a better fit of the data and accounted for the variability more fully than the model minus the racial variables.

## Conclusion

The findings from this study showed that a pattern of racial and gender discrimination existed in death-eligible charging practices in San Joaquin County, California from 1977 through 1986, immediately following reforms instituted by the state. The results replicated previous findings, discovering that defendants in White victim cases (and perhaps to some extent Asian American victim cases) faced much greater odds of being charged with a death-eligible offense than did defendants in Black victim cases. This investigation also permitted Hispanic/White comparisons. Defendants in White victim cases faced greater odds of being charged with capital homicide than defendants in Hispanic victim cases.

Aside from these race-of-victim effects, this research also found that killing a woman versus a man

increased a defendant's odds of facing a capital homicide charge. Every attempt was made to find any plausible legal explanation that could "explain away" these racial and gender results. The commission of a contemporaneous felony, having planned the murder, or having left fingerprint(s) on the murder weapon raised a defendant's chances of facing a death-eligible charge. These and additional variables such as the relationship between the defendant and victim, weapon(s) used, and whether the defendant had a prior serious record, however, could not eliminate the racial and gender outcomes.

Critics may still argue that more information or other possible explanatory variables may have explained the findings. They may suggest that missing data and/or omitted variables could have explained away the racial and gender effects. The depth of the data (from two sources which provided for cross-references) and very low missing values, however, illustrate the strengths of the inquiry. The findings of this investigation also were consistent with previous research. There were limitations to this study nevertheless. Most significantly, the examination was not longitudinal and did not follow the cases through the various steps of the death penalty system. There were critically important steps that proceeded the charging phase at the Superior Court level and others that followed. How and which defendants were charged in the early phases and which death-eligible charges "stuck" are crucial factors that ought to be analyzed when evaluating a death penalty system. Despite these shortcomings, this study offered new and important findings related to how Hispanics fared in the death penalty system. The results lend support to the claim that Hispanics are a racialized minority group in this country and face discrimination like African Americans do. Current immigration and demographic trends may indicate greater social integration, including intermarriage with Whites, but Hispanics suffered from racial bias in the criminal justice system in San Joaquin County from 1977 through 1986. Hispanic victim cases received "less law" than White victim cases. This article demonstrates that future studies of Hispanic social mobility and integration ought to consider their treatment in the criminal justice system.<sup>17</sup>

In addition to these sociological insights, evidence of racial variation in death-eligible charging raised two substantial legal concerns. First, the procedural reforms that the Supreme Court advocated in *Furman* may not have provided enough safeguards against discrimination. In the 1976 Supreme Court death penalty decisions, the Court believed that states' statutory reforms would prevent wide discretionary practices by the prosecutor

that could undermine the death penalty system. In the *Gregg* decision, the Court emphasized that the prosecutor's discretion to charge defendants of lesser charges would not run the risk of creating an unconstitutionally arbitrary death penalty system. As this study suggested, however, prosecutorial discretion produced a biased system as nonlegal, impermissible factors such as race influenced the charging practices of the death penalty process.

There was a second, related legal concern raised by this study. As discussed earlier, in *Gregg*, Justice White questioned whether the Georgia Supreme Court could fairly consider death penalty appeals on claims of comparative excessiveness if there were cases that escaped a death sentence by being charged lesser offenses. He believed that it was unlikely that the comparative-proportionality review process could be tainted in such a manner. This study, however, highlighted how the system of review and the death penalty system as a whole in California were affected by discretionary charging practices. Racially biased charging practices contaminated the pool to which the review referred for evaluation. The review itself, therefore, might have failed to prevent comparative excessiveness and therefore unconstitutionally arbitrary outcomes.

This study drew attention to the constitutionality as well as fairness of the death penalty system.<sup>18</sup> These legal, and some may argue moral, concerns have been raised before. The difference here was that these issues did not simply involve African Americans and Whites, but Hispanics as well. The large number of Hispanics from a county such as San Joaquin County, California, where the important racial and ethnic distinction is Hispanic/non-Hispanic White, not only Black/White, provided an opportunity to examine racial and ethnic discrimination in charging practices beyond the usual Black/White investigations. Very critically, the patterns of discrimination in charging practices in this and other studies illustrated the value and worth attributed to some victims but not to others. The findings of this research highlighted the criticisms that the death penalty system is biased. Whether it is in or out of the political and media spotlight, this article demonstrates the need for continued research and discussions over the role of the death penalty in the criminal justice system.

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## Appendix A. List of aggravating factors or “special circumstances

### California Penal Code §190.2 (2003).

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

- (1) The murder was intentional and carried out for financial gain.
- (2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.
- (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.
- (4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.
- (5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.
- (6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.
- (7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.
- (8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.
- (9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.
- (10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, “juvenile proceeding” means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.
- (11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor’s office in this or any other state, or of a federal prosecutor’s office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.
- (12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.
- (13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.
- (14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase “especially heinous, atrocious, or cruel, manifesting exceptional

- depravity” means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.
- (15) The defendant intentionally killed the victim by means of lying in wait.
- (16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.
- (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:
- (A) Robbery in violation of Section 211 or 212.5.
  - (B) Kidnapping in violation of Section 207, 209, or 209.5.
  - (C) Rape in violation of Section 261.
  - (D) Sodomy in violation of Section 286.
  - (E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.
  - (F) Oral copulation in violation of Section 288a.
  - (G) Burglary in the first or second degree in violation of Section 460.
  - (H) Arson in violation of subdivision (b) of Section 451.
  - (I) Train wrecking in violation of Section 219.
  - (J) Mayhem in violation of Section 203.
  - (K) Rape by instrument in violation of Section 289.
  - (L) Carjacking, as defined in Section 215.
  - (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.
- (18) The murder was intentional and involved the infliction of torture.
- (19) The defendant intentionally killed the victim by the administration of poison.
- (20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.
- (21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, “motor vehicle” means

any vehicle as defined in Section 415 of the Vehicle Code.

