

LOCAL HISTORY, PRACTICE, AND  
STATISTICS: A STUDY ON THE INFLUENCE  
OF RACE ON THE ADMINISTRATION OF  
CAPITAL PUNISHMENT IN HAMILTON  
COUNTY, OHIO (JANUARY 1992–AUGUST  
2017)

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ABSTRACT

Anthony Amsterdam urged litigators and scholars to focus on individual prosecutors' offices or counties and to identify "a set of local institutions, conventions, and practices which are manifestly the residues of classic Southern apartheid"; to "conduct analyses of the impact of race in the sentencing patterns . . . in those specific counties or venues"; and to "investigate, analyze, and prepare evidence of the legacy of apartheid embedded in the counties' political, economic, and social life, particularly as it bears on law enforcement, prosecution, and courthouse customs." The goal, Amsterdam says, is "to build a case not solely on statistical evidence of discrimination but to supplement it with evidence of anecdotes and local custom."

Hamilton County, Ohio, lies technically just north of the South, but it is close. Its history reflects the emblematic segregation and overt racism associated with the South. This paper documents this history. It also remains in the top 2% of counties producing a majority of

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executions nationally. This history and ongoing use of the death penalty made it an ideal candidate for the kind of hyper-localized inquiry that Amsterdam suggested.

This article reports a study of all cases charged with aggravated murder in Hamilton County from January 1992 to August 2017, including controlled analyses on three outcome measures. The model for the prosecutor's decision to charge a case capitally showed, after taking into account potentially relevant race-neutral factors, that a case with at least one white victim faced odds of being charged capitally that were 4.54 times the odds of a similarly situated case with no white victims. The model of the decision to impose a death sentence overall (combining the charging and sentencing decisions) found that a black defendant who killed at least one white victim faced odds of receiving a death sentence that were 3.79 times those of all other similarly situated defendants. Finally, in a model of the death sentencing decisions limited to death-specified cases (that is, the cases in which the state sought death), a black defendant with at least one white victim faced odds of receiving a death sentence that were 5.33 higher than all other cases. These findings are both theoretically and statistically significant ( $p < .01$ ).

The local practice and history, bolstered by the statistical analysis, makes a strong case that race has influenced the administration of capital punishment in Hamilton County, Ohio.

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## INTRODUCTION

Over a decade ago, Professor Anthony Amsterdam urged litigators and scholars to focus on individual prosecutors' offices or counties and identify "a set of local institutions, conventions, and practices which are manifestly the residues of classic Southern apartheid"; to "conduct analyses of the impact of race in the sentencing patterns . . . in those specific counties or venues"; and to "investigate, analyze, and prepare evidence of the legacy of apartheid embedded in the counties' political, economic, and social life, particularly as it bears on law enforcement, prosecution, and courthouse customs."<sup>1</sup> The goal, Amsterdam said, is to build a case not solely on statistical evidence of discrimination, but to supplement it with anecdotes and evidence of local custom.<sup>2</sup>

Hamilton County, Ohio is not technically in the South, but it is close. Its history of segregation and overt racism and its liberal use of the death penalty make it an ideal candidate for the kind of hyper-localized inquiry that might convince the Supreme Court to address the role of race in the death penalty, as Amsterdam hoped the approach would, ultimately, accomplish.<sup>3</sup>

We conducted a study of all the cases in which individuals were charged with aggravated murder in Hamilton County between January 1992 and August 2017, including controlled analyses of three different outcomes: (1) the prosecutor's decision to charge a case capitally, (2) the jury's decision to impose a death sentence, and (3) the overall odds that a defendant who is legally eligible for the death penalty will receive a death sentence. After taking into account potentially relevant race-neutral factors, we found that a defendant charged with killing at least one white victim faced odds that the prosecutor would charge the case capitally 4.54 times higher than those of a similarly situated defendant with no white victims. The statistical model of the decision to impose a death sentence overall (combining the charging and sentencing decisions) found that a black defendant who killed at least one white victim faced odds of receiving

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1. Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 49 (2007).

2. *Id.* at 50.

3. See *infra* Part III; see also RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 29 (2013) (listing Hamilton County, Ohio as a part of the 2% of U.S. counties that are responsible for 56% of death penalty executions).

a death sentence that were 3.79 times those of all other similarly situated defendants. Finally, in a statistical model of death sentencing decisions limited to the cases in which the state sought death, a black defendant with at least one white victim faced odds of receiving a death sentence that were 5.33 times higher than in all other cases. Each of these findings was theoretically and statistically significant ( $p < .01$ ).

When combined with local practice and history, this statistical analysis presents a strong case that race has influenced the administration of capital punishment in Hamilton County, Ohio. In Part I, this article presents key historical information on Hamilton County, and in Part II, it reviews previous capital charging and sentencing studies that focused on Ohio. Part III then documents the design and methodology of this study. Part IV describes the analysis and results of this study concerning the influence of race on capital charging and sentencing decisions in cases involving charges of aggravated murder<sup>4</sup> in Hamilton County, Ohio between January 1992 and August 2017. If similar studies are replicated in other localities, as Amsterdam suggested, more evidence can encourage the Supreme Court to consider racism in the administration of capital penalty.

### I. RACE IN HAMILTON COUNTY, OHIO

Residents of Hamilton County have not been immune from racial strife and discrimination. From 1877 to 1950, at least six African-Americans were lynched in the Cincinnati area.<sup>5</sup> As in much of the country, racial segregation among neighborhoods was prevalent throughout Cincinnati.<sup>6</sup> In 1958, an entire black neighborhood was forcibly removed by the city for “urban renewal” in Cincinnati’s West

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4. See OHIO REV. CODE ANN. § 2903.01 (2002).

5. Mark Curnutte, *Six Blacks Lynched Near Cincinnati Among 4,400 Named at a New Memorial That Opens Thursday*, CINCINNATI (Apr. 25, 2018), <https://www.cincinnati.com/story/news/2018/04/25/six-blacks-lynched-near-cincinnati-among-4-400-named-new-national-memorial-peace-justice/513025002/> [<https://perma.cc/W39Y-HRVM>]; see also EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR SUPPLEMENT: LYNCHINGS BY COUNTY 44 (3d ed. 2018) (explaining that outside of Southern states, lynching still took place in response to “racialized economic competition, unproven allegations of crime, and violations of the racial order”).

6. Michelle Dillingham, *Opinion: A Change to Foster Inclusion, Diversity*, CINCINNATI ENQUIRER, Jan. 5, 2015, at A6.

End.<sup>7</sup> Many Cincinnati residents were still fighting for integration of schools into the 1990s.<sup>8</sup>

Racial tensions in Cincinnati continued into the civil rights era. The NAACP Legal Defense and Educational Fund described two violent events in the late 1960s in Avondale, a historically African-American neighborhood in Cincinnati:

The first major event stemmed from “[t]he arrest of a black man for loitering near the Abraham Lincoln statue at Rockdale Avenue and Reading Road in June 1967,” which led to “widespread civil unrest. Seven hundred Ohio National Guard officers were called in to restore order. One person was killed, 63 injured and 404 people were arrested.” The second uprising occurred after the assassination of Rev. Martin Luther King in April 1968, when “Cincinnati was among more than 100 cities that experienced urban violence. Again, the Ohio National Guard was summoned to Avondale where two people were killed and at least 220 were injured. Police arrested 260 people during two nights of violence.”<sup>9</sup>

The NAACP Legal Defense and Educational Fund also described the impact of the 2001 race riots in Cincinnati:

[T]hree days of violence . . . rocked Cincinnati in early April 2001 after police officer Thomas Roach fatally shot Timothy Thomas, an unarmed African-American teenager, following Officer Roach’s attempt to arrest Mr. Thomas for outstanding traffic violations. Residents took to the streets to express their concerns

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7. Alyssa Konermann, *25,737 People Lived in Kenyon-Barr When the City Razed It to the Ground*, CINCINNATI MAG. (Feb. 10, 2017), <http://www.cincinnati.com/citywiseblog/lost-city-kenyon-barr-queensgate/> [https://perma.cc/D357-JXDK].

