Final Report on the Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis

Note to Reader from Allen L. Curtis, Executive Director
July 26, 2002

The Commission accepted the Homicide Report in July 25, 2001 from the contractor Keating, O'Gara, Davis and Nedved, P.C., and copies were distributed as required by statute.

Following the release of the original report, the authors found several cases which were coded incorrectly and should have been considered death eligible. Dr. Baldus *(Lead researcher for contractor)* decided since corrections were required, he would clarify some of the findings. Dr. Baldus then met with the Judiciary Committee in November, 2001 and released amended versions of Volumes 1 and 2. The amended report *". . . clarifies and expands upon a few issues of interpretation that arose in response to the initial report, corrects coding and typographical errors identified since July, and reflects several reclassifications in the data base that expand slightly the universe of death-eligible cases. "*

The Commission discussed how best to maintain the integrity of the homicide report while also presenting the corrections. Although the report findings had not changed substantially, having two reports led to confusion.

The contractor agreed having 2 versions of the report was confusing and suggested the Commission retract the amended report. He provided an errata sheet addressing technical issues and substitute sheets to insert in the original report.

The Commission voted to accept the withdrawal of the second Homicide Report by the author. The original research consultants (Cheryl Wiese and Julia McQuillan) were then hired to review the errata sheets to insure that changes listed were in accordance with generally accepted research logic or theory.

At the July 26, 2002 Crime Commission meeting, the consultants, Dr. Julia McQuillan and Cheryl Wiese, submitted their review of the errata sheets and proposed changes in text to the Commission for consideration. Members were provided: 1) the consultants' report which explained their work and the amendment process, 2) errata sheets listing all changes to the original report, 3) insert sheets to replace the amended pages of the original report, 4) a new Table of Contents, and 5) new figures and tables. The Commission voted unanimously to accept these 5 submitted documents as corrections to the original homicide report and directed their placement, along with the original report, on the Commission's website. We have updated Volume 1 and Volume 2 of the original report with the corrected sheets.

Consultants' Report

Explaining Their Work

and the Amendment Process

(NOTE: The consultants hired to review the report were Dr. Julia McQuillan, Department of Sociology, and Cheryl J. Wiese, Department of Sociological Research, University of Nebraska Lincoln.)

June 13,2002

To: Allen Curtis and the Crime Commission

From: Julia McQuillan and Cheryl Wiese

Re: Evaluation of the *Amended Final Report on The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis.*

Background

The State of Nebraska Commission on Law Enforcement and Criminal Justice, requested proposals to review and analyze all cases involving criminal homicide committed on or after April 20, 1973, as outlined by the provisions of Legislative Bill 76, Ninety-sixth Legislature, First Session, 1999.

Attorney General Don Stenberg appointed a panel consisting of Gary Lacey and Harold Clarke of Lincoln and Steve Exon and Phyllis Anstine of Omaha. The panel's charge was to recommend how to proceed with the study with the appropriated funds for the Nebraska Commission on Law Enforcement and Criminal Justice to examine the death penalty. This panel held two public forums early in August of 1999 in Omaha and North Platte, Nebraska, to provide an opportunity for public input on the process.

The Nebraska Commission on Law Enforcement and Criminal Justice Crime commission decided to request proposals from researchers to prepare the data and preliminary analysis for such a review of criminal homicide cases occurring after April 20, 1973, and before December 31, 1999. The state released a request for proposals (RFP) in October of 1999 and after a competitive bid process, the commission awarded the contract to the proposal by Gary Young and David Baldus et al.

The legislation (LB76A) funded the study specifying that the Supreme Court shall review and analyze all cases involving criminal homicide occurring after April 20, 1973. As directed by the proposed law the researchers reviewed and analyzed (a) the facts including mitigating and aggravating circumstances, (b) the charges filed: (c) the crime for which defendant was convicted, and (d) the sentence imposed. The RFP specified that the study be released by August 1, 2001.

After the timely release of the *Final Report on The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis,* the report authors (Baldus, Woodworth, Young and Christ) determined, upon further examination of the coded data for all *death-eligible cases,* that twelve cases should be re-classified. In two of these cases: there were resentences, and the coder erroneously did not code the resentences as separate units of study analysis. An additional eight cases had no aggravators but did have a penalty trial. The study's coding protocol required these cases be coded as "death eligible", but the coders erroneously coded them as "not death eligible." Finally, there were two cases that were originally coded as "death-eligible" that had been reclassified to not-death eligible during the analysis because special circumstances in the cases prevented the exercise of discretion on the question of deathworthiness by the prosecutor and the sentencing judge(s). Although these cases had been reclassified for treatment as "not death-eligible" during tabulation of the study data these cases were erroneously included in the death-eligible pool of cases.

After correctly classifying the twelve cases: all of the base numbers changed slightly; therefore all of the analysis had to be recalculated with the correct data. The study authors also added the 32 non-capital homicide cases to the tables that were inadvertently omitted from the original tables of the report as the authors explained in footnote 75 of the original report.

The report authors took two actions to rectify the situation. First, they wrote a revised report that added considerable additional text intended to clarify issues that they realized were unclear in the first report. This revised report apparently caused some confusion; therefore the study authors withdrew the "extra text" report from consideration to eliminate the confusion.