- (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

## Notes

1. The term “Hispanic” is used over “Latino.” The latter term usually refers to individuals who claim a Central or South American origin, while the former includes all individuals who claim a Spanish or Spanish-speaking origin. Which term is utilized can generate dissatisfaction for some who prefer one or the other (or even another term like “Chicano”). For sake of clarity and consistency, “Hispanic” was chosen in part, because this was the official government term and category for the period studied. See [note 3](#).

2. When not specified, “White” refers to non-Hispanic Whites. Terms “Black” and “African American” are used interchangeably as are “Asian” and “Asian American.”

3. Census and other government statistics treat “Hispanic” as an ethnicity. An individual who identifies as a Hispanic can claim a White or Black racial identity. Despite the official counting of the Hispanic identity as an ethnicity, some people who claim to be

Hispanics and social scientists argue that the category has become racialized, which goes hand in hand with the argument that Hispanics face racial discrimination (Barrera, 1979; Cornell & Hartmann, 1998; DeGenova & Ramos-Zayas, 2003).

4. In 1976, the Supreme Court approved the death penalty systems of Georgia, Florida, and Texas respectively in its decisions in *Gregg v. Georgia* (1976), *Jurek v. Texas* (1976), and *Proffitt v. Florida* (1976). These decisions are collectively called the *Gregg* decision.

5. The terms “death-eligible charge” and “charged with capital homicide” are used interchangeably.

6. The study was conducted for an actual death penalty appeal case. The end date for the study was determined by the case details.

7. The 1980 U.S. Census counted 347,342 residents in San Joaquin County. Seventy-six percent (264,038) of the population was White. African Americans made up 5 percent (19,176) of the population. Nineteen percent (66,565) claimed Spanish origin. Eighty-nine percent (57,225) of those claiming Spanish origins were of Mexican descent. Thus, 16 percent of the total population was of Mexican descent. Much smaller numbers of Puerto Ricans, Cubans, and other Spanish made up the remaining total.

8. For greater theoretical development and application of Black's theory of law, see Borg and Parker (2001) and Litwin (2004).

9. See Appendix A for the list of aggravating factors or “special circumstances.”

10. Homicides that were charged as manslaughter cases by the time they reached Superior Court may have resulted from earlier bias. Some studies examined the charging process from the initial stage up through the trial and sentencing levels (Paternoster et al., 2003; Radelet & Pierce, 1985). Data and other limitations precluded such investigations in this study. There were only four cases, for example, that resulted in a death penalty in the sample, which precluded the investigation of the sentencing phase.

11. The National Research Council Panel on Sentencing in 1983 recommended a longitudinal study, which explored the various stages of the death penalty system (Baldus et al., 1990, p. 45). The panel argued that a longitudinal design would avoid the risk associated with overlooking discrimination and arbitrariness at earlier stages in the death penalty process.

12. Contemporaneous felonies include kidnapping, rape, robbery, and burglary. See Appendix A, number 17.

13. Variables were coded as binary outcomes. Four coders independently coded the data and had a match rate of 95 percent.

14. With “victim Hispanic” and “victim African American” variables in the model, the reference category included Whites and Asian Americans. A model with victims of the three minority groups (African American, Asian American, and Hispanic) and with the reference group “victim White” was run but not presented. There were very few Asian American victim cases; they numbered seven. To include all three minority groups in the model made the estimates very unstable. Definitive conclusions about Asian American victim cases could not be made given their small number in the sample. Despite lasting claims about Asian Americans’ “forever foreign” characteristic, as a racial group, they occupy a more favorable, if still somewhat ambiguous, position versus other minority groups such as African Americans and Hispanics in the U.S. (Schuman, Steeh, & Bobo, 1985; Takaki, 1998; Tuan, 1998).

15. A t-value of 1.96 was necessary for a coefficient to reach statistical significance at the 0.05 level.

16. Robbery, and to a lesser extent, burglary, were the most common felonies in cases involving a contemporaneous felony.

17. A careful study of Hispanics must also consider diversity within the categorical group. A very wide range of educational

attainment, occupational status, and immigrant status exists amongst individuals who claim to be Hispanic. This study did not have such detailed information.

18. Unfortunately, the Supreme Court attacked statistical findings such as those found in this study. In *McCleskey v. Kemp* (1987), the Supreme Court argued that statistical evidence does not necessarily challenge the constitutionality of the death penalty with regards to the Eighth Amendment. The Court argued that such evidence can only demonstrate *risk* and does not establish *proof*.

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