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Rape, Race, and Capital Punishment: An Enduring Cultural Legacy of Lethal Vengeance?

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Abstract

Historical analyses of southern statutes (i.e., Slave Codes, Black Codes, "Jim Crow," etc.) and their enforcement reveals evidence of an enduring cultural legacy prescribing lethal vengeance to Blacks who violate White sensibilities, especially for Black males accused of sexually assaulting White females. Using a population of official data on capital murder trials in North Carolina (1977–2009), this study examines the degree to which this cultural legacy endures to the present by examining the joint effects of offender's race and rape/sexual assault on the capital sentencing outcomes of capital murder trial involving White female victims. Our findings reveal support for the continuing endurance of this cultural legacy of lethal vengeance.

Keywords

race and sentencing, race and courts, race and death penalty, race-of-the-victim effects, homicides, victimization, violence against women

Special legal codes to control the behavior of slaves and preserve White hegemony were originally the carryover of British common law doctrines relating to the villeinage system of Feudal England (see Higginbotham 1978). Under this system workers

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were bound to the land and owed the manor the fruits of their labor; such common law traditions sanctioned the treatment of indentured servants, apprentices and children and were easily applied to slaves in the colonies as well. The first such "Slave Code" in the New World originated in the British colony of Barbados and served as the model for South Carolina, in turn, these codes quickly became the model of other southern Slave Codes throughout the colonies (Stampp, 1956). With the founding of the United States, colonial Slave Codes became the basis for state statutes that continued this practice of *de jure* racial discrimination. In most southern states, these antebellum Slave Codes extended their reached onto free Blacks as well (Shofner, 1977; Vandiver, Giacopassi, & Curley, 2003) and were even evident in the Black Codes and Jim Crow laws of the post–civil war reconstruction era, despite the undefined prohibitions against the unequal protection of the law in the 14th Amendment to the Constitution.

Whether a Slave Code, a Black Code, or Jim Crow, these laws permitted and prescribed the unequal, and often harsh, treatment of Blacks relative to Whites. These codes served to preserve White hegemony by regulating even the most mundane behaviors of slaves and free Blacks (Dodd, 1918; Flanigan, 1974; Imes, 1919; Paternoster, 1991). Some of these codes criminalized the behaviors of Blacks, which if engaged in by Whites were not considered crimes. Importantly, these codes provided for considerably more severe criminal sanctions, including death, for crimes committed by Blacks than if the same crimes were committed by Whites. These punishments were especially harsh if the alleged crime was against a White, particularly a White female (Bardaglio, 1994). Often these sanctions were doled out by the slave owner without the benefit of a criminal trial, or, where a formal legal process was required by law, the process was a mere formality (Flanigan, 1974). During the reconstruction/Jim Crow era, an expedited, pro forma criminal trial process served the same purpose, and, all too often, the lynch mob replaced the slave owner.

Perhaps one of the clearest and most manifest expressions of the unequal enforcement of these codes involves allegations of rape by Black males against White women (Bardaglio, 1994; Dorr, 2000; Rise, 1992). For the majority of the 20th century, rape was a capital crime, especially in the south. Research by Wolfgang and Riedel (1973, 1975; see also Greenberg & Himmelstein, 1969), showed tremendous evidence of racial disparity in capital sentencing outcomes, such that a sentence of death for rape was especially likely for Black defendants with White victims. While the U.S. Supreme Court has ruled that capital punishment for the crime of rape is an unconstitutional violation of the 8th Amendment ban on cruel and unusual punishment because such a punishment is disproportionate to the severity of the crime (see *Coker v. Georgia*, 1977; *Kennedy v. Louisiana*, 2008), rape still serves as a highly salient aggravating circumstance such that those who kill their victims during a rape-involved homicide are eligible for the death penalty. The question before us in the present study is whether there is evidence of an enduring cultural legacy such that Black defendants charged and convicted of a rape-involved capital murder of White females are disproportionately likely to be sentenced to death. To examine this question, we employ data from official court records for the population of penalty-phase capital murder trials involving White female victims ($N = 312$) in the state of North Carolina

(1990–2009). These data allow us to examine the independent and joint effects of both defendant's race and whether or not the capital murder was rape involved on capital sentencing outcomes, while controlling for the influence of a host of legal and extralegal case characteristics in the form of a propensity score control variable.[1]

Slave Codes, Black Codes, and the Emergence of a Cultural Legacy

The first Slave Code in the New World was enacted by British colonists in Barbados in 1688. While English common law did not recognize a legal status for slavery (Black, 1968; Watson, 1989), it did recognize, through the villeinage system, the legal obligation of workers who were bound to the land and owed the manor the products of their labor (Higginbotham, 1978). Similar common law obligations were recognized for indentured servants, apprentices, and even children. The Barbados Slave Code was erected to model these common law obligations of workers to their masters. Moreover, the British colonists recognized the need for a specific Slave Code as England was increasingly more prepared to outlaw the practice of slavery (Plimmer & Plimmer, 1973).

The Barbados Slave Code was replicated by the Planters in colonial South Carolina in 1712, which in turn, served as the model for other Slave Codes in the deep south—first in Georgia in 1770, followed by Florida, and then to other colonies/states. The tobacco-growing colonies also developed Slave Codes beginning with Virginia and spreading to Maryland, Delaware, North Carolina, and Tennessee. In fact, several of the northern colonies also legally recognized slavery in their early codes, though all quickly abolished slavery. These codes defined the legal status of both slaves and free Blacks, identified the rights and obligations of slave owners and overseers toward their slaves, and greatly regulated the allowable conduct of both slaves and free men in southern society (Imes, 1919). The legal status of slaves was one of both personage and property. As chattels, personal property owned by another; slaves could be sold, willed, insured, mortgaged, and seized in payment of the master's debts (Flanigan, 1974, p. 537) and those who intentionally or negligently injured or killed slaves were liable to the master for damaging his property. Likewise, slaves could not make contracts, own property, sue or be sued, or enjoy any other of the essential rights and duties of free men; yet in criminal matters, the personhood of slaves was much more evident. Slaves could be held criminally responsible for their conduct, and given that the criminal penalties for slaves were much harsher than those for Whites, slaves were afforded an even greater level of criminal responsibility and thus, personhood, compared with Whites. Clearly, the primary purpose of these codes was twofold to greatly circumscribe the lawful conduct of slaves and Blacks and to express and preserve the hegemony of Whites, particularly White elites. But how could such an oppressive system have been justified?