8. See, e.g., *Bronson v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 525 F.2d 344, 349 (6th Cir. 1975) (explaining “there is a strong public policy against the continuance of racial segregation in public schools”); *Bronson v. Bd. of Educ. of City Sch. Dist. of Cincinnati*, 604 F. Supp. 68, 75 (S.D. Ohio 1984) (discussing a settlement agreement that will “over the next seven years, continue to reduce racial isolation” in Cincinnati schools); *Deal v. Cincinnati Bd. of Educ.*, 244 F. Supp. 572, 580 (S.D. Ohio 1965), *aff’d*, 369 F.2d 55 (6th Cir. 1966) (finding that “the racial composition of each school is simply a result of the racial composition of the neighborhoods which they serve”).

9. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. at 4, *State v. Bates*, No. 2016-1783 (Ohio Feb. 13, 2018) (citing John Kiesewetter, *Civil Unrest Woven into City’s History*, CINCINNATI ENQUIRER, July 15, 2001, at E6).

over Mr. Thomas's murder; the fifteenth death of a Black male at the hands of law enforcement in a six-year period. The subsequent protests gained international attention. On the third day of protest, then Mayor Charles Luken declared a state of emergency – announcing a citywide curfew, sending police outfitted in riot gear and ordering “only people going to and from work be allowed on the streets. Others should stay in their homes and pray.” In the end, law enforcement arrested 837 people, dozens were injured, and the city experienced an estimated \$3.6 million in infrastructural damages.<sup>10</sup>

The excessive use of force by the Cincinnati Police Department during these demonstrations led the U.S. Department of Justice Civil Rights Division (“DOJ”) to investigate. The police department ultimately entered into an extensive consent decree with the DOJ beginning in April 2002.<sup>11</sup> The consent decree required the police department to substantially reform its use of force policy, including retraining on appropriate use of force.<sup>12</sup> It also required the police department to implement monitoring, documentation, and citizen complaint processes.<sup>13</sup>

Many Cincinnati neighborhoods remain segregated, and socioeconomic disparities persist among white and black residents in the county.<sup>14</sup> The lack of affordable housing in certain neighborhoods further entrenches segregation.<sup>15</sup> As one journalist explained, “many of the social and economic reasons for the 1960s Avondale riots parallel the three-day April [2001] riots . . . ‘The underlying

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10. *Id.* (internal citations omitted).

11. Memorandum of Agreement between the U.S. Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department, at 6 (Apr. 12, 2002), <https://www.cincinnati-oh.gov/police/linkservid/EA1A2C00-DCB5-4212-8628197B6C923141/showMeta/0/> [https://perma.cc/VG27-VVJ5].

12. *Id.* at 9–13.

13. *Id.* at 30–35. The U.S. Department of Justice announced the termination of the decree in April 2007 after Cincinnati undertook extensive reforms. Letter from Shanetta Y. Cutlar, Chief, Special Litigation Section, Civil Rights Division, U.S. Department of Justice to the Honorable J. Rita McNeil, City Solicitor, Cincinnati, Ohio (Apr. 12, 2007), <https://www.cincinnati-oh.gov/police/linkservid/0385D749-855F-43F3-A91C673DF428F664/showMeta/0/> [https://perma.cc/8RAL-M353].

14. MICHAEL MALONEY & CHRISTOPHER AUFFREY, *THE SOCIAL AREAS OF CINCINNATI: AN ANALYSIS OF SOCIAL NEEDS, PATTERNS FOR FIVE CENSUS DECADES* (5th ed. 2013).

15. Dillingham, *supra* note 6.

issues—unemployment, housing and educational opportunities—all of those are still here today.”<sup>16</sup>

Against this backdrop of racial inequality and strife, many are concerned that racism has infected Ohio’s criminal case processing, including capital punishment. Hamilton County produces an extraordinarily high number of death sentences. In fact, Hamilton County is among the 2% of counties that produce a majority of executions countrywide.<sup>17</sup> The American Bar Association conducted a review of Ohio’s death sentencing system and, in 2007, made a number of recommendations to improve it, including calling for legislation that would allow defendants to raise racial disparity claims based on a pattern of racially disparate outcomes.<sup>18</sup> Similarly, in 2014, a statewide “blue-ribbon” task force composed of a broad cross-section of Ohio leaders, scholars, and lawyers was formed to assess Ohio’s use of capital punishment. The task force called on Ohio lawmakers to “enact legislation allowing for racial disparity claims to be raised and developed through a Racial Justice Act”<sup>19</sup> and to ensure “a more representative jury pool.”<sup>20</sup>

Hamilton County offers an interesting opportunity to examine the role of race in charging and sentencing decisions for another reason. It has been under the leadership of the same Prosecuting Attorney for twenty-two of the past twenty-eight years.<sup>21</sup> The office has not been free of criticism about its treatment of racial issues during this period.<sup>22</sup> At least fifty appellate decisions address defendants’

16. John Kiesewetter, *Civil Unrest Woven into City’s History*, CINCINNATI ENQUIRER, July 15, 2001, at E6.

17. DIETER, *supra* note 3, at 27.

18. AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT 362 (2007), [https://www.americanbar.org/groups/crsj/projects/death\\_penalty\\_due\\_process\\_review\\_project/state\\_death\\_penalty\\_assessments/ohio/](https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments/ohio/) [<https://perma.cc/XP8A-U3A9>].

19. JOINT TASK FORCE TO REVIEW THE ADMIN. OF OHIO’S DEATH PENALTY, FINAL REPORT AND RECOMMENDATIONS 14 (Apr. 2014), <http://www.sc.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf/> [<https://perma.cc/W2QV-DWHE>]. Recommendation 35 passed with a vote of 13-1. *Id.*

20. *Id.* Recommendation 36 passed with a vote of 12-2. *Id.*

21. See *Biography of Joseph T. Deters*, HAMILTON COUNTY PROSECUTING ATT’Y’S OFF., <https://hcpros.org/about-the-prosecuting-attorneys-office/biography-of-joseph-t-deters/> [<https://perma.cc/4WF2-Z7EV>].

22. See Dave Zirin, *Racism 101: Criminal Charges Considered After College Hoops Brawl*, NATION (Dec. 14, 2011), <https://www.thenation.com/article/racism-101-criminal-charges-considered-after-college-hoops-brawl/> [<https://perma.cc/8ESC-RLLF>] (discussing criticisms of the Hamilton County prosecutor as engaging



claims that a Hamilton County prosecutor relied on race in exercising peremptory strikes, in violation of *Batson v. Kentucky*.<sup>23</sup> The reviewing court granted relief in only one of these cases, finding that the prosecutor offered a sufficiently race-neutral reason in the rest.<sup>24</sup>

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in racially discriminatory practices); Brad Underwood, *Cincinnati NAACP on Deters' Decision: "The Pursuit of Justice Was Abandoned Today."*, LOCAL12 (July 18, 2017), <https://local12.com/news/local/cincinnati-naACP-on-deters-decision-the-pursuit-of-justice-was-abandoned-today> [<https://perma.cc/TB3Q-VBR4>] (discussing Deters' decision not to retry an officer who killed a black driver during a traffic stop).