Secondly, they wrote amended insert pages and an errata sheet identifying the places in the text of the original report that required changes to reflect the reclassification of the case described above; and to indicate where text was changed only to reflect the new numbers in the tables and figures. We evaluated the amended insert pages and the new tables and figures for the Crime Commission. Our goals were to: a) make sure that the new text accurately reflects the new data, b) evaluate whether or not there are any substantive changes to the original report, and c) to

make a recommendation regarding whether or not the new pages and tables/figures should be considered as "the report" by the Crime Commission.

Evaluation Process

At the request of the Commission, we carefully reviewed the "insert sheets" with the new text and the tables and figures reflecting the changes in the base numbers. McQuillan did the initial comparison of old and new tables/figures/text. She submitted a list of questions to Baldus and Young regarding anything that was not immediately obvious or seemed inconsistent, and met with Young to review the study authors' answers. In addition, sections that McQuillan thought should have changed as a result of the new analysis but did not change were brought to the attention of the authors. The authors made additional changes based on these suggestions and questions when such changes were appropriate and mutually agreed upon. After the initial review and reply exchange, McQuillan and Young met to go over the answers and agreed upon what should be done. Then Young made all of the agreed upon changes, and Wiese reviewed the new report, now called the 3rd revised report, to make sure that all of the changes as agreed upon were made. McQuillan and Young did one final review of the needed changes, and made sure that only changes that reflected the new tables and figures (based on the new numbers), as well as corrections of typos in the previous report, were included in the insert pages and errata sheet.

Through this process we are confident that the new text in the insert sheets accurately reflects the changes in the tables and figures, and that the tables and figures accurately reflect the new numbers. No text other than that needed to reflect the new numbers were added to the report. We found only one substantive change: the victim SES effect is now apparent in both the urban areas and greater Nebraska, not just the latter area. Otherwise we share the conclusion of Baldus, Woodworth, Young and Christ that only minor substantive conclusions changed due to the new numbers.

Recommendation

The third revised report is now the most accurate statement of the findings. We recommend that the Commission consider the new tables/figures and accompanying text (The 3rd revised version) as "the report". This is the most accurate information available, and therefore should not be ignored.

A more cumbersome approach, but one that leaves the original report intact as an historical document while also giving accurate information, is to provide the insert sheets and the errata sheet listing changes as an addendum to the original report (including all of the new figures and tables).

The social science of this study in context

Error in social science research

We anticipate that the Commissioners may have additional questions or concerns about the errors that were detected and corrected. We pose some of those questions and our answers below by providing the study and reports in the context of how the research process occurs.

All research involves errors. We use data collection and analysis methods that assume and attempt to minimize the effects of errors on conclusions. We use probabilistic rather than deterministic language partly because of the imperfections inherent in research.

Errors can occur at many levels of research. The raw data used for this study involved a variety of sources, all likely to be imperfect (case reports, death certificates, court records, memories of those involved, etc.) There is little that can be done about errors in the raw data unless the errors are obvious and there are ways to validate the data through other sources. The coded data is also likely to have errors. We try to minimize these errors by using appropriate procedures (see a discussion of this below). The data analysis can also have errors: particularly specification errors. Specification errors occur when all of the important variables are not included in an analysis. In this study the authors ran a variety of statistical models that included all possible variables, and many combinations of variables. Specification errors are still possible, but unlikely. Analyzed data put into tables and figures can also have errors. It is possible to put

the wrong data in a table, to make a transcription error, etc. The likelihood of such errors in this study at this point is less likely. All of the tables and figures have been created at least twice, and have been reviewed four times. However, with so many numbers, errors are possible. Gaps between the "absolute truth" and finished studies are inherent in all research. We can and do take precautions to minimize errors as much as possible. It is impossible to eliminate all errors.

Errors in this study

The study inspired by LB76 was a very large undertaking. The researchers worked very quickly to get the work done on schedule. They built checks into their system of coding and analysis, and worked in a professional manner. Even with the careful work that they did, it is entirely possible for errors of this type to occur. These errors were systematic, in that they had a pattern to them. When one error was detected, they re-examined all of the coding sheets to determine if the same error occurred elsewhere, and discovered the 10 problem cases.

Ideally an external audit (by someone not part of this team) of a random sample of cases could be done to check the coding. However, given the financial budget and time constraints, this was not feasible. Instead the research team did the next best thing - they had the coding for each case checked by Gary Young as an internal "audit". It is likely that there are other small errors in coding or data entry that are randomly distributed among the data. The Commission should understand that these sorts of minor tabulation and coding errors are generally to be expected in social science research - no data set is perfect. Instead, we assume in our analysis that the errors are random, and therefore should not influence results.

If the researchers had had the luxury of more time, and had not been required to present their initial draft of the report in a public forum as was required by the special nature of the project, they would have made their initial final report a "draft", and would have allowed an opportunity for clarification and review before the report in its final form would have been published. This is what the researchers did in the Review of Virginia's System of Capital Punishment which was released December 10, 2001, and reported on in the Washington Post by Brooke A. Masters in the Tuesday, December 11, 2001, edition of the paper (see

http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A22698-2001Dec10) - they released a draft report to the public to allow for questions and clarification before a final report was published.