Given the abolitionist activities in the northern colonies/states and the withering approval for slavery in England, southern Planters felt the need to defend and preserve their practice. Dodd (1918) describes the efforts of learned elite southern Whites, such as Thomas R. Dew, Chancellor Harper, John C. Calhoun, Thomas Carlyle, George

Fitzhugh, and many others, to establish a social philosophy/ideology justifying slavery and the caste system of the colonial and antebellum south. In essence, according to these White southern elite spokespersons, Thomas Jefferson was wrong; all men are not born free or equal; "man is born to subjection . . . the proclivity of the natural man is to be domineer or to be subservient" (Chancellor Harper as cited by Dodd, 1918, p. 739). Harper adds:

> It is the order of nature and of God that the being of superior faculties and knowledge, and therefore of superior power, should control and dispose of those who are inferior. It is as much in the order of nature that man should enslave each other as that animals should prey upon each other. (Quoted by Dodd, 1918, p. 738)

From such a starting point, Dodd (1918, p. 737), it would be easy to formulate the necessary doctrine to uphold the hegemony of White elites in the south and the enslavement of Blacks:

> Not all men should vote, but only those who owned property; not all men should be educated at public expense, but only those whose life and business required education and training. Hard labor was for those whose hands were hard, mainly for [B]lack hands. Superintendence and guidance were the work of [W]hite men . . . . There were to be gradations in society, gentlemen and ladies, middle-class artisans, honest farmers, and slaves.

And, there needed to be a body of laws to govern these gradations—and so it was in the antebellum south and with the Slave Codes.

The Black Codes and "Jim Crow"

The loss of the civil war by the Confederate States, the legal prohibition of slavery by the Emancipation Proclamation, the adoption of the 13th and 14th Amendments to the U.S. Constitution, and the passage of the Civil Rights Act of 1866 all spelled the end of the Slave Codes. But, they did not bring about the end of *de jure* racial discrimination in the south. Specifically, in the mid-1860s, the former slave states simply replaced the Slave Codes with the Black Codes and Jim Crow laws. Near perfect replicas of the Slave Codes, the Black Codes were intended to greatly constrain the freedom of Blacks and to compel them to labor in an agricultural economy based on low wages and forced debt accrual (Howington, 1986).

Shofner (1977) argues, that with slavery abolished and reconstruction required, southern Whites attempted to salvage as much as possible from the Slave Codes that had previously regulated both slaves and free Blacks. In this regard, Blacks continued to be viewed by Whites as mentally inferior and incompetent to order their own lives; thus, subjection to White superiority was necessary. Under such a belief, emancipated Blacks should not possibly occupy a position in society higher than free Blacks had held before the civil war. In turn, it was deemed necessary to create a separate class of

citizenship for Blacks that legally recognized their natural inferiority. The Black Codes and Jim Crow laws provided such a system.

As with the Slave Codes, the Black Codes restricted free Blacks ability to own real property, to lease or sell land, to conduct business, to migrate into the state, to assemble in public spaces, to hold public office, to vote, to bear arms, become literate, speak freely, or to testify against Whites. Anti-miscegenation laws banned interracial marriages and "sundown laws" restricted the free passage of Blacks in and about White communities. Blacks were forced into a state of economic bondage via required work contracts which, if breached, could be defined as impudence, disobedience, or disrespect and could result in whippings, the pillory, or, more typically, being forced into labor. Whites could not be subject to whippings or to the pillory for "to degrade a [W]hite man by physical punishment is to make a bad member of society . . . to fine and imprison a colored man . . . is to punish the state" (Florida House Journal as cited by Shofner, 1977, p. 283). Tenant farmers who failed to pay their rent on time could suffer crop liens which could be extended indefinitely. Special taxes reserved only for free Blacks and set at a mileage beyond their ability to pay, placed Blacks into a debt that could only be paid by forced labor.

But the defining feature of these Black Codes was the localized and overbroad nature of vagrancy ordinances which allowed local authorities to arrest freed Blacks and to commit them to involuntary labor. Blacks without proof of legitimate employment or who had failed to pay their debts or certain taxes could be arrested for vagrancy and hired out to local landowners and businesses to work off their debts (Cohen, 1991; Novak, 1978). Similarly, local ordinances that restricted impudence, swearing, disobedience, and other such acts could also lead to arrest and forced servitude. Those arrested for violations of the criminal Codes, which, as with the Slave Codes, held Blacks to a higher level of criminal liability, could also be forced into labor through the convict leasing systems common throughout the late 19th- and 20th-century south (Cohen, 1991). Through the vagrancy ordinances, the Black Codes kept Blacks in their place as laborers under a system of White supremacy (Wilson, 1965).

Southern Criminal Justice from the Slave Codes to the Present

A common feature of both southern Slave Codes and Black Codes was the harsher penalties doled out to both slaves and free Blacks than to Whites found guilty of the same crimes. Slaves and Blacks received especially severe criminal penalties for crimes against White victims, particularly White females. Yet, as Flanigan (1974) has established, southern courts and the codes these courts enforced provided considerable due process protections to slaves and free Blacks, protections equal to those given to White defendants. While these due process protections were equal to those enjoyed by White defendants, Hall (1989) reminds us that such protections should not be overestimated as they were still reserved for only those defendants charged with the most serious of offenses and were shamefully limited in their scope when compared to today's standards.