23. Based on authors' Westlaw search for "Joseph T. Deters," "Batson," and "Court of Appeals of Ohio, First District, Hamilton County." See also *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids prosecutors from exercising peremptory strikes based solely on race).

24. The appellate court denied relief in all but one of these cases, where the Hamilton County prosecutor relied explicitly on the prospective juror's statements about the juror's own experience of racial discrimination as the reason for the strike. *State v. Richardson*, 2005-Ohio-530, 2005 WL 323684, at ¶ 2 (Ohio Ct. App. Feb. 11, 2005) ("[T]he reason . . . that as a possible victim of discrimination because of race the juror might favor the defendant—was based on race itself. This is the very evil outlawed by the . . . Supreme Court in *Batson*. Therefore, we must reverse Richardson's convictions and remand his case for a new trial."). The reviewing courts affirmed the trial courts' decisions in the other cases, often for proffered reasons that, while facially neutral, are strongly associated with race. See *State v. Black*, 2017-Ohio-5611, 2017 WL 2829307, at ¶ 2 (Ohio Ct. App. Jun. 23, 2017) (high-crime neighborhood); *State v. Jordan*, 167 Ohio App. 3d 157, 166, 2006-Ohio-2759, 854 N.E.2d 520, at ¶ 31 (Ohio Ct. App. 2006) (use of criminal databases during voir dire to check the records of three of the four African-American jurors in the venire); *State v. Martin*, 2006-Ohio-5263, 2006 WL 2846289, at ¶ 7 (Ohio Ct. App. Oct. 6, 2006) (prior involvement with drugs by family members of prospective jurors); *State v. Reaves*, 130 Ohio App. 3d 776, 788, 721 N.E.2d 424, 432 (Ohio Ct. App. 1998) (son was prosecuted for a felony offense within the past four years and remained incarcerated); *State v. Roberts*, 2005-Ohio-3034, 2005 WL 1413357, at ¶ 13 (Ohio Ct. App. Jun. 17, 2005) (venire member's belief that there was different treatment under the law based upon a person's race and socioeconomic background); *State v. Robertson*, 2015-Ohio-773, 2015 WL 1021425, at ¶ 12 (Ohio Ct. App. Mar. 6, 2015) (venire member's concern that some police officers abuse their power); *State v. Tibbs*, 2011-Ohio-6716, 2011 WL 6884802, at ¶ 24 (Ohio Ct. App. Dec. 28, 2011) (venire member was familiar with the neighborhood and potentially subject to pressure); *State v. Washington*, 2005-Ohio-1878, 2005 WL 927011, at ¶ 16 (Ohio Ct. App. Apr. 22, 2005) (knew several people who used marijuana); cf. Wash. R. Gen. Application GR 37(h) (Washington State rules on jury selection).

Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid

Therefore, due to its continuing history of racial segregation and tensions, prior investigations on the effects of racial considerations on capital punishment, and consistent leadership at the prosecutor's office, Hamilton County is a prime locality suited to study the effects of entrenched, systemic racism on the administration of criminal penalties, specifically the death penalty.

## II. RACE IN CAPITAL PUNISHMENT

The critical role that race plays in capital punishment has been consistently researched and reported over the past decades and across jurisdictions.<sup>25</sup> Most of these studies examine decisions that take place after the police investigation is complete and the underlying murder has been charged.<sup>26</sup> Scholars have documented the perverse symbiotic relationship between crime and race—where “crime is racialized (when we think of crime, we have African Americans in mind)” and “race is criminalized (when we think of African Americans, we have crime in mind).”<sup>27</sup> Race and crime are mutually constitutive. The prosecutorial charging decision marks the earliest decision analyzed in these studies. As such, these studies can only identify evidence of race discrimination from that point forward and in formal decisions.

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reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood . . .

*Id.*

25. See generally Barbara O'Brien, Catherine M. Grosso, George Woodworth, & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997 (2016) (concluding that, “despite ongoing protestations to the contrary, race plays a significant factor in charging and sentencing decisions”); see also Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT app. A (James Acker & Robert Bohm eds., 3d ed. 2014) (summarizing the empirical studies relating to death sentencing systems since 1990).

26. See, e.g., O'Brien et al., *supra* note 25 (assessing charging and sentencing decisions only).

27. Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 152 (2014) (reviewing the literature on race and crime).

Capital charging and sentencing studies remain largely consistent in finding that the influence of the defendant's race on capital charging and sentencing practices has diminished over the decades since *Furman v. Georgia*.<sup>28</sup> Studies in some jurisdictions have identified discrimination on the basis of the defendant's race, but studies finding that the race of defendants by itself influences charging and sentencing decisions are rare.<sup>29</sup> Rather than showing discrimination based on the race of the defendant, studies overwhelmingly demonstrate the importance of the race of the victim to capital charging and sentencing decisions.<sup>30</sup> Most studies find that defendants who killed at least one white victim are more likely to be charged with a capital crime and more likely to be sentenced to death than their counterparts who did not kill a white victim.<sup>31</sup>

Studies of capital punishment in Ohio parallel national trends. In 1961, a Legislative Service Commission in Ohio failed to find racial discrimination against black defendants facing the death penalty, but it noted that disproportionately more white than black death row prisoners had their sentences commuted.<sup>32</sup> In 1980, Rosina Maynard studied the cases of 105 individuals in Ohio who were sent to death row under the 1974 statute, and she reported that black defendants made up almost two-thirds of the death-sentenced prisoners, vastly exceeding their portion of the population (approximately 13%).<sup>33</sup> Moreover, while most black people were sentenced to death for killing a white victim, not a single white person had been sentenced to death in Ohio for killing a black victim during the study period.<sup>34</sup>

William Bowers and Glenn Pierce conducted the earliest post-*Furman* study using Supplementary Homicide Report ("SHR") data,

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28. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5-6 (1990) (concluding based on an evaluation synthesis of 28 capital charging and sentencing studies that the race of the victim influenced decisions at all stages of the criminal justice process); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 202-26 (2003) (reaching the same conclusion based on research conducted after 1990).

29. Grosso et al., *supra* note 25, at 538-39.

30. *See id.*

31. *Id.* at 537.

32. ANDREW WELSH-HUGGINS, NO WINNERS HERE TONIGHT 75 (2009) (citing OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 62, 75 (1961)).

33. *Id.* at 79 (citing ROSINA MAYNARD, OHIO'S OTHER LOTTERY SYSTEM: THE DEATH PENALTY (1980)).

34. *Id.*

and they supplemented it with additional data on cases resulting in a death sentence.<sup>35</sup> They assessed the overall probability that a case would result in a death sentence for 2193 cases between November 1, 1974, and December 31, 1977. The study included 101 cases that resulted in a death sentence, yielding an overall death-sentencing rate of 4.6%. This overall rate was not evenly distributed by race. Black defendants accused of killing at least one white victim received death sentences 25% of the time, white defendants with at least one white victim received death sentences 4.6% of the time, and black defendants who killed only black victims received death sentences 1.7% of the time. No white defendant who killed a black victim received a death sentence.

Marian Williams and Jefferson Holcomb conducted a similar study using SHR data that they supplemented with additional information about those homicides resulting in a death sentence.<sup>36</sup> Their study analyzed homicides between 1981 and 1994—a total of 5319 cases (after excluding cases with defendants under eighteen years of age). The sample included 185 death sentences, resulting in a 4% death-sentencing rate. Again, black defendants accused of killing at least one white victim faced the highest likelihood of receiving a death sentence (11%), followed by white defendants with at least one white victim (5%). Regardless of a defendant's race, defendants who were accused of killing only black victims faced a 2% chance of receiving the death sentence, whereas defendants accused of killing only white victims faced a 6% chance.<sup>37</sup> Williams and Holcomb also ran a logistic regression model on the variables available in the SHR data to analyze the influence of race. They found that defendants who had at least one white victim were 1.75 times more likely to receive a death sentence than similarly situated defendants without at least one white victim.<sup>38</sup>

Two similar SHR studies published in 2004 assessed the importance of victim gender and race in death sentencing outcomes in Ohio. First, Williams and Holcomb analyzed 5320 cases from 1981 to 1994 and showed that while cases with white female victims were 15%

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35. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, in *LEGAL HOMICIDE* 193 (W.J. Bowers, G.L. Pierce & J.F. McDevitt eds., 1984).

36. Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 *J. CRIM. JUST.* 207 (2001).

37. *Id.* at 214 tbl.2.

38. *Id.* at 215 tbl.4.

of the universe, these cases represented 35% of the death sentences.<sup>39</sup> The scholars prepared a series of logistic regressions demonstrating that cases with other victim groups, black female victims and all male victims, faced significantly lower odds of receiving a death sentence.<sup>40</sup> Second, Holcomb, Williams, and Stephen Demuth addressed this research question again using a similarly enhanced SHR database of Ohio homicides that expanded the data to 1997.<sup>41</sup> This project reached similar results and concluded “homicides with white female victims were more likely to result in a death sentence than others.”<sup>42</sup>

Glenn Pierce, Michael Radelet, and Raymond Paternoster conducted the most recent examination of race disparities in death sentencing in Ohio using the SHR data.<sup>43</sup> Their study examined homicides from January 1, 1981, through December 31, 2000, and included 7628 homicides and 238 death sentences.<sup>44</sup> This represents an overall death-sentencing rate of 3.1%, slightly lower than the rates reported in earlier studies. Once again, this research documented disparities in death sentencing outcomes by race of victim and defendant/victim combinations. Defendants suspected of killing at least one white victim resulted in death sentences in 5.4% of the cases, compared with all other defendants who received death sentences in 1.4% of the cases. Black defendants accused of killing at least one white victim received death sentences at the highest rate (9%) compared with white defendants who killed at least one white victim (4.5%) and any case involving a black victim, which ranged from 1.4 to 1.8%.<sup>45</sup> Logistic

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39. Marian R. Williams & Jefferson E. Holcomb, *The Interactive Effects of Victim Race and Gender on Death Sentence Disparity Findings*, 8 HOMICIDE STUD. 350, 360–66 (2004).

40. *Id.* at 367–68 tbls.4 & 5.

41. Jefferson E. Holcomb, Marian R. Williams & Stephen Demuth, *White Female Victims and Death Penalty Disparity Research*, 21 JUST. Q. 877, 898 (2004).

42. *Id.*

43. Glenn Pierce, Michael Radelet & Raymond Paternoster, *Racial and Geographic Disparities in Death Sentencing in Ohio 1981–2000*, in AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT (2007), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/ohio\\_appendix.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/ohio_appendix.pdf) [<https://perma.cc/8UA3-CHA5>]; see John Wooldredge, Timothy Griffin, Amy Thistlethwaite, & Fritz Rauschenberg, *Victim-Based Effects on Racially Disparate Sentencing in Ohio*, 8 J. EMPIRICAL LEG. STUD. 85 (2011), for a more recent study finding victim-based disparities in Ohio sentencing generally.

44. Pierce et al., *supra* note 43, at J–K.

45. *Id.* at 10, tbl.5. This study also analyzed the death sentencing rates by judicial districts and concluded that Hamilton County had the “unusually high rate of death sentencing” of 8.7%. *Id.* at 15.

regression analysis with limited controls found that white defendants accused of killing at least one white victim faced odds of receiving a death sentence that were 1.41 times higher than those of all other defendants, and that black defendants with at least one white victim faced odds of receiving a death sentence that were 1.12 times higher than all others.<sup>46</sup>

Reporter Andrew Welsh-Huggins and colleagues at the *Associated Press* collected case information and coded cases to examine racial patterns of death sentencing in Ohio.<sup>47</sup> They tracked the races of defendants and victims from 1936 capital indictments filed from 1981 through 2002.<sup>48</sup> Their results were consistent with what others have found, both nationally and in Ohio.<sup>49</sup> Capital defendants charged with killing a white victim were twice as likely to be sentenced to death than those who killed a black victim.<sup>50</sup> Like the earlier studies, this study was statewide. We are not aware of any existing study of a single county.

### III. STUDY DESIGN AND METHODOLOGY

We analyzed the role of race in charging and sentencing decisions in Hamilton County, Ohio for aggravated murders charged from 1992 through 2017. During all but six years (1999–2004) of that period, the prosecutor’s office was under the same leadership.<sup>51</sup>

#### A. Overview of Database Development

The database was developed with the assistance of the Office of the Federal Public Defender in the Southern District of Ohio (“FPD”). FPD compiled a list of all persons charged with aggravated murder between 1992 and 2017 via two public records requests to the Hamilton County Clerk of Courts.<sup>52</sup> This list defined the universe of

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46. *Id.* at tbl.11.

47. WELSH-HUGGINS, *supra* note 32, at 83; Andrew Welsh-Huggins, Frank Bass & Liz Sidoti, *Race, Geography Can Mean Difference Between Life, Death*, LINCOLN J. STAR (May 7, 2005), [https://journalstar.com/news/national/race-geography-can-mean-difference-between-life-death/article\\_3e71fef3-1d48-5f91-ab42-26e1790b3b1e.html](https://journalstar.com/news/national/race-geography-can-mean-difference-between-life-death/article_3e71fef3-1d48-5f91-ab42-26e1790b3b1e.html) [<https://perma.cc/DV6J-SAYM>].

48. WELSH-HUGGINS, *supra* note 32, at 80–81.

49. *See supra* note 25.

50. *Id.* at 82.

51. *See Biography of Joseph T. Deters, supra* note 21.

52. Ohio’s aggravated murder statute is codified at OHIO REV. CODE ANN. § 2903.01 (West 2019).

our study. The Clerk of Courts' spreadsheet provided defendant names and case numbers. We received additional information that the Ohio Public Defender's office had previously collected on capitally-indicted aggravated murder cases between 1996 and 2013. This included the indictment year, defendant name, case number, charges, whether or not the state sought a death sentence in the case by filing capital specifications, convictions, sentencing, and details about the victims.

FPD collected and coded this information for the remaining cases, as well as additional information about the demographics and economy of the defendant's home neighborhood and the neighborhood in which the crime occurred for each case. FPD staff and law student interns requested and reviewed the original indictments, the Clerk of the Courts' online case file information, case opinions, newspaper articles, a genealogy website, and any other available information to code the additional information and to prepare a summary of the facts of the crime. Five attorneys, one paralegal, two investigators, and six law students participated in this process. Staff and interns recorded the sources on which they relied for coding in a second spreadsheet. Attorneys at the FPD office supervised this coding.

FPD entered this information in a single Excel file. We reviewed the data and reformatted the spreadsheet into a machine-readable database.<sup>53</sup> We raised any mistakes or inconsistencies that came to their attention during this review with FPD for additional investigation and correction. In each instance, FPD located original source documents and provided documentation on the proper coding.

After reviewing the data, we proposed two coding projects to FPD to strengthen the information available for analysis. The first project involved identifying for each case the factual presence of the criteria for imposing death or imprisonment for a capital offense under Ohio law.<sup>54</sup> The second project involved reviewing the racial distribution of defendants of homicide charges other than aggravated murder in Hamilton County during the study period. We explain each project below.

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53. Reformatting involved separating grouped information into individual columns including details about charges, trial, convictions, sentencing, and defendant and victim demographics. For example, victim race, gender, and age had been entered in a single column. We created separate variables for each descriptor.

54. OHIO REV. CODE ANN. § 2929.04 (West 2002).

## B. Coding the Factual Presence of Capital Specifications

As noted, the first project identified in each case the factual presence of the criteria for imposing death or imprisonment for a capital offense codified in Ohio law. FPD trained new coders, including two attorneys, two law graduates, and two law students on the bases on which a prosecutor could seek a death sentence under the statutory specifications, how each has been applied in Ohio case law, and any interpretation of the specifications available in case law.<sup>55</sup>

We then instructed coders to read the factual summary included in the Excel spreadsheet and to identify precise facts demonstrating that a given specification is present in the case. Coders had permission to look at outside sources such as the Hamilton County Clerk of Courts website or news reports. Coders recorded source information for any news articles they consulted. The coder was instructed to code a specification present only if, given an opportunity, an Ohio appellate court would sustain a jury finding that the specification is present.

Two independent coders looked at the factual summary in each case to identify specifications. The coders were instructed not to consult with each other and, instead, to consult with attorneys at FPD with all questions. Double coding allowed FPD to identify and correct any coding inconsistencies, which increased the reliability of the coding. This project allowed us to create distinct variables noting the presence and frequency of each capital specification in each case.

## C. All Homicides Review Project

The second project sought to verify the distribution of homicides by race in Hamilton County. The study universe, as noted above, included all cases where defendants were charged with aggravated murder during the study period. Charging and sentencing studies typically seek to include every case that could be charged capitally, whether or not they were charged with the necessary

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55. The Ohio statute includes 10 statutory aggravators: (1) assassination of a political leader, (2) offense committed for hire, (3) offense committed to escape detection or punishment for another offense, (4) offense committed by a prisoner, (5) prior to the offense at hand, the offender was previously convicted of another murder, or the crime was committed during a course of conduct involving the purposeful killing of two or more people, (6) law enforcement victim, (7) the offense occurred while committing a specified felony, (8) victim was a witness killed to prevent testimony, (9) victim was under thirteen years of age, (10) terrorism. OHIO REV. CODE ANN. § 2929.04(A) (West 2002).



predicate crime.<sup>56</sup> Otherwise, if race in fact influenced the initial charging decision, the subset of cases that were charged more leniently, with murder rather than aggravated murder, would be invisible to this study because we analyzed only those charged with aggravated murder. The second project provides a limited evaluation of this risk.

FPD trained one law graduate and three law student coders to review all murder, voluntary manslaughter, and involuntary manslaughter cases listed on the website of the Hamilton County Clerk of Courts. Trained coders searched for nine section numbers related to murder, voluntary manslaughter, and involuntary manslaughter for each year of the study.<sup>57</sup> Coders then recorded defendant name, year of indictment, case numbers, charges, convictions, victim name and any race information for each case. This produced a second database providing information about the distribution of cases by race at each charge level.<sup>58</sup>

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56. David Baldus, George Woodworth, Neil Alan Weiner, David Zuckerman & Catherine M. Grosso, *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* (Charles S. Lanier, William J. Bowers & James Acker eds., 2009).

57. OHIO REV. CODE ANN. § 2903.02 (LexisNexis 2019) (murder); OHIO REV. CODE ANN. § 2903.02(A) (LexisNexis 2019) (murder); OHIO REV. CODE ANN. § 2903.02(B) (LexisNexis 2019) (murder); OHIO REV. CODE ANN. § 2903.03 (LexisNexis 2019) (voluntary manslaughter); OHIO REV. CODE ANN. § 2903.03(A) (LexisNexis 2019) (voluntary manslaughter); OHIO REV. CODE ANN. § 2903.03(B) (LexisNexis 2019) (voluntary manslaughter); OHIO REV. CODE ANN. § 2903.03 (LexisNexis 2019) (involuntary manslaughter); OHIO REV. CODE ANN. § 2903.03(A) (LexisNexis 2019) (involuntary manslaughter); OHIO REV. CODE ANN. § 2903.03(B) (LexisNexis 2019) (involuntary manslaughter).

58. The second project also identified 122 aggravated murder cases that had not been included in the original list generated by the Clerk of Courts. The original list provided by the Hamilton County Clerk of Courts included cases entered into the Clerk's database as aggravated murders. After consulting with the Clerk's office, we were told that in some instances, offenses are entered in the database as murders, but then later indicted as aggravated murders. Upon request, the Clerk's office provided a subsequent list of all homicides from 1992 through August 2017 listing the cases by type of homicide charged in the indictment. We then used this list to cross-reference and ensure we captured all cases in which the prosecutor's office charged aggravated murder in the original indictment.

#### D. Terminology and Definitions

We report here the disparities observed as well as measures of the likelihood that the finding would occur as a result of chance. The primary measure, called a *p*-value, reflects the probability of observing a disparity of a given magnitude simply by luck of the draw. The lower the *p*-value, the lower the chance that an observed disparity was due merely to chance.<sup>59</sup> In the controlled analysis, we also report the standard error and confidence intervals. The standard error gives the likely magnitude of a random error by estimating the distribution of the sample data and measures the likely size of the random error in the sample average (the standard error). Confidence intervals make these ideas more precise.<sup>60</sup>

The analysis below refers to different stages of criminal prosecution, specifically distinguishing between the stages where charging decisions and sentencing decisions are made.

### IV. RESULTS

#### A. Comparative Representation Rates

We used the databases to calculate the representation rates of black defendants and other defendants among all homicide charge levels to assess the representation in the aggravated murder universe. Table 1 shows four levels of homicide charges in Column A: aggravated murder, murder, voluntary manslaughter, and involuntary manslaughter. Column B, Row 1 reports the number of cases in the aggravated murder study. Rows 2 and 3 report the number of cases we identified at each level of charging through the review of all homicides. Each case is represented only one time, at the highest homicide charge brought by the state against the defendant. Columns C and D report the representation of black and white defendants at each level.

**Table 1**

	<b>A</b>	<b>B</b>	<b>C</b>		<b>D</b>	
	Highest Charge for Homicide	Number of Cases <i>number</i>	Black Defendants		White Defendants	
			<i>percent</i>	<i>number</i>	<i>percent</i>	<i>number</i>
1.	Aggravated Murder	599	81%	486	18%	110

59. David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 251–52 (National Academies Press, 3d ed. 2011).

60. *Id.* at 243.

	<i>Study Universe</i>					
2.	Murder	668	83%	555	16%	104
3.	Voluntary Mansl.	19	68%	13	32%	6
4.	Involuntary Mansl.	99	51%	51	48%	48

Black defendants in Hamilton County, Ohio, face the overwhelming majority of cases in which either aggravated murder or murder is the highest homicide charged. Indeed, black defendants face 81% of cases with at least one aggravated murder charge (Table 1, Row 1) and 83% of cases with at least one murder charge (Table 1, Row 2). Correspondingly, white defendants face a small minority of these cases. White defendants face 18% of aggravated murder cases and 16% of murder cases (Table 1, Rows 1 & 2).

The representation rates for voluntary manslaughter and involuntary manslaughter differ from aggravated murder and murder. The black defendant representation rate falls to 68% of voluntary manslaughter cases (Row 3) and 51% of involuntary manslaughter cases (Row 4). The average representation rate for white defendants in voluntary and involuntary manslaughter cases is roughly double that of aggravated murder and murder cases.<sup>61</sup> White defendants face 32% of cases where the highest charge is voluntary manslaughter (Row 3), and 48% of the cases where the highest charge is involuntary manslaughter (Row 4).