Review process in social science

In most social science research, results go through informal and formal peer review processes before being published in their final form. During that process errors such as the ones involved here are discovered and corrected before the work becomes "final". In this process reviewers usually focus carefully on the tables and figures, and compare their own conclusions with those of the study authors. It is possible for researchers to disagree in their interpretations of the tables and figures. The meaning of the size of differences between groups partly reflects expectations of a discipline. What is a small effect for a crime study might be a large effect for a mental health study. There are reasonable ranges of interpretations. From a social science point of view. the key contribution of the study is the tables and figures. The text is a good guide to interpreting the tables and figures: but is less likely to be considered "the findings". The tables and figures are "the findings". In this case, we had very similar interpretations of the data as the authors. Like most social scientists, we focus on results that are statistically significant. These are results that are most likely to reflect something "real" going on, rather than a chance pattern due to this particular data. Because of the high profile and public nature in which the report was required to be released, and the strict confidentiality restrictions on the report prior to release, the researchers did not have the benefit of this ordinary process. Even this process sometimes misses errors. For this reason we recommend making the data public, if it is possible to do so with in the law, so that the process of replication can begin. This process should reveal any further problems, and/or increase our confidence in the results of this study.

Finally, the correction of the ten cases results in very small changes in interpretation, and none of the *major* findings of the study were reversed. This suggests that the results as presented are robust to minor errors in the data. In other words, the patterns presented are quite strong, and emerged even when there were ten cases mis-classified. This should strengthen confidence in the findings of the study.

Should the commission consider the more accurate report "the report" or retain the original report with 12 misclassified cases?

We recommend that the commission consider the report with only corrected tables/figures and accompanying text "the report". This report is the closest to the "truth" of the data. Even though few conclusions change with the new base numbers, we recommend that the State have the most accurate representation of the data requested in LB76. The amended report provides this information.

Is it possible thatfuture problems will arise?

Yes, it is possible, as is the case with all social science research. As stated above, when the data and analysis are subject to replication, it is possible that other errors will emerge. The fact that the coding instrument was used several times before, that most of the measures are straight forward, and that at least two people coded every case minimizes the likelihood of bias. But again, it is generally accepted in social science that human error cannot be totally eliminated. Instead, we assume that there will be error, and that if a pattern is strong enough, it will emerge despite the error in the data. Even if the coding and data entry were executed perfectly, there would be errors in the source data. However, from a scientific point of view, it is better to have systematically collected data that is as accurate as possible than to have no systematic information on the topic when making policy decisions.

Errata Sheets

Listing All Changes

to the Original Report

(NOTE: Errata sheets are a list of corrigendum which are errors in a printed work discovered after printing and shown with its correction on a separate sheet.)

David C. Baldus, et al., The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, July 25, 2001

Errata, Volume I

Page	Line	Alteration
4	23	change: "86" to "87"
6	2	change: "over 700" to "691"
	9	change: "177" to "175"
	10	change: "the imposition of 27" to "185 prosecutions and 29"
	11	change: "of the universe of over 700" to "691"
	15	add: "(b) there was some evidence of aggravation in the case," change "(b)" to "(c)"
7	5	change: "81" to "89"
	6	change: "27" to "29"
	7	change: "27" to "29"
	8	change: "150" to "156"
14	17	change: ".15 (20/130)" to ".16 (22/135)"
	18	change: ".16 (7/45)" to ".14 (7/49)"; change: ".36 (20/56)" to ".37 (22/60)"
	19	change: ".29 (7/24)' to ".25 (7/28)"
	FN 2a	add FN2a, with the following text: "There were 50 death eligible cases in this denominator and therefore 50 prosecutorial decisions. However, because there were only 49 cases in which there was a meaningful exercise of discretion by the sentencing court on the death sentencing issue, we limited the denominator to those 49 cases for this calculation."
15	1	change: ".43 (56/131)" to ".44 (60/135)"
	2	change: ".54 (25/46)" to ".58 (29/50)"; delete "not"; add: "at the .10 level."
	4	change: "becomes" to "is"
	5	change: "remains" to "is not"; change: "insignificant" to "significant"
	6	change: "(24/145)" to "(26/152)"; change: ".11 (3/28)" to ".10 (3/30)"
	7	change: "(24/66)" to "(26/72)"; change: ".21 (3/14)" to ".19 (3/16)"
	8	change: ".46 (67/147)" to ".48 (73/153)"
	9	change: ".50 (14/28)" to ".53 (16/30)"
16	5	change: ".22 (5/23)" to ".20 (5/25)"
	10	change: ".14 (22/152)" to ".15 (24/159)"
	11	change: ".38 (5/13)" to ".33 (5/15)"; change: "(22/67)" to "(24/73)"
	9	moved: first sentence to end of previous paragraph
	10	delete: "However. . . culpability."
	16	change: ".58 (14/24)" to ".62 (16/26)"
	17	change: ".44 (67/153)" to ".46 (73/159)"
17	7	change: 52% (14/27) to 48% (14/29)
	18	change: 26% (7/27) to 14% (4/29)
	23	change: "one case" to "three cases"
	24	change: "has" to "have"
18	FN4	moved: footnote 4 from page 19 to page 18

19	FN4	moved: footnote 4 from page 19 to page 18
20	3	change: .15 to .16; change: .16 to .14
	10	add: ", adjusted for defendant culpability,"; change: (.38 v. .35) to (.37 v. .31)
	11	change: "twice" to "2.4 times"; change: "--.27 v. .13" to "(.26/.11)"
	17	change: 50% to 41%; change: (from .38 to .20) to (from .37 to .22)
	18	change: (from .35 to .31) to (from .31 to .29)
	19	change: (.20 v. .31) to (.07/.29)
21	11	change: "--.09" to ".12"; change: ".14" to ".13"
	17	change: "177 capital murder" to "175 death-eligible"
	FN 6	add the following text to the footnote: "See infra notes 153 and 154 and accompanying text for a description of the measures of defendant and victim socioeconomic status used in this report."
22	9	change: "1.8 (.64/.35)" to "1.9 (.70/.37)"
	10	change: "3.7 (.22/.06)" to "5. 6 (.28/.05)"
	13	delete: "When. . . counties."
	20	change: "low SES" to "SES of the"; change: "apparent" to "substantial in charging and sentencing decisions"
23	2	change: "over 700" to "691"
	4	change: "177" to "175"
	5	change: "27" to "29"
23	6	change: "over 700" to "691"
	7	change: "of the 27 death sentences" to "defendants sentenced to death"
	10	change: "81" to "89"
	11	change: "27" to "29"
24	1	change: "27" to "29"
	2	change: "150" to "156"
29	7	change: "26" to "25"
	18	change: "39%" to "41%"
34	4	change: "more than 700" to "691"
	8	add: "(b) there was some evidence of statutory aggravation in the case,"; change "(b)" to "(c)"
	FN58	change: "912" to "894" and "over 700" to "691"
	FN59	moved: a portion of the text that appeared on page 34 now appears on page 35
35	2	change: "177 cases that we identified as death-eligible" to "185 prosecutions of 175 death-eligible defendants"
	17ff.	moved: a portion of the text that appeared on page 35 now appears on page 36
36	1	change: "47% (36/77)" to "48% (39/82)"
	6	change: "(2/16)" to "(2/17)"
	7	change: "77" to "84"; change: "16% (12/77)" to "14% (12/84)"
	10	change: "65" to "72"
	11	change: "38% (25/65)" to ".37 (27/72)"
	12	change: "(27/81)" to "(29/89)"
	13	change: ".15 (27/177)" to ".16 (29/185)"

	14	change: "27" to "29"; change: "25%" to "15"
	15	delete: "while 20 sentences have been finally affirmed on appeal."; add: "or have been vacated by federal courts."
	16	change: "There are currently" to "At the time of the release of this report, there are"
	FN63	change: ".19 (7/36)" to ".18 (7/39)"; change: ".49 (20/41)" to ".51 (22/43)"
	FN64	change: "65" to "72"; change: "25" to "27"; change: "16" to "17"; add: "In one of these cases, the court did not exercise discretion, and therefore it has been omitted from our subsequent analyses of penalty trial decision making."
	FN66	add: ", although one case was reversed on a 'traditional' ground of excessiveness."
38	4	change: "522" to "548"
	5	change: "12% (64/522)" to "11% (62/548)"
	6	change: "(171/522)" to "(182/548)"
	7	change: "(47/171)" to "(50/182)"
	8	change: "(287/522)" to "(304/548)"
	10	change: "171" to "182"
	20	moved: a portion of the text that appeared on page 38 now appears on page 39
	FN75	delete footnote text and replaced with: "This footnote has been omitted."
39	1	change: "29" to "21"
	11	change: "case" to "cases"
	15	change: "1978" to "1987"
	11	change: "1978" to "1987"
	12	change: "22% (11/50)" to "14% (7/51)"
	13	change: "47% (19/40)" to "25% (9/36)"; change: ".40 to .21" to ".36 to .27".
	14	change: "60% (12/20)" to "29% (5/17)"
	15	change: ".20 to .08" to ".17 to .12"
	FN78	change: "(.50 and .39)"; change: ".50" to ".51"
41	FN	add FN 79a, with the following text: "See infra notes 153 and 154 and accompanying text for a description of the SES measures."
42	11	change "over 700" to "691"
44	23	change "more than 700" to "691"
51	17	change: ".43 (56/131)" to ".44 (59/135)"; change: "54% (25/46)" to ".58 (29/50)"
	16	change: "11" to "14"; change: "(.43-.54)" to "(.44-.58)"
54	3	change: ".15" to ".16"
	8	change: ".34" to ".33"; change: "25" to "23"; change: "19" to "17"
	11	change: ".15" to ".16"
	17	change: "only one," to "none of"
	FN91	delete "and l(h)"; delete "factors l(b), l(e), l(f) and l(h) were"; add: "only factor 1(c) was"

55	1	delete "catchall mitigating factor in Column H,"; replace with: "mitigators by itself"
	14	change: ".37" to ".41"; change: ".02" to ".06"
	15	change: ".01" to ".03"
	FN93	delete: "One, the 2(g) factor, was significant at the .10 level."; delete: "the 2(d) mitigator was significant at the .05 level"; add after "penalty trial,": "the catchall mitigator was significant at the .001 level."
56	1	change: "52%" to "48%"
	2	change: "27" to "29"
	19	change: ".02 (1/40)" to ".06 (3/48)"
57	2	change: "37%" to "41%"
	15	change: "Row" to "Part"; change: "show no effect" to "suggest a slight effect"
	16	change: "only one case in that category received a death sentence" to "the three death sentences in that category had only one or two mitigators"; change: "Row" to "Part"
	21	moved: a portion of the text that appeared on page 57 now appears on page 58
	FN95	change: "3.5" to "2.9"; change: "6.7" to "5.7"
58	16	change: "(.15)" to "(.16)"
	22ff.	moved: a portion of the text that appeared on page 58 now appears on page 59
59	11	change: "3" to "4"
	15	change: "C and D" to "D and E"; change "one" to "three"
	16	change: "70% (19/27)" to "69% (20/29)"
	17	change: "52% (14/27)" to "48% (14/29)"; change: ".90" to ".87"
	19ff.	moved: a portion of the text that appeared on page 59 now appears on page 60
60	17	moved: a portion of the text that appeared on page 60 now appears on page 61
	FN99	change: "note 16" to "note 47"
61	6	change: "66% (457/697)" to "67% (366/548)"; change: "state's homicides" to "state's non death-eligible homicides"; change: "59% (105/177)" to "61% (113/185)"; change "murders" to "murder prosecutions."
	7	change: "71% (55/77)" to "75% (67/89)"; change: "67% (18/27)" to "69% (20/29)"
	14	add after "Figure 9": ", Part I"
	17	change: "2.0 (.57/.29)" to "1.9 (.59/.31)"
	20	add the following text at end of paragraph: "Part 11 of Figure 9 presents comparable disparities when the outcomes are adjusted for offender culpability." (additional text appears on page 62).
	20	moved: a portion of the text that appeared on page 61 now appears on page 62
	FN102	moved: now appears on page 62
62	14	change: "over the last 15 years" to "since 1982"