Through the antebellum period slaves and free Blacks had their criminal offenses addressed through a tiered system of justice starting with an informal system of plantation justice for the least serious of breaches. As slave/free Black criminal offenses became more serious or spread beyond the physical limits of the plantation, the formal institutions of the criminal justice system came increasingly into play (Flanigan, 1974). The progression in societal response to slave/Black crimes, from the master to the magistrate, was a gradual progression with several intermediate responses including justice administered by White private citizens who witnessed a breach of racial etiquette, to slave patrols and posses, justices of the peace, and special freeholder's courts. As Flanigan (1974) has established, justice in these intermediate stages was both sanctioned and encouraged by the courts. The "authorities" in these intermediate stages were granted extraordinary powers not only to arrest and bring charges but also to try, convict, and punish (including beatings, whippings, brandings, mutilations, and lynchings). Slaves and free Blacks brought to trial for minor crimes appeared before a justice-of-the-peace (a local, governmental jack-of-all-trades) and the trials were brief, summary processes unhampered by rules of evidence, due process, juries, and defense counsel. Such trials resulted in very high conviction rates. The higher courts, with all the trappings of due process, were, for the most part, restricted to slaves/free Blacks charged with the most serious crimes, typically capital crimes. While slaves were provided with due process protections in capital trials, the protections were not for the slaves, but instead, to protect the property interests of their masters from injustice (Flanigan, 1974).

During the early part of the 20th century, when the federal courts enforced the 14th Amendment's guarantee of the equal protection of the law, southern legislatures removed race-specific laws from their penal codes, but they still placed sentencing into the hands of all-White, all-male juries. By doing so, they allowed those juries to draw on their own passions, prejudices, and ideologies (Hale, 1998). Denied legal equality, political rights, and economic security southern Blacks had no defense. They were tied to the landowners by perpetual indebtedness and were dependent on the good will of White men; in short, in the early 20th-century southern Blacks occupied a position in society hardly different from that of the antebellum free Blacks (Shofner, 1977). Across all of these manners of administering *de jure* and de facto race-specific justice, slaves, and Blacks received harsh justice, especially for those Black males accused of sexually assaulting White women.

Race, Rape, and Southern Justice

Bardaglio (1994, p. 752) asserts that many White southerners shared the belief that Black men were "obsessed with the desire to rape White women." For those who did, it was a "certain invitation to a tortured death" (Litwack, 1998, p. 344) as they were likely to be sanctioned by castration, death, or both (cf., Dorr, 2000), for Black-on-White rape was regarded as "the worst crime in all the catalogue denounced by our laws" (Judge George J. Hundley, *Commonwealth v. Alfred Wright*, 1912, p. 511).

> No other crime so excites, alarms, and arouses our people. It not only violates the laws of God and Man, . . . it is a deadly menace to the very framework of society itself.

Justice Joseph Henry Lumpkin of the Georgia Supreme Court also represented the perspective of the southern White male when he opined that the rape of a White woman by a Black man was "a crime, from the very nature of it, calculated to excite indignation in every heart" (*Stephen v. State*, 1852). Southern White males invoked a paternalistic concern for White female chastity; as such lynching the accused not only would punish the Black offenders for their crimes, but would also spare fragile White women from having to testify about their trauma in a public courtroom (Rise, 1992). Such passions were provoked by Black-on-White sexual assaults in large measure because traditionally southern White men viewed female sexuality as property that they owned (Dorr, 2000). Rape, thus, was viewed not as a violation of women's autonomy, but of the honor of her male head-of-household.

Conversely, since rape was traditionally viewed as a form of trespass and theft, a property crime, masters could not be held legally responsible for raping slaves, as one cannot trespass upon one's own property nor can one steal from oneself. Other Whites accused of raping Black women were punished not by death, but instead, with penalties commensurate with other property crimes (Bardaglio, 1994). In part, this was because the conventional wisdom of southern White males held that Black women were "naturally promiscuous and sought to copulate with [W]hite men" (Bardaglio, 1994, p. 757); hence, White-on-Black rapists could not bear full culpability for their crimes. While the typical penalty for a Black-on-White rape conviction was death, the typical penalty for a White-on-Black rape was a fine and/or short prison sentence. White-on-White rapes resulted in considerably longer terms of imprisonment, but not death, as did the typical Black-on-Black rape convictions.

Dorr (2000, p. 717) reports that, between 1908 and 1960, an era during which death was an allowable punishment for rape, 56 men were executed in Virginia for rape or attempted rape; none were White. A study conducted by the Florida Civil Liberties Union of sentences for rape convictions in Florida from 1940 to 1964 revealed that only 5% of White-on-White rape convictions lead to a death sentence while 54% of Black-on-White rapes resulted in a sentence of death; no Whites convicted of raping Blacks received a death sentence. Greenberg and Himmelstein (1969) concluded that the death penalty in cases of rape was applied almost exclusively to Blacks convicted of raping White women. Research by Wolfgang and Riedel (1973, 1975), also produced evidence of tremendous racial disparities in capital sentencing outcomes in Georgia for those convicted of rape between 1945 and 1965, such that a sentence of death for rape was especially likely for Black defendants with White victims. Conversely, Johnson (1957) observed evidence of a much smaller racial disparity in death sentences for rape conviction in North Carolina between 1909 and 1954. Radelet and Vandiver (1986, p. 180) attest that "no cases are known in which any White man was executed for the rape of a Black woman."

Vandiver, Giacopassi, & Curley (2003, p. 82) contends that an oppressive system of unequal treatment toward Blacks has become institutionalized in the south and that the

remnants of this system are evident today in the form of an enduring cultural legacy that is reflected in capital punishment statistics such as those reported above (see also Lofquist, 2002). This institutionalized system operates in a twofold manner such that Black defendants are punished more harshly and White victims are given more protection of the law (see Kavanaugh-Earl, Cochran, Smith, Bjerregaard, & Fogel, 2008).

While no one today may be sentenced to death for rape (see *Coker v. Georgia*, 1977; *Kennedy v. Louisiana*, 2008), sexual assault still serves as a highly salient aggravating circumstance in capital murder trials; those who kill their victims during a rape-involved homicide are eligible for the death penalty. As such, the purpose of the present study is to examine whether or not there is evidence of this cultural legacy enduring to the present day such that Black defendants convicted of the rape-involved capital murder of White females are disproportionately more likely to be sentenced to death. To examine this question, we employ data from official court records for the population of capital trials ($N = 1{,}356$) in the state of North Carolina (1977–2009). These data allow us to examine the direct and independent effects of both defendant's and victim's race, as well as offender–victim racial dyads, on modern era capital sentencing outcomes, while controlling for the influence of a host of legal and extralegal case characteristics. These data also permit us to examine whether or not the effects of race on capital sentencing may operate through either racially enhanced or dampened effects of legally relevant factors through the use of race-specific models.

This study builds on a large body of extant research that has examined the issue of racial disparities in capital sentencing. While this body of research is vast, it has also been extensively reviewed (see Baldus & Woodworth, 2003a, 2003b; Bohm, 2012; Dieter, 1998; Kavanaugh-Earl et al., 2008; Kleck, 1981; U.S. General Accounting Office, 1990). These reviews suggest that while a few studies reveal no evidence of racial disparity of any kind (e.g., see Berk, Li, & Hickman, 2005 or Klein, Berk, & Hickman, 2006), the typical findings suggest the presence of one or more forms of racial disparity. Studies examining data on capital sentencing prior to the 1970s tend to suggest disparities based on the race of the defendant, such that Black defendants were more likely to receive the death penalty than were White defendants. The more contemporary studies have revealed a different form of racial disparity: race-of-victim, such that killers of White victims are more apt to be sentenced to death, especially Blacks who kill Whites (U.S. General Accounting Office, 1990). Even more recent research examining victim-based disparities suggest that there should be especially higher odds of capital sentencing among those who kill women (Richards et al., 2016), particularly White women (Holcomb, Williams, & Demuth, 2004; Williams & Holcomb, 2004), and especially when the killing involves a cotemporaneous sexual victimization (Williams, Demuth, & Holcom, 2007). Prior studies with the data used in the present study have also produced evidence of both victim-gender and victim-race effects on capital sentencing outcomes generally, but little evidence of offender-race effects (Jennings, Richards, Smith, Bjerregaard, & Fogel, 2014; Richards et al., 2016; Stauffer, Smith, Cochran, Fogel, & Bjerregaard, 2006). However, with the exception of Williams, Demuth, and Holcom (2007), these studies have examined victim and offender race and gender interactions on capital sentencing generally.

Moreover, research on victim effects in capital sentencing have also examined the roles of victim sex and race, mostly in an effort to examine whether or not there are any such effects. Relatively little research has examined why there might be such effects (Richards et al., 2016). Williams and her colleagues (2007) have suggested that victim race and gender become meaningful predictors of blameworthiness and deservedness for the death penalty under a "focal concerns" approach, but they do not offer much in the way of explicating how victim characteristics have become predictor of blame-worthiness. Richards et al. (2016) and Jennings, Richards, Smith, Bjerregaard, and Fogel (2014) elaborate further on this issue by describing the role of "gendered aggravators" such the heinousness of the offense or the presence of a sexual assault of the victim during the offense (see also, Williams et al., 2007). Yet they too fail to offer the any account as to how certain aggravating circumstances have come to be so gendered. We believe that these "focal concerns" and "gendered aggravators" and perhaps other accounts as well derive from more enduring cultural legacies such as that offered above.

Following the argument by Williams et al. (2007), we contend that the effects of victim and offender race and gender interactions on capital sentencing will be most prominent among those capital murders that also involve cotemporaneous sexual victimization. In particular, we predict that Black males who kill White females during rape-involved capital murders will be more likely to receive the death penalty than similarly situated White males. As such, we feel we extend upon the work of Williams and colleagues (2007) by providing an historical/cultural context and theoretical basis for predicting these effects, beyond that suggested by the focal concerns approach offered by William and colleagues (2007).

Method

The data for this study were provided by the North Carolina Capital Sentencing Project (NCCSP—see Kavanaugh-Earl et al., 2008, for a full description of these data). The NCCSP consists of a population of jury decisions in capital murder trials in North Carolina (1977–2009). These data focus on jury decisions, the final step, excluding appeals, in which a sentence of life in prison versus death is determined; these data do not permit an examination of prosecutorial decisions to seek the death penalty, but instead the data constitute the sentencing outcomes in all cases for which the prosecution sought the death penalty and the case advanced to the penalty phase of the capital trial process. That is, the data set is comprised of all cases in which (a) the state secured a first-degree murder conviction, (b) sought the death penalty, and (c) the trial advanced to the penalty phase whereby the jury was instructed to make a sentence of life or death. At the penalty phase, the jury is presented with an "Issues and Recommendation as to Punishment form" and is instructed to record their responses as to the aggravating factors submitted by the prosecution, mitigating factors submitted on behalf of the defendant, and a recommendation for a sentence either for death or life without parole.

The NCCSP data contain the population of cases ($N = 1{,}356$) meeting these criteria for North Carolina between June 1977 and December 2009. The initial date marks the

return to capital punishment in North Carolina following the *Gregg v. Georgia* (1976) decision that allowed for the resumption of capital punishment in the United States. The latter date is the last year for which a full contingency of information is available and compiled. Our interest in the effects of offender race (specifically, Whites and Blacks; the data contain too few cases of offenders of other races—moreover, the enduring cultural legacy hypothesis holds particularly for Black vs. White offenders accused of crimes against White female victims).

Because the NCCSP data derive from the penalty phase of capital murder trials, it is useful to provide a brief overview of the legal process involved in North Carolina. During the penalty phase of a capital trial in North Carolina, the jury is presented with evidence and testimony regarding aggravating factors by the prosecution and mitigating factors by the defense. Prosecutors must prove unanimously that one or more of 11 statutorily delineated aggravating factors existed in the circumstances surrounding the crime. Following the state's presentation of aggravating circumstances, the defense may present any of nine statutory mitigating factors on behalf of the defendant, as well as an unlimited number of nonstatutory mitigating factors that had gained the trial judge's prior approval.[2] Jurors are asked to indicate on the "Issues and Recommendation form," their acceptance or rejection of each of the aggravating and mitigating factors presented to them and to qualitatively weigh the impact of the accepted aggravating factors to that of the accepted mitigation factors and to render a sentencing recommendation of death if the weight of aggravation sufficiently outweighed that of mitigation.

The resulting data set can be said to consist of the population of jury decisions in death eligible, capital murder convictions, involving Black or White male offenders and White female victims, where the jury carried out their specific instructions regarding aggravating and mitigating factors. Given that our data comprise a population, rather than a sample, we do not rely upon inferential statistics when interpreting our results; we do, however, report these tests of statistical significance for the readers to reach their own conclusions. We warn however, that while one could argue that the data do, indeed, constitute a sample, it is certainly not a random sample and, thus, in clear violation of one of the key underlying assumptions of inferential statistics.

Dependent Variable

In North Carolina, capital juries are afforded only two sentencing options: (a) life currently without the possibility of parole or (b) the death penalty; North Carolina requires the capital jury to be unanimous in reaching its sentencing recommendation. As such, the dependent variable used in this study makes a dichotomous distinction between these two options (0 = *life*; 1 = *death*), and the method of analysis employed is logistic regression.

Independent Variables

The primary independent variables in this analysis are measures of the offender's race (0 = *White defendant*, 1= *Black defendant*) and whether or not the offense involved the rape/sexual assault of the victim (0 = *no indication of rape involvement*; 1 = *rape*

involved). Rape involvement was assessed via two separate sets of dummy variables: (1) whether or not the rape/sexual assault aggravating factor was both presented to and accepted by the capital jury (1 = *yes*) and (2) whether or not the rape/sexual assault aggravating factor was presented to the jury, regardless of whether or not the jury accepted it (1 = *yes*). In addition, cross-product terms for the interaction of offender's race and rape involvement were also included in our models.

The Effects of Legal and Extralegal Case Characteristics Modeled as Propensity Scores

The remaining independent variables included in our analyses were selected to represent what have become the standard legal and extralegal factors examined in the capital sentencing literature (Bjerregaard, Smith, Fogel, & Palacios, 2010). Among these are various defendant, victim, and offense characteristics; these include: total number of aggravating factors accepted (excluding rape), total number of statutory and nonstatutory mitigating circumstance accepted, offender's age at the time of the offense (in years), the total number of accomplices involved in the offense, the presence of physical evidence linking the defendant to the offense (1 = *physical evidence present*, 0 = *physical evidence not present*), victim's age (in years), victim's marital status (1 = *married*, 0 = *not married*), victim's involvement in criminal activity (1 = *yes*, 0 = *no*), victim–offender relationship (1 = *stranger*, 0 = *known to one another*), total number of victims, offense occurred in an urban jurisdiction (1 = *yes*, 0 = *no*), case tried in the Mountain Region of North Carolina (1 = *yes*, 0 = *no*), case tried in the Piedmont Region of North Carolina (1 = *yes*, 0 = *no*) with case tried in the Coastal region of North Carolina serve as the reference category, year sentence imposed, and whether or not the case was tried after the US Supreme Court ruling in *McKoy v. North Carolina*, 1990 which further enabled the capital jury to consider nonstatutory mitigating factors (see Kremling, Smith, Cochran, & Fogel, 2007).

Given the small population of cases used in our analyses, we elected to control for the effects of these legal and extralegal case characteristics via a data reduction approach. That is, we employed, as a single control variable, a measure that presented the total effect of all of these control variables in the form of a predicted probability estimate of the case being rape involved or not. To do so, we ran a logistic regression model in which a dichotomous measure of rape involvement predicted by these numerous case characteristics. From this model, a predicted probability estimate was computed for each case in the population of White female victim capital murder trials. This process resembles a propensity score weighting process and permits us to examine the direct and joint effects or offender's race and the rape-involvement variables on the capital sentencing outcomes while controlling for these predicted probability scores.[3]

Results

Of the 312 cases in these data, only 39 (12.5%) were rape involved (i.e., the state presented evidence to the jury in support of the rape–sexual assault aggravating factor)

of which 24 involved a White offender and 15 involved a Black offender. Two thirds (16/24) of the White, rape-involved capital murderers were sentenced to death; while approximately 85% of the Black, rape-involved capital murderers (11/13) were sentenced to death. These distributions suggest that both offender's race and rape involvement may influence the likelihood of a death sentence and may do so in a manner consistent with the expectations of the enduring cultural legacy hypothesis.

Table 1 reports the results of four logistic regression analyses in which we examined the effects of both offender race and rape involvement (i.e., whether or not the rape/sexual assault aggravating factor was presented to the capital jury—Models 1 and 2 and whether or not it was accepted by the capital jury—Models 3 and 4) on the odds of a death sentence. The first and third models examined the independent effects of these two variables while Models 2 and 4 include their cross-product interaction terms. In all four models, Black offenders were at greater odds (18–26 percentage points more likely) than White offenders of receiving a death sentence for the capital murder of a White female victim and rape-involved offenders were 2 to almost 2.5 times more likely to be sentenced to death than nonrape-involved offenders. Yet it is the effect of the cross-product term representing the unique effect of rape involvement by Black offenders in the capital murder of White female victims in Models 2 and 4 that are of primary interest in this study. This effect constitutes our test of the enduring cultural legacy hypothesis. That this effect was positive and rather sizable (odds ratios of 1.38 and 1.69) indicates support for this hypothesis. That is, the unique odds of a death sentence for Black, rape-involved killers of White females were increased almost 35–70%. The joint effects of offender's race and whether or not the rape/sexual assault aggravating factor was accepted by the capital jury is more plainly evident in the predicted probability estimates of a death sentence presented at the bottom of the table. These predicted probability estimates indicate that the probability that a Black rape-involved killer of a White female victim receives a death sentence is .75–.84; for White rape-involved offenders, the predicted probability of a death sentence is .65, almost 10–20 percentage points less; the racial disparity in the predicted probability of a death sentence for offenders who were not found to be rape involved is much smaller (four percentage points) as well as their likelihoods of receiving a death sentence (.52 vs. .48).

Discussion

From the colonial and antebellum Slave Codes, through the Black Codes and Jim Crow laws of the reconstruction era, to the present time, the south has been characterized by proclivity to deny the equal protection of the laws to Blacks, both by punishing Black offenders more harshly and neglecting Black victims (Dodd, 1918; Flanigan, 1974; Imes, 1919; Paternoster, 1991). In particular, southern states maintained an enduring cultural legacy that called for harsh punishment, including death, for Blacks who violated White sensibilities. This was especially evident in the archetypical case of the Black male accused of sexually assaulting a White female (Bardaglio, 1994; Dorr, 2000; Rise, 1992); under such circumstances, via legal or extralegal means, lethal vengeance was a very strong probability (Wolfgang & Riedel,

Table 1. The Effects of Offender's Race and Rape Involvement on Death Sentencing Outcomes in White Female Victim Capital Murder Trials, Controlling for Propensity Score.

	Rape Aggravator Submitted						Rape Aggravator Accepted					
	Model 1			Model 2			Model 3			Model 4		
Variables	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*
Black defendant (1 = *yes*)	0.209	1.233	.411	0.164	1.179	.550	0.228	1.256	.371	0.165	1.179	.545
Rape-involved (1 = *yes*)	0.826	2.284	.037	0.714	2.041	.127	0.891	2.437	.029	0.731	2.077	.118
Black × Rape-Involved	—	—	—	0.323	1.381	.662	—	—	—	0.552	1.686	.512
Propensity score (Y = rape-involved)	1.260	3.519	.076	1.261	3.528	.076	1.205	3.335	.091	1.198	3.312	.095
Constant	−.316	.730	.052	−.302	.739	.067	−.316	.729	.052	−.296	.744	.074
Log likelihood		−206.859			−206.762			−206.622			−206.398	
Model χ^2		18.34			18.54			18.82			19.27	
Pseudo R^2		.043			.043			.044			.045	
Predicted probability of death:												
Black rape-involved	.752						.839					
White rape-involved	.651						.654					
Black not rape-involved	.518						.517					
White not rape-involved	.477						.476					

Note. Logistic regression ($N = 312$).

1973, 1975, see also Greenberg & Himmelstein, 1969). While the death penalty is no longer permissible for rape and sexual assault (see *Coker v. Georgia*, 1977), rape/sexual assault is a statutorily recognized aggravating circumstance that makes rape-involved homicides eligible for capital punishment.

The present study examined the degree, if any, to which there is evidence that this cultural legacy endures to the present. Using official case data for the population of capital murder trials in North Carolina (1990–2009), we examined the joint effects of offender's race and whether or not the offense involved rape/sexual assault on death sentencing outcomes for the capital murder of White female victims. Our findings support the hypothesis of an enduring cultural legacy of lethal vengeance such that Black males convicted of a rape-involved capital murder of a White female victim are substantially more likely to receive a sentence of death (predicted probability of death = .75–.84) than are White rape-involved killers of White female victims (predicted probability of death = .65) or either Black or White nonrape-involved killers (predicted probabilities of death = .52 and .48, respectively). Under this scenario, rape involvement increased the odds of a death sentence for Black male killers of White females by almost 30% ([.84–.65]/.65). This evidence of an enduring cultural legacy calling for harsher punishment of Black males who sexually assault and kill White females is interesting from an academic standpoint, but it is also disturbing and highly problematic; it is evidence of a gross failure to provide equal protection of the laws.

However, while the present study limited its analysis to an examination of a southern cultural legacy regarding race relations, it must be pointed out that the colonial, antebellum, postreconstruction, and 20th century south also prescribed other cultural legacies. In particular, there is a rich history of southern values and mores regarding traditional gender roles (Bardaglio, 1994; Dorr, 2000). Regarding sexuality, these traditional gender norms strongly demanded a woman's chastity before marriage and her fidelity during marriage; any violation was an affront to her father's/husband's honor and could activate male chivalry norms requiring swift and severe responses both toward her and her suitors. White females who violated these gender norms were viewed as unclean, impure, and less worthy of legal protections (Dorr, 2000).

Similarly, the south also had class-based cultural legacies that endured well into the 20th century; these class-based norms distinguished rights and responsibilities of landowners from small tenant farmers, store owners/merchants from clerks, and professionals from the working class. Personal affronts that crossed these class boundaries could also be punished quite severely. As such, a deeper, perhaps qualitative, analysis of the enduring nature of these multiple cultural legacies is needed, one that explicitly examines the intersectionalities of race, gender, and class in the south as they may apply to sentencing decisions in rape-involved capital murder trials. As Paternoster and Brame (2008) suggest, it is imperative that we continue to critically think about and further unpack the potentially complex and nuanced relationships between race and capital punishment decision-making. Such an analysis should be expanded beyond an examination of these cultural legacies in a single state, and it should also compare and contrast any evidence observed in southern states against evidence observed in nonsouthern states where these cultural legacies may be nonexistent or perhaps less enduring.

Finally, this study's data limited it to a focus exclusively on the capital sentencing process, as such it overlooked a great deal of potentially critical discretion at several junctures earlier in the processing of these capital cases; key among these are the prosecutors' decisions to seek the death penalty and, if so, which aggravating circumstances to present (see, Paternoster, 1983; Petersen, 2016; Radelet & Pierce, 1985; Sorensen & Wallace, 1999). Our observation of racial disparity in the sentencing rape-involved capital murder cases may mask and/or may be due, in part, to these more systemic disparities that are present at these earlier stages of case processing. Additional research should also examine the extent, if any, to which evidence of this enduring cultural legacy is reproduced at these earlier stages of capital case processing. Despite this limitation, the results of the present study, do, nonetheless, contribute, however modestly, to a growing body of research literature evidencing the cumulative disadvantage of minority defendants as their case are processed through the criminal justice system.

Appendix A

Table A1. Descriptive Statistics for North Carolina Capital Murder Trials with White Female Victims, 1977–2009.

	Mean	*SD*	Range
Death sentence	0.51	0.03	0–1
Rape aggravator submitted	0.17	0.37	0–1
Rape aggravator accepted	0.16	0.37	0–1
Black defendant	0.32	0.47	0–1
Number of aggravators accepted	2.02	1.31	0–9
Number of mitigators accepted	8.14	9.06	0–50
Torture involved	0.14	0.35	0–1
Kidnapping involved	0.20	0.40	0–1
Offense bloody or unusually repulsive	0.52	0.50	0–1
Sentencing post-McKoy	0.69	0.46	0–1
Region: coastal	0.32	0.03	0–1
Region: mountain	0.14	0.02	0–1
Urban area	0.49	0.50	0–1
Number of victims	1.45	0.81	0–5
Stranger murder	0.35	0.48	0–1
Victim was involved in illegal activities	0.08	0.27	0–1
Victim age at time of offense	40.53	23.17	0–100
Defendant age at sentencing	28.91	8.86	17–64
Private attorney	0.09	0.28	0–1
Number of accomplices	0.55	1.23	0–8
Defendant was triggerman	0.14	0.35	0–1
Defendant cooperated with police	0.32	0.47	0–1

Note. $N = 312$.

Appendix B

Table B1. Bivariate Correlations in North Carolina Capital Murder Trials with White Female Victims, 1977–2009.

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
1. Death sentence																					
2. Rape aggravator submitted	.207*																				
3. Rape aggravator accepted	.211*	.978*																			
4. Black defendant	.077	.083	.059																		
5. Number of aggravators accepted	.354*	.330*	.329*	.238																	
6. Number of mitigators accepted	−.188	.090	.072	−.070	.258																
7. Torture involved	.180*	.121*	.130*	.067	.137*	−.020															
8. Kidnapping involved	.101	.118*	.129*	.017	.183*	.002	.239*														
9. Offense bloody/ unusually repulsive	.165*	.172*	.176*	.036	.206*	.000	.292*	−.075													
10. Sentencing post-McKoy	.067	.112*	.102	.022	.244*	.379*	.085	.024	−.002												
11. Region: Coastal	−.006	−.015	−.041	.147*	.095	.019	.061	.096	.117	.031											
12. Region: Mountain	−.098	−.061	−.055	−.025	.008	.201	−.111	−.093	.012	−.023	.000										
13. Urban area	−.044	−.026	−.009	−.063	−.010	−.050	−.057	−.046	−.057	−.041	−.254*	−.202*									
14. Number of victims	−.096	−.161*	−.165*	−.009	.138*	.269*	−.117*	−.139*	−.017	.092	.101	.157*	.022								
15. Stranger murder	.039	.145*	.141*	.315*	.258*	.023	.080	.138*	.107	−.011	.188*	−.088	.041	.190							
16. Victim involved in illegal activities	−.070	.026	.032	.078	−.059	.062	−.050	−.090	−.070	.018	−.053	−.020	.136*	.027*	−.165*						
17. Victim age at offense	−.071	.028	−.004	.135*	.096	.021	−.139*	−.230*	.106	−.006	−.008	.025	−.086	−.032	.099	−.153*					
18. Defendant age at sentencing	.080	−.071	−.085	−.203*	−.177*	−.114*	−.026	−.116*	−.050	−.041	−.036	−.071	−.099	−.085	−.279*	−.072	−.018				
19. Private attorney	−.023	−.138*	−.135*	−.063	−.145*	−.091	−.090	−.013	−.046	−.017	.006	−.062	−.028	−.099	−.056	−.007	−.019	.096			
20. Number of accomplices	−.046	−.109	−.102	.279*	.072	−.010	.200*	.166*	.001	.066	.154*	−.035	.152*	.122*	.213*	.128*	−.017	−.254*	−.026		
21. Defendant was triggerman	.048	−.012	−.005	.093	.134*	.184*	.101	.044	.085	.076	.047	−.039	.126*	.090	.142*	.047	.002	−.155*	−.094	.322*	
22. Defendant cooperated with police	.008	.028	.040	−.051	.080	.177*	.027	−.103	.132*	−.008	.014	−.006	.020	.110	−.018	.002	−.016	−.052	−.014	−.002	−.083

Note. $N = 312$.
*$p < .05$.

Appendix C

Table C1. The Effects of Offender's Race and Rape Involvement on Death Sentencing Outcomes in White Female Victim Capital Murder Trials with Multiple Control Variables.

	Rape Aggravator Submitted						Rape Aggravator Accepted					
	Model 1			Model 2			Model 3			Model 4		
Variables	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*
Black defendant (1 = yes)	−0.034	0.967	.920	−0.124	0.884	.733	−0.018	0.982	.958	−0.094	0.910	.794
Rape involved (1 = yes)	0.839	2.316	.064	0.612	1.845	.263	0.804	2.234	.079	0.606	1.834	.267
Black × Rape involved	—	—	—	0.657	1.928	.474	—	—	—	0.605	1.832	.522
Number of aggravators	1.039	2.825	.000	1.032	2.806	.000	1.038	2.825	.000	1.031	2.803	.000
Number of mitigators	−0.118	0.889	.000	−0.118	0.889	.000	−0.117	0.890	.000	−0.116	0.890	.000
Torture	0.601	1.825	.212	0.624	1.866	.195	0.598	1.819	.214	0.618	1.854	.200
Kidnapping	−0.157	0.854	.691	−0.126	0.882	.752	−0.156	0.855	.693	−0.128	0.880	.748
Bloody	0.280	1.323	.355	0.310	1.364	.310	0.286	1.331	.345	0.314	1.369	.305
Post-McKoy	0.523	1.687	.107	0.516	1.676	.112	0.525	1.690	.106	0.519	1.680	.110
Mountain region (1 = yes, 0 = piedmont)	−0.133	0.876	.770	−0.109	0.407	.811	−0.141	0.394	.756	−0.121	0.886	.790
Coastal region (1 = yes, 0 = piedmont)	−0.419	0.658	.220	−0.420	0.657	.220	−0.408	0.665	.233	−0.401	0.669	.241
Urban	−0.327	0.721	.294	−0.332	0.717	.286	−0.328	0.720	.292	−0.334	0.716	.283
Number of victims	−0.113	0.893	.574	−0.109	0.896	.586	−0.112	0.894	.576	−0.107	0.898	.593
Stranger murder	−0.365	0.694	.291	−0.363	0.696	.295	−0.366	0.694	.291	−0.367	0.693	.289
Victim involved in illegal activity	−0.428	0.652	.457	−0.425	0.654	.460	−0.426	0.653	.459	−0.426	0.653	.459
Victim age at offense	−0.018	0.983	.010	−0.018	0.982	.010	−0.017	0.983	.012	−0.017	0.983	.012
Defendant age at sentencing	0.026	1.027	.115	0.026	1.027	.114	0.027	1.027	.108	0.027	1.027	.104
Private attorney	0.208	1.231	.677	0.203	1.226	.684	0.200	1.221	.689	0.195	1.216	.695
Number of accomplices	−0.145	0.865	.329	−0.138	0.872	.355	−0.149	0.862	.317	−0.142	0.868	.339
Triggerman	0.621	1.861	.171	0.613	1.846	.176	0.615	1.849	.175	0.606	1.834	.180
Defendant cooperated	0.136	1.145	.663	0.145	1.157	.641	0.127	1.136	.683	0.132	1.141	.671

(continued)

Table C1. (continued)

	Rape Aggravator Submitted						Rape Aggravator Accepted					
	Model 1			Model 2			Model 3			Model 4		
Variables	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*
Constant	−1.146	0.318	.152	−1.138	0.321	.155	−1.179	0.308	.140	−1.185	0.306	.138
Log likelihood		−160.667			−160.404			−160.857			−160.646	
Model χ^2		110.73			111.25			110.35			110.77	
Pseudo R^2		.256			.2575			.255			.256	
Predicted probability of death:												
Black rape-involved	.569						.559					
White rape-involved	.437						.432					
Black not rape-involved	.195						.274					
White not rape-involved	.296						.293					

Note. Logistic regression ($N = 312$).

Appendix D

Table D1. The Effects of Offender's Race and Rape Involvement on Death Sentencing Outcomes in White Female Victim Capital Murder Trials, Controlling for Total Number of Aggravators.

	Rape Aggravator Submitted						Rape Aggravator Accepted					
	Model 1			Model 2			Model 3			Model 4		
Variables	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*	*b*	*OR*	*p*
Black defendant (1 = *yes*)	−0.041	0.960	.881	−0.080	0.923	.784	−0.0256	0.975	.925	−0.085	0.918	.769
Rape involved (1 = *yes*)	0.674	1.962	.066	0.581	1.787	.194	0.729	2.072	.053	0.582	1.791	.192
Black × Rape Involved	—	—	—	0.273	1.313	.721	—	—	—	0.475	1.607	.562
Number of aggravators	0.606	1.834	.000	0.606	1.834	.000	0.604	1.829	.000	0.603	1.828	.000
Constant	−1.203	0.300	.000	−1.192	0.304	.000	−1.205	0.230	.000	−1.187	0.305	.000
Log likelihood		−192.655			−192.590			−192.449			−192.275	
Model χ^2		46.75			46.88			47.16			47.51	
Pseudo R^2		.108			.109			.109			.110	
Predicted probability of death:												
Black rape- involved	.593						.640					
White rape-involved	.546						.546					
Black not rape- involved	.383						.382					
White not rape- involved	.402						.402					

Note. Logistic regression ($N = 312$).

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Notes

1. Please note in Appendices C and D we report a number of alternative analyses which vary the manner in which we control for rival influences. In Appendix C, we control for all of the variables employed in the computation of the propensity score variable, and in Appendix D, we simply control for the number of aggravating factors accepted by the capital jury, as this is the one control variable with the most appreciable effects. While the size of the coefficients of interest vary across these alternative models, the overall results are largely the same as those reported herein.
2. North Carolina's 11 statutory aggravating factors are as follows: (a) the murder was especially heinous, atrocious, cruel, or depraved (or involved torture); (b) the capital offense was committed during the commission of, attempt of, or escape from a specified felony; (c) the murder was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons; (d) the defendant knowingly created a grave risk of death for one or more persons in addition to the victim of the offense; (e) the murder was committed for pecuniary gain or pursuant to an agreement that the defendant would receive something of value; (f) the murder was committed to avoid or prevent arrest, to effect an escape, or to conceal the commission of a crime; (g) the capital offense was committed to interfere with the lawful exercise of any government function or the enforcement of the laws; (h) the defendant has been convicted of, or committed, a prior murder, a felony involving violence, or other serious felony; (i) the capital offense was committed by a person who is incarcerated, has escaped, is on probation, is in jail, or is under a sentence of imprisonment; (j) the victim was a government employee, including peace officers, police officers, federal agents, firefighters, judges, jurors, defense attorneys, and prosecutors, in the course of his or her duties; and (k) the murder was committed against a witness against the defendant while engaged in the performance of his official duties. The nine statutory mitigating factors recognized by the State of North Carolina are (a) the defendant had no significant history of prior criminal activity, (b) the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, (c) the victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act, (d) the defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor, (e) the defendant acted under duress or under the domination of another person, (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, (g) the age of the defendant at the time of the crime, (h) the defendant aided in the apprehension of another

capital felon and testified truthfully on behalf of the prosecution in another prosecution of a felony, and (i) any other circumstance arising from the evidence which the jury deems to have mitigating value.

3. In addition to estimating predicted probabilities that the case was rape involved, we calculated predicted probability estimates that the case resulted in a death sentence and used these scores as a control variable. The results from these supplementary analyses are very similar to those reported here and are available upon request from the lead author. Supplementary analyses presented in Appendices C and D report analyses with all of these control variables entered into the logistic regression models.

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