This distribution differs significantly from the representation of these groups in the Hamilton County population in 2017. The United States Census estimates that non-Hispanic white residents composed 65% of the population in Hamilton County in 2017, whereas black residents composed 26.6% of the population.<sup>62</sup> The distribution of cases in which the highest charge is voluntary manslaughter or involuntary manslaughter in Rows 3 and 4 approaches the overall population distribution, but black defendants represent a higher share of cases

61. The average representation of white defendants in the first two rows is 17%  $((18\% + 16\%)/2)$ . The average representation of white defendants in the third and fourth rows is 40%  $((32\% + 48\%)/2)$ .

62. *Quick Facts, Hamilton County, Ohio. Population Estimates*, U.S. CENSUS BUREAU (Jul. 1, 2017), <https://www.census.gov/quickfacts/hamiltoncountyohio> [<https://perma.cc/Z3KT-RW7M>]. The 1990 Census estimated that non-Hispanic white residents composed 78% of the population and black residents 21%. U.S. CENSUS BUREAU, CP-1-37, 1990, CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, OHIO (1990). The 2000 Census estimated that non-Hispanic white residents composed 73% of the population and black residents 23%. U.S. CENSUS BUREAU, PHC-1-37, OHIO: 2000, SUMMARY OF POPULATION AND HOUSING CHARACTERISTICS (July 2002).

than their proportion in the population might suggest if all else was equal.

The difference in distribution between the more serious homicide charges and the lesser charges raises the possibility that charging practices outside the bounds of this study, which is limited to aggravated murder, may be responsible for observed disparities. We cannot, however, draw any stronger conclusions based on the data presented here and without information about facts in individual cases.

#### B. Disparate Charging and Sentencing in Aggravated Murder Cases—Analysis and Results

The study includes 599 aggravated murder cases. The state filed capital specifications in 102 of the cases (17%), and 26 resulted in a death sentence (4%). The universe of cases includes 486 black defendants (81%), 110 white defendants (18%), 2 Hispanic or Latino defendants, and 1 defendant of another race.

Most defendants in the study were between the ages of eighteen and twenty-nine at the time of the crime (54%, 321/599). The second highest share of defendants were between thirty and fifty (23%, 135/599). A significant portion of the defendants, 17% (102/599), were under eighteen years at the time. Since 1981, Ohio law has excluded juveniles from the punishment of death following a conviction for a capitally indicted aggravated murder.<sup>63</sup> As such, while eight defendants were capitally charged, no defendant who was under the age of eighteen at the time of the crime received a death sentence.

This study used the charging decision to define the universe: all defendants charged with aggravated murder are included in the study. This includes 599 cases and the following sentencing outcomes: 26 death sentences (4%), 50 life without parole (8%), 224 life sentences (37%), and 249 a term of years (42%). The database also includes 17 defendants whose charges were subsequently dismissed pre-trial, 22 defendants who were acquitted of all charges, and 4 defendants who were acquitted of all homicide charges. Seven cases had not been resolved at the time of this analysis.

The following subsections present the observed racial disparities in the database in sections. Subsections IV.B.1.3 present unadjusted disparities by race of defendant, race of victim, and by

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63. OHIO REV. CODE ANN. § 2929.02(A) (West 2002).

defendant/victim race combinations. These subsections provide simple measures of the presence of each group in the database, and the rate at which they advance to capital charges or a death sentence. The final section, Subsection IV.B.4, presents fully controlled analyses using logistical regression.

### 1. Unadjusted Race of Defendant Disparities

This section presents unadjusted disparities by race of defendants. These disparities take no account of the different culpability levels of individual defendants. Black defendants represent 69% of cases facing capital specifications (70/102); white defendants compose the remaining 31% (32/102). The representation of black defendants decreases at each stage of charging and sentencing. Black defendants make up 65% (17/26) of people receiving a death sentence, whereas white defendants make up 35% (9/26).

The same results can be observed more precisely by analyzing the relative rates at which black and white defendants are selected for capital specifications or a death sentence. 70 of the 486 black defendant aggravated murder cases were capitally charged (14%). In contrast, 32 of the 110 white defendant aggravated murders received capital charges (29%). White defendants are 15% more likely to face capital charges, a ratio of slightly more than 2 to 1 ( $p < .01$ ).

A similar disparity appears in overall death sentencing decisions. This inquiry looks at the rate at which aggravated murder cases result in death sentences overall. In these decisions, 17 of 486 black defendant cases resulted in a death sentence (3%), whereas 9 of 110 white defendant cases received a death sentence (8%). This is a difference of 5%, and a ratio of 2.67 to 1 ( $p < .05$ ).

These disparities, however, may be capturing the same decisions. No disparity can be observed in the death sentencing decisions limited to only those cases facing capital charges. As noted, 102 defendants faced capital charges, 70 black and 32 white. These cases received death sentences at similar rates: 17/70 black defendants (24%) and 9/32 white defendants (28%) (not significant,  $p = .68$ ). This suggests that charging decisions, rather than sentencing decisions, may be responsible for the observed unadjusted race of defendant disparities.

## 2. Unadjusted Race of Victim Disparities

In the entire universe of aggravated murder cases, at least one white victim died in 171 of the 599 cases (28%). The representation of cases involving at least one white victim increases as we move from the universe of aggravated murders to the universe of aggravated murders that received capital specifications, and again if we look at the universe of death sentenced cases. White victim cases represent 51% of the cases (52/102) facing capital specifications. This is almost two times the representation of white victim cases in the universe of all aggravated murders charged (28%, 171/599) ( $p < .001$ ). White victim cases rise to 58% of the population that received a death sentence (15/26).

The selection rates for cases with capital specifications demonstrate similar stage-wise results. These rates show the risk that each group faces of being selected for the particular outcome. At the charging stage, 30% of white victim cases (52/171) face capital charges in comparison to 12% of cases with no white victims (50/428). This 18% disparity (30% minus 12%) is larger than any observed in the race of defendant analysis. The ratio between selection rates is 2.5 to 1 ( $p < .001$ ), meaning a case involving a white victim is 2.5 times more likely to result in the defendant facing capital charges than if the victim is not white.

In death sentencing outcomes overall, 9% of aggravated murder cases with at least one white victim result in a death sentence (15/171), compared to 3% of all other cases (11/428). The relative rate of selection is 3 to 1 ( $p < .001$ ). Again, this disparity appears to result from charging decisions rather than death sentencing decisions at a capital trial. There is a 9-point difference in death sentencing selection rates among the 102 cases selected for a capital prosecution (29% for white victim cases versus 22% for other cases), but the disparity is not statistically significant ( $p = .43$ ).

## 3. Unadjusted Disparities by Defendant/Victim Racial Combinations

This subsection presents unadjusted disparities for each possible defendant/victim racial combination. Table 2 presents the overall findings.<sup>64</sup> The study includes 414 cases with a black defendant

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64. Table 2 limits the cases presented to those with black or white defendants and victims. This excludes 12 cases in which either the defendant or victim was not black or white. Analysis presented in the text includes all cases where possible.

and no white victims (69%) (Column B), 99 cases with a white defendant and at least one white victim (16%) (Column C), 72 cases with a black defendant at least one white victim (12%) (Column D), and 11 cases with a white defendant and no white victims (2%) (Column E).

**Table 2. Representation and Selection Rates by Defendant/Victim Combinations**

	A	B	C	D	E
		Black Def./ Black Vic.	White Def./ White Vic.	Black Def./ White Vic.	White Def. /Black Vic.
1.	Representation in Universe (n = 599)	69% (414/599)	16% (99/599)	12% (72/599)	1% (7/599)
2.	Selection for Capital Specs. (n = 599)	11% (46/414)	29% (29/99)	32% (23/72)	14% (1/7)
3.	Death Sentencing Overall (n = 599)	2% (10/414)	7% (7/99)	11% (8/72)	14% (1/7)
4.	Death Sentencing Among Capitally Charged Cases (n = 102)	22% (10/46)	24% (7/29)	35% (8/23)	100% (1/1)

Table 2, Row 2, Column D reports that black defendant/white victim cases are selected for capital charges in 23 of 72 cases (32%). Other cases received capital charges overall in 79 of 527 cases (15%).<sup>65</sup> This is a 17% disparity with black defendant/white victim cases, with a ratio of 2.1 to 1 ( $p < .001$ ).<sup>66</sup> The representation of black defendant/white victim cases increases from 12% (72/599) in the universe to 23% (23/102) among cases receiving capital specifications. In other words, it almost doubles.

The second largest selection rate is in Column C, at 29%, for white defendant/white victim cases. Other cases received capital charges overall in 73 of 500 cases (15%), a 14% disparity and a 1.9 to 1 ratio ( $p < .001$ ). Recall that 33% of white victim cases are capitally charged. Black defendant/white victim cases make up 42% of white victim cases (72/171). Black defendant/white victim cases represent an unusually high portion of white victim cases.<sup>67</sup>

65. This calculation includes cases with defendants or victims who are not black or white and, therefore, not reported in Table 2.

66. Some cases included in the calculation here and elsewhere in the text are not represented in Table 2 because they do not have a black defendant/black victim, white defendant/white victim, black defendant/white victim, or white defendant/black victim.

67. For example, our study of capital charging and sentencing practices in North Carolina found that black defendant/white victim cases make up 32% of

Row 3 presented the overall rate of death sentencing. Black defendant/white victim cases received death sentences in 8 of 72 cases (11%). This is a 3.7 times higher risk of receiving a death sentence than in all other cases combined (18/527, 3%) ( $p < .01$ ). The black defendant/white victim cases make up 31% (8/26) of the cases receiving a death sentence. This represents a 20% increase over their representation in the universe of cases facing aggravated murder charges (72/599, 11%).

Unlike in the race of defendant or race of victim analyses discussed above, disparities persist when the analysis is limited to the 102 cases facing capital charges in Row 4. Among these cases, 8 of the 23 black defendant/white victim cases received a death sentence (35%), compared to 18 of 79 cases with any other defendant/victim combination (23%). This 12% disparity is not significant,  $p = .25$ . Note that the small number of white defendant-black victim cases face an even higher death sentencing rate overall (1/7, 14%) and that the single case that was charged capitally received a death sentence, leading to a 100% death sentencing rate among capitally charged cases.

#### 4. Controlled Analysis of the Role of Race in Charging and Sentencing

Because the decision to charge a case capitally or to impose a death sentence can turn on a number of factors in isolation or combination, we also conducted fully controlled logistic regression analyses. These analyses allowed us to take into account approximately fifty potentially relevant race-neutral factors (such as the number of victims killed or whether the victim was especially vulnerable) to examine whether the racial disparities reported above could be explained by some combination.<sup>68</sup> We based these candidate explanatory variables on the criteria for imposing a death sentence in

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white victim cases. See O'Brien et al., *supra* note 25, at 2020 tbl.1. Our study of capital charging and sentencing practices in the U.S. Armed Forces found that black defendant/white victim cases make up 31% of white victim cases. See David C. Baldus, George Woodworth, Catherine M. Grosso & Richard Newell, *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1265 fig.2 (2011).

68. Control variables include variable for specification or presence of each statutory aggravator, aggravated murder, murder, robbery, aggravated robbery, involuntary murder, aggravated burglary, burglary, conspiracy, felonious assault, kidnapping, rape, arson, aggravated arson, and a record of any other felony charged in the case. A complete list is available from the authors on request.



Ohio and prior research on capital charging and sentencing. In this process, we erred on the side of inclusion, assessing the impact of as many factors as possible. Potential explanatory variables were tested in isolation and in combination to assess their influence on the decision to charge a case capitally or to impose a death sentence, and those variables with a consistent statistically significant effect (while controlling for the effects of the other variables) were included in the final model. The variables included in the final model are identified in each table. In each instance, the model was specified manually and confirmed by allowing the statistical software package, STATA, to select variables for inclusion based on their importance to the underlying decision (i.e., through a stepwise analysis).

**Table 3. Logistic Regression Model of Decision to Bring Capital specifications**

	A Variables <sup>69</sup>	B Odds Ratio	C Std. Err.	D p-value	E [95% Conf. Interval]	
1.	At least one white victim	4.54	1.49	<.001	2.39	8.63
2.	AggA5 present or specified	3.59	1.36	<.001	1.70	7.56
3.	AggA9 present or specified	57.42	27.73	<.001	22.29	147.94
4.	D also convicted of aggravated robbery, burglary, kidnapping, or assault	4.62	1.59	<.001	2.35	9.06
5.	Scale of total aggravators present or specified divided by number of decedent victims	1.83	0.22	<.001	1.45	2.31
6.	At least one victim was 60 years old or older	3.40	1.56	<.01	1.38	8.35

Table 3 models the decision to bring a case as a capital case; that is, to file capital specifications in a case charged as aggravated murder. As shown in Table 3, Row 1, even after controlling for five other factors relevant to the decision to bring a capital case against a defendant, a case with at least one white victim faced odds of being charged capitally that were 4.54 times those of all other similarly-situated defendants.<sup>70</sup> The control variables in rows 2 to 6 of this model include every variable with a consistent statistically and theoretically significant effect while controlling for the effects of the other variables. In other words, even after accounting for strong predictors of charging decisions, race remained a powerful predictor of which cases receive capital charges. This difference was statistically significant at  $p < .001$ ; put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the decision-making was actually race neutral.

<sup>69</sup> A table providing variable definitions for the variables included in these tables is located in Appendix A.

70.  $n = 496$ , Pseudo  $R^2 = 0.41$ .

**Table 4. Logistic Regression Model of Overall Risk of Death Sentence**

	A	B	C	D	E	
	Variables	Odds Ratio	Std. Err.	p-value	[95% Conf. Interval]	
1.	Black Defendant/White Victim	3.79	2.16	0.02	1.23	11.68
2.	AggA3 present or specified	14.09	9.59	<.001	3.71	53.52
3.	AggA5 present or specified	3.92	2.02	<.01	1.43	10.77
4.	D also convicted of aggravated robbery, burglary, kidnapping, or assault	2.85	1.47	<.05	1.04	7.81
5.	Number of Aggs Specified is greater than the Number of Aggs Factually Present	4.19	2.24	<.01	1.47	11.93
6.	Defendant was 18-29 years	0.13	0.07	<.001	0.04	0.40

Table 4 models the risk of receiving a death sentence overall. Even after controlling for six other factors relevant to the decision to impose a death sentence, a black defendant with at least one white victim faced odds of getting a death sentence that were 3.79 times those of all other similarly-situated defendants.<sup>71</sup> In other words, even after accounting for strong predictors of charging decisions, race remained a powerful predictor of who receives capital charges. This difference was statistically significant ( $p < .03$ ).

71.  $n = 496$ , Pseudo  $R^2 = 0.37$ . We excluded defendants under 18 at the time of the crime and limited this model to black and white defendants. Parallel analyses including these cases produced the same results.

**Table 5. Logistic Regression Model of Death Sentencing Among Death Specified Cases**

	A	B	C	D	E	
	Variables	Odds Ratio	Std. Err.	p-value	[95% Conf. Interval]	
1.	Black Defendant/White Victim	5.33	4.31	0.04	1.09	26.01
2.	AggA9 present or specified	10.60	9.90	<.02	1.70	66.12
3.	More than one decedent victim	25.55	24.21	<.01	3.99	163.63
4.	D also convicted of aggravated robbery, burglary, kidnapping, or assault	9.18	8.10	<.02	1.63	51.72
5.	Scale of Number of Felony Aggravators	1.98	0.70	0.05	0.99	3.97
6.	Defendant was 18-29 years	0.14	0.10	<.01	0.03	0.57

Finally, Table 5 presents a fully controlled model of the decision to impose a death sentence among the cases in which the state sought a death sentence. The odds of a black defendant with at least one white victim receiving a death sentence, after the state seeks death, are 5.33 times higher than all other cases. This disparity is significant at  $p < .05$ .<sup>72</sup> This model relies on the same variables as the earlier models.

#### CONCLUSION

As this study demonstrates, death-sentencing decisions are influenced by race in Hamilton County, Ohio. The residents of

72.  $n = 96$ , Pseudo  $R^2 = 0.28$ . We excluded defendants under 18 at the time of the crime and limited this model to black and white defendants. Parallel analyses including these cases produced the same results.

Hamilton County, including those in the city of Cincinnati, have experienced racial violence and discrimination in the forms of lynching, racial and economic segregation, disparate policing, and high rates of police violence, particularly against black men.

Cincinnati police underwent focused reforms on the excessive use of force at the behest of the U.S. Department of Justice and under close supervision of an independent monitor.<sup>73</sup> The criminal justice system continues to struggle with the present-day manifestations of race discrimination, such as the all too common appearance of all white juries.<sup>74</sup> Indeed, as noted, official bodies from the American Bar Association Death Penalty Assessment to a locally constituted blue ribbon task force concluded that race might be influencing capital charging and sentencing.<sup>75</sup> Both recommended legislative changes and better monitoring.<sup>76</sup> Against this backdrop of enduring racial strife and discrimination, Hamilton County produces an extraordinarily high number of death sentences: it is among the 2% of counties that produce a majority of executions countrywide.<sup>77</sup>

This study, which arises in the context of that history, examined 599 aggravated murder cases in Hamilton County between 1992 and August 2017. The state filed capital specifications in 102 of the cases (17%), and 26 of those resulted in a death sentence (4%). The unadjusted analysis presented here initially suggests that white defendants face capital charges at a higher rate than black defendants, but this disparity is better explained by the race of victim and the combination of the defendant's race and victim's race, rather than solely the defendant's race. Controlled analyses confirm this observation.<sup>78</sup>

Among white victim cases, 30% (52/171) of defendants faced capital charges; in comparison, only 12% of cases with no white victims did (50/428). This disparity is larger than any observed in the race of

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73. See, e.g., Am. Post-Conviction Pet. at 22, *State v. Fears*, No. B-9702360 (Mar. 8, 2019) (Ohio Ct. Com. Pl.) (on file with authors); Dan Horn, *Prosecutor: Killer Clung to Necklace*, CINCINNATI POST (Nov. 15, 1996) (noting that capital defendant Elwood Jones was tried by an all-white jury).

74. See, e.g., *Ohio v. Richardson*, 2005-Ohio-530, 2005 WL 323684, at ¶ 2 (Ohio Ct. App. 2005) (explaining that the prosecutor struck a black venire member because she had been a possible victim of discrimination and might be too sympathetic with concerns of discrimination against the defendant).

75. See *supra* notes 18–19 and accompanying text.

76. *Id.*

77. DIETER, *supra* note 3.

78. See *supra* Subsection IV.B.4.

defendant analysis.<sup>79</sup> A case involving a white victim is 2.5 times more likely to result in the defendant facing capital charges than cases in which a victim is not white ( $p < .001$ ). This disparity persists in analyses of death sentencing outcomes overall; 9% of white victim aggravated murder cases result in a death sentence (15/171), compared to 3% of all other cases (11/428). The relative rate of selection is 3 to 1 ( $p < .001$ ). This disparity appears to stem from prosecutors' charging decisions rather than from death sentencing decisions at a capital trial.<sup>80</sup>

Black defendant cases with at least one white victim face a significantly higher risk of capital charges (23/72, 32%) and a sentence of death (8/72, 11%) than any other defendant/victim racial combination. The capital charge rate is 2.1 times that of all other rates ( $p < .001$ ), and the death-sentencing rate is 3.7 times that of all others ( $p < .01$ ). Unlike in race of defendant or race of victim analyses, disparities persist when the analysis is limited to the 102 cases facing capital charges. Among these cases, 8 of 23 black defendant/white victim cases received a death sentence (35%), compared to 18 of 79 cases with any other defendant/victim combination (23%), but the disparity is no longer statistically significant ( $p = .25$ ) (perhaps due to the smaller number of cases involved).

Because the decision to charge a case capitally or to impose a death sentence can turn on a number of factors in isolation or combination, we also conducted logistic regression analyses including more potentially relevant race-neutral factors on three different outcomes: (1) the decision to file capital specifications in the case, (2) the overall risk of a death sentence, and (3) the jury decision to impose a death sentence in a death specified case.

After taking into account potentially relevant race-neutral factors, the model of the prosecutor's decision to charge a case capitally found that a case with at least one white victim faced odds of being charged capitally that were 4.54 times the odds of a similarly situated case with no white victims ( $p < .001$ ). A second model of the decision to impose a death sentence overall (combining the charging and sentencing decisions) found that a black defendant with at least one white victim faced odds of receiving a death sentence that were 3.79 times those of all other similarly-situated defendants ( $p = .02$ ). Finally, a third model limited to cases in which the state sought a death sentence found the odds of a black defendant with at least one white

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79. See *supra* Subsection IV.B.2.

80. See *supra* Subsection IV.B.1.

victim receiving a death sentence are 5.33 times higher than all other cases ( $p = .04$ ).

These clear and compelling findings that race influences charging and sentencing in aggravated murder cases in Cincinnati are consistent with previous statewide research, as well as most research in other U.S. jurisdictions. As significant as these statistical disparities are, they should not be considered in isolation, but in the context of a long history of racial tensions in Hamilton County. Professor Amsterdam encouraged researchers to undertake statistical analyses examining racial disparities, but urged them to do so in a way that embeds the findings in local history and custom. This allows the researcher to situate any statistical disparities in the “culture of racism that produces the ubiquitous outcome of race-based differentials in capital sentencing.”<sup>81</sup> Replicating similar studies in other jurisdictions could push the needle forward in thinking about reforms related to capital punishment.

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81. Amsterdam, *supra* note 1, at 51.

## APPENDIX

AggA3sum	R.C. § 2929.04(A)(3) (“The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.”) was specified or found present.
AggA5sum	R.C. § 2929.04(A)(5) (“Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.”) was specified or found present.
AggA7CtSmX	This variable is a two-level scale distinguishing cases with a single felony aggravators from those with more than one felony aggravator.
AggA9sum	R.C. § 2929.04(A)(9) (“The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.”) was specified or found present.
AggDisparity	The total number aggravators specified exceeded those found factually present in the case.
AggViolFel	The defendant was also convicted of aggravated robbery, burglary, kidnapping, or assault.
BDWV	The case involved a black defendant and at least one white victim.



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NumAgg_per_Vic	Divides the higher of the number of aggravators specified or present in the case by the number of decedent victims.
SeniorVic	At least one victim was over 60 years of age.
TwoVic	The case involves more than one decedent victim.
WhiteVic	The case involves at least one white victim.
YoungD	The defendant was 18–29 years old.
YouthVic	At least one victim was under 30 years old.

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