	20	moved: a portion of the text that appeared on page 62 now appears on page 63
	FN103	moved: now appears on page 63
63	5	change: "(.40 v. .20)" to "(.44 v. .20)"
	7	change: "(.59 v. .42)" to "(.56 v. .42)"
	14	change: "31" to "28"; change: "28" to "31"
	18ff.	moved: a portion of the text that appeared on page 63 now appears on page 64
	15	change: "(.57 v. .30)" to "(.57 v. 27)"
	16	change: "four" to "3.5"; change: "(.60 v. .14)" to "(.60 v. 17)"
	19ff.	moved text "Although . . . significant" to FN106 which now appears on page 64
	FN105	replace text "present the best picture of" with "informed"
64	4	change: "3.5 (.38/.11)" to "3.7 (.37/.10)"
	5	change: "twice as high (.14/.07)" to "1.4 times higher (.14 /.l0)"
	24	moved: a portion of the text that appeared on page 64 now appears on page 65
65	7	change: "27" to "30"; change: "(.54-.27)" to "(.58-.28)"
	6	delete: "not"; add after "Figure 12": "note 1"; change: "6" to "2"; change: "(.26-.32)" to "(.27-.29)"
	17	delete: "not"; add after "Figure 12": "note 1";
	7	change: "3" to "5"; change: "--.14" to ".15"; change: ".11" to ".10"
67	2	change: "row" to "column"
	3	change: "14" to "15"
	5	change: "14" to "15"; change: "5 points" to "1 point"
79	12	change: ".15 (20/130)" to ".16 (22/235)"; change: ".16 (7/45)" to ".14 (7/49)"
	13	change: ".36 (20/56)" to ".37 (22/60)"; change: ".29 (7/24)" to ".25 (7/28)"
	FN139	delete complete text of footnote; add the following text in footnote: "Disparities were calculated for the penalty trial death sentencing rates statewide, and for death sentences imposed among all death-eligible cases, while applying a number of controls: number of aggravating circumstances, number of aggravating and mitigating circumstances, the salient factors measure, the regression based scale, and the logistic regression analysis. None of the disparities were statistically significant."
80	2	change: "(24/145)" to "(26/145)"; change: ".11 (3/28)" to ".10 (3/30)"
	6	change: ". T" to ", t"
	10	change: ".22 (5/23)" to ".20 (5/25)"; change: ".13 (22/152)" to ".15 (24/159)"
	11	change: ".38 (5/13)" to ".33 (5/15)"
	12	change: ".33 (22/67)" to ".33 (24/73)"
	FN140	delete complete text of footnote; add the following text in footnote: "Disparities were calculated for the penalty trial death sentencing rates statewide, and for death sentences imposed among all death-eligible cases, while applying a number of controls: number of

		aggravating circumstances, number of aggravating and mitigating circumstances, the salient factors measure, the regression based scale, and the logistic regression analysis. None of the disparities were statistically significant."
	FN141	delete complete text of footnote; add the following text in footnote: "Disparities were calculated for the penalty trial death sentencing rates statewide, and for death sentences imposed among all death-eligible cases, while applying a number of controls: number of aggravating circumstances, number of aggravating and mitigating circumstances, the salient factors measure, the regression based scale, and the logistic regression analysis. None of the disparities were statistically significant."
81	FN	deleted extraneous footnote text: "defendant . . . cases."
82	9	change "Without more" to "Without further analysis"
	FN143	(line 2) change: "11 points (p = .18)" to "12 points (p = .11)"; (line 3) change: "14 points (p = .12)" to "16 points (p = .06)"; (line 4) change: "16 points (p = .13)" to "11 points (p = .06)"; (line 5) change: "--.49" to "--.45"; (line 7) change: "16 points (p = .05)" to "19 points (p = .02)"; (line 9) change: "15 points (p = .05)" to "15 points (p = .04)"; (line 10) change: ".49" to ".67"; (line 15) change: "16 points (.10)" to "18 points (p = .05)"; (line 16) change: "13 points (p = .16)" to "12 points (p = .08)"; (line 17) change: "11 points (p = .33)" to "10 points (p = .18)"
83	7	change: "2" to "-1"
84	18	change: "46" to "50"
	19	change: "89% (41/46)" to "90% (45/50)"
85	1	change: "24" to "26"; change: "83% (20/24)" to "85% (22/26)"
	FN147	change: (line 1) "46 (41 + 5)" to "50"; (line 2) change: "41" to "45"; change: "24" to "26"; (line 3) change: "20" to "22"
86	10	change: "weight" to "weigh"
	17	add: "with below average" between "communities" and "per", and change "appropriation" to "appropriations"
	18	change: "delegate" to "delegates"
90	7	change: ".37" to ".40"; change: ".50" to ".51"
	8	change: ".65" to ".70"
	6	change: "2.6 (.26/.10)" to "3.0 (.3/.1)"
	22	change: "2.7 (.16/.06)" to "3.0 (.15/.05)"
91	1	change: "6" to "13"; change: "1.4:1" to "1.9:1"
	2	change: "(.22/.16)" to "(.28/.15)"
	9	change: ".52" to ".59"; change: ".60" to ".72"
	3	change: ".52" to ".51"; change: ".56" to ".72"
	4	change: "12" to "17"
	5	change: "13" to "20"; add after "percentage points" the following: "(.29/.09)"
	22ff.	moved: a portion of the text that appeared on page 91 now appears on page 92
92	7	change: "24" to "28"; change: "15" to "23"
	6	change: "13" to "20"

11 change: "-11" to "-12"

13 change: "1" to "2"; change: "-13" to "-15"

17 change: "-13" to "-15"

FN 158 delete the text of the footnote, and replace it with following text:

High Victim SES Effects: concerning the impact of victim high SES effects on the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the statewide disparity is 12 points (p = .01); controlling for the salient factors measure, the disparity is 17 points (p = .24); controlling for the regression based scale, the disparity is 25 points (p = .0l); in the logistic regression analysis in Table 4, Column E, the coefficient for the victim SES scale is -.61, and statistically significant.

For the penalty trial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the high victim SES disparity is 3 points (p = .01); controlling for the regression based scale, the disparity is 21 points (p = .01); in the logistic regression analysis in Table 4, Column G, the coefficient for the victim SES scale is -1.2 and statistically significant. For death sentences imposed among all death-eligible cases controlling for the number of aggravating and mitigating circumstances in the cases, the high victim SES disparity is 8 points (p = .01); controlling for the salient factors measure, the disparity is 7 points (p = .08); controlling for the regression based scale, the disparity is 15 points (p = .04); in the logistic regression analysis in Table 4, Column I, the coefficient for the victim SES scale is -1.2 and statistically significant.

Low Victim SES Effects: concerning victim low SES effects statewide, for the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances, the disparity is –20 points (p = .01); controlling for the salient factors measure, the disparity is -12 points (p = .14); controlling for the regression based scale, the disparity is -17 points (p = .02).

On the penalty trial death sentencing rates, controlling for the number of aggravating and mitigating circumstances, the victim low SES disparity is -19 points (p = .03); controlling for the salient factors measure, the disparity is -20 points (p = .02); controlling for the regression based scale, the disparity is -18 points (p = .02). For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the low victim SES disparity is -14 points (p = .01); controlling for the salient factors measure, the disparity is -13 points (p = .01); controlling for the regression based scale, the disparity is –9 points (p = .01).

93/94 9 ff. Delete text: "Figure 23 replicates . . . and judicial sentencing rates"; replace deleted text with the following:

Figure 23 replicates the three level victim SES analysis presented in Figure 19 separately for the major urban counties and greater

Nebraska counties. The victim SES effects are apparent in both areas of the state. The specific patterns of SES effects in prosecutorial charging and judicial sentencing decisions vary in the two areas, but the bottom line of disparities among all death eligible cases is strong and consistent in both areas.

Figure 24 highlights these patterns by focusing separately on the high and low victim SES effects in the major urban and other counties after adjustment for the number of aggravating circumstances in the cases. The data in Part I, which focus on the high SES victim effects document patters in both parts of the state that are quite comparable in terms of magnitude and levels of statistical significance. Part II tells a similar story for the low SES victim effects. These data strongly suggest that defendants whose crimes are comparable in terms of their criminal culpability are treated differently on the basis of the SES status of their victims by both prosecutors and sentencing judges. The disparities documented in Figures 23 and 24 after adjustment for the numbers of statutory aggravating factors in the case are replicated in other analyses that we conducted with alternative measures of defendant culpability.

Recall that Figure 21 documented statewide significant high SES victim effects. Figure 24 indicates that those statewide effects reflect a patter of high (Part I) and low (Part II) SES victim disparities in charging and sentencing decisions in both the major urban counties and greater Nebraska.

FN159 moved: a portion of the text that appeared on page 94 now appears on page 95

99 16 change: "27" to "29"

101 10 add after "Column I" the following text: "limits the pool of potential near neighbors to penalty trial defendants. It"; change: "12" to "11"

17 replace the following text: "Part I, Column A, in contrast, identifies one case" with the following: "Part I also indicates that there are no death sentenced cases"; delete the following text: "We classify that ...culpability."; add the following text: The analysis in Part II of Figure 25 expands the pool of potential near neighbors to embrace all death-eligible cases. As a consequence, the results shown in this Part of Figure 25 reflect the impact of both prosecutorial charging and judicial sentencing decisions. Column I indicates that none of the death sentenced cases fall in the category in which .80 or more of his near neighbors result in a death sentence. In one death sentenced case (Column A), the rate of death sentencing among near neighbors is less than .10.[173] Columns A – E of Part II indicate that for 52% (15/29) of the death sentenced cases, the rate of death sentencing among near neighbors is less than 50%.

FN173 delete text of footnote and replace with the following: "This footnote has been omitted." FN 173 now appears on page 102.

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102	21	change: ".35" to ".33"
103	2	change: ".15" to ".16"
	7	add after "Indeed," the following: "Figure 25 and Appendix B"
	8	change: ".52 (14/27)" to ".48 (14/29)"; change: "22% (6/27)" to "17% (5/29)"
	19	change: "12" to "11";
	20	change: "only 3" to "no"
	21	moved: a portion of the text that appeared on page 103 now appears on page 104
104	11	change: "51%" to "54%"
	12	change: "42%" to "40%"; change: "56%" to "62%"
105	14	change: "52% (14/27)" to "48% (14/29)"
	19	change: "22% (6/27)" to "17% (6/29)"
106	7	change: "26% (7/27)" to "21% (6/29)"
	11	change: "(14/27)" to "(15/29)"
	18	change: ".35" to ".33"
	19	change: ".15 in both states." to ".16 in Nebraska and .15 in Jew Jersey."
	7	change: "4% (1/27)" to "3%(1/29)"
	8	change: "(3/39)" to "(3/34)"
107	2	change: "4% (1/27)" to "3%(1/29)"
	6	change: "over one-half" to "48% (14/29)"
108	16	change: "177" to "185"
109	2	change "statistically significant degree in only one analysis (Column E)" to "statistically significant degree in none of the analyses (Column E)"
	13	add the following text after "that": "when compared to other penalty trial cases,"; change "52% (14/27)" to "48% (14/29)"
	17	change: "26% (7/27)" to "28% (8/29)"
	18	after the text ". . .or less," add the following: When the comparison embraces all death-eligible cases, 17% (5/29) of the death sentences were imposed in cases in which over 70% of the defendant's near neighbors were sentenced to death, and in 52% (15/29) of the death sentences, the death sentencing rate among similarly situated offenders was 50% or less.
	19	moved: a portion of the text that appeared on page 109 now appears on page 110
110	6	change: "one case" to "three of 48 cases"; change: "has" to "have"
	14	change: "nearly" to "about"
	19ff.	moved: a portion of the text that appeared on page 110 now appears on page 111
	15	change: "nearly" to "about"; change: "(.57 v. .30)" to "(.57 v. .27)"
111	1	change: "4.6 times (.60/.13)" to "3.5 times (.60/.17)"
	5	change: "3" to "6"
	6	change: "(.38 v. .35)" to "(.37 v. .31)"
	7	change: "11" to "7"; change: "(.20 v. .31)" to "(.22 v. .29)"
	19ff.	moved: a portion of the text that appeared on page 111 now appears on page 112

112	5	change: "37%" to "32%(7/22)"
	19ff.	moved: a portion of the text that appeared on page 112 now appears on page 113
113	18ff.	moved: a portion of the text that appeared on page 113 now appears on page 114
114	9	Deleted text: "When. . . state."; replaced with text: "The SES of the victim effects are substantial in charging and sentencing decisions throughout the State."

Errata, Volume II Tables and Figures

All tables and figures have changed due to the changes in the base numbers. Accordingly, please refer to the revised tables and figures submitted herewith.

Insert Sheets

To Replace the Amended Pages

of the Original Report

Volume 1

(NOTE: If you have a copy of Volume 1 of the original report released July, 2001, these sheets are printed so when inserted in the original report, they will provide a corrected copy of the report as accepted by the Crime Commission July 26, 2002.)

Executive Summary

I. Introduction

This report examines decision-making in the disposition of 691 Nebraska homicide cases that resulted in a criminal conviction between 1973 and 1999.[1] The research was undertaken pursuant to a decision of the Nebraska Legislature to support a study of Nebraska homicides with a focus on fairness. Pursuant to the enabling legislation, the Nebraska Commission on Law Enforcement and Criminal Justice (the "Crime Commission") authorized the study. The universe of the study is all criminal homicides committed after April 20, 1973, and before December 31, 1999.

The principal focus of the report is on decision-making in 175 death-eligible homicides processed between 1973 and 1999 that resulted in 185 prosecutions and 29 death sentences. We identified this pool of death-eligible cases in a case by case screen of 691 cases.

The test we used for identifying death-eligible cases in the broader universe of cases has two parts. The first part focuses on first-degree murder (M1) convictions. We classified M1 cases as death-eligible if (a) they advanced to a sentencing hearing under Neb. Rev. Stat. Section 29-2520; (b) there was some evidence of aggravation in the case, and (c) the court addressed the issue of whether the sentence should be life or death. For M1 convictions that did not advance to a sentencing hearing because of a waiver of the death penalty by the state, we classified the case as death-eligible if the facts clearly established that one or more statutory aggravating circumstances was present in the case.

Second, we classified cases as death-eligible that resulted in a conviction for a crime less than M1 if (a) the conviction was pursuant either to an initial charge of less than M1 or a plea bargain that reduced an initial M1 charge to the lesser offense and (b) the facts clearly

established the presence of the mens rea (mental state) required for M1 and one or more statutory aggravating circumstances in the case.

In all of these death-eligible cases, we examined prosecutorial charging and plea bargaining decisions, as well as the prosecutorial decision to advance first-degree murder cases to a penalty trial. In the 89 first-degree murder cases that advanced to a penalty trial with the State seeking a death sentence, the study focused on the judicial decisions that resulted in 29 death sentences.

In the analysis of the death-eligible cases, we first examine the impact of defendant culpability on charging and sentencing outcomes. We then examine three issues relating to fairness in the administration of the death penalty: (a) geographic disparities, (b) disparities based on the race: gender, religious preference and socio-economic status of the defendant and the victim, and (c) the extent to which the 29 defendants sentenced to death can be meaningfully distinguished from the 156 death-eligible offenders who received a sentence less than death (death sentences that fail to meet this standard are known as "comparatively excessive").

Finally, the study examines decision-making in the homicides that we have determined were not death-eligible either because the defendant lacked the mens rea (mental state) required to support a first-degree murder conviction or there was no statutory aggravating circumstance present in the case. For these cases, we examined prosecutorial charging decisions, the crime of conviction, and the sentencing decision.

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[1] A description of the cases addressed in this study is provided in Section IV.A.1 of the report

We first developed a logistic regression model of death sentences imposed among all death-eligible cases. The regression coefficients estimated in this analysis reflect the combined impact of all decisions taken by prosecutors and sentencing judges.

We also estimated "decision-point" logistic regression models that focus on the successive stages at which prosecutors and judges advance the cases through the system. For example, what case characteristics best explain which cases (a) advanced to a penalty trial with the state seeking a death sentence, and (b) resulted in a death sentence being imposed in penalty trial.

III. Summary of Principal Findings and Conclusions.

The analysis produced several statistical findings that are relevant to the concerns addressed by the Nebraska Legislature and the Nebraska Crime Commission in its Request for Proposals.

1. There is No Significant Evidence of the Disparate Treatment of Defendants Based on the Race of the Defendant or the Race of the Victim.[2]

a. Race-of-Defendant Disparities. Our first finding is that there is no significant evidence of disparate treatment on the basis of the race of defendant. Among all death-eligible cases, the death-sentencing rate for white offenders is .16(22/135) and for racial minorities it is 14 (7/49).[2a] In the penalty trial death-sentencing decisions, the rate is .37 (22/60) for white defendants and .25 (7/28) for minority defendants. Neither of these disparities is statistically significant. When we introduced controls for defendant culpability, there are also no significant race-of-defendant effects in the death-sentencing data

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[2] See Section VII for detailed findings.

[2a] There were 50 death eligible cases in this denominator and therefore 50 prosecutorial decisions However, because there were only 49 cases in which there was a meaningful exercise of discretion by the sentencing court on the death sentencing issue, we limited the denominator to those 49 cases for this calculation

Statewide, white defendant cases advance to a penalty trial at a rate of .44 (60/135) while in minority defendant cases the rate is .58 (29/50). This disparity is statistically sigificant at the .10 level. When controls for defendant culpability are introduced, this statewide disparity persists and is statistically significant when some measures of defendant culpability are applied but is not significant when others are applied.

However, when the analysis takes into account whether the cases are prosecuted in a major urban county or a county of greater Nebraska, the statewide white defendant disparity evaporates. The reason it does is that 90% of the prosecutions against minority defendants take place in major urban counties where the rate that cases advance to a penalty trial is twice as high as it is in the rest of the state. This is what produces the statewide white defendant disparity. When the focus is on the two areas of the state separately, there are no significant race-of-defendant effects in either place. In short, the data do not support an inference that similarly situated defendants are treated differently on the basis of their race.

b. Race-of-victim. We also found no significant evidence of disparate treatment on the basis of the race of the victim. Among all death-eligible cases, the death-sentencing rate in white-victim cases is .17 (26/152) and in minority-victim cases it is .10 (3/30). In the penalty trial death-sentencing decisions, the rate is .36 (26/72) for white-victim cases and .19 (3/16) for minority-victim cases. White-victim cases advance to penalty trial at a rate of .48 (73/153), while the rate is .53 (16/30) for minority-victim cases. None of these disparities is statistically significant.

When we introduced controls for defendant culpability there are no significant race-of-victim effects in the data. This conclusion holds for prosecutors and judges statewide and within the major urban counties and the counties of greater Nebraska. In short, the data do not support

an inference that similarly situated defendants are treated differently on the basis of their victim's race.

c. Defendant/Victim Racial Combination. We also found no significant evidence of disparate treatment in cases involving minority defendants and white victim. Among all death-eligible cases, the death-sentencing rate in minority defendantiwhite-victim cases is .20 (5/25) and .15 (24/159) for all other cases. In the penalty trial death-sentencing decisions, the rate is .33 (5/15) for minority defendant/white-victim cases and .33 (24/73) for all other cases. None of these disparities is statistically significant. When we introduce controls for defendant culpability, there are no significant race effects in the penalty trial death-sentencing data.

Minority defendant/white-victim cases advance to penalty trial at a rate of .62 (16/26), while the rate is .46 (73/159) for cases with all other defendant/victim racial combinations. When controls for defendant culpability are introduced, the statewide data show disparities along the same lines as the white defendant disparities described above, i.e., minority defendant/white victim cases are more likely to advance to a penalty trial. However, when the analysis takes into account whether the cases are prosecuted in a major urban county or the counties of greater Nebraska, the statewide minority defendant/white victim disparity evaporates for the same reason that the white defendant effect described above evaporates.

2. Compared to Other Jurisdictions, the Nebraska Capital Charging and Sentencing System Appears to be Reasonably Consistent and Successful in Limiting Death Sentences to the Most Culpable Offenders.[3]

Our second finding is that compared to other death sentencing jurisdictions for which data are available, the Nebraska capital charging and sentencing system appears to be reasonably consistent and successful in limiting death sentences to the most culpable offenders. A good measure of the consistency of the system is that 48% (14/29) of the death sentences were imposed in cases in which over 70% of other offenders with a similar level of culpability were sentenced to death. In this regard, the number of statutory aggravating circumstances has a particularly important influence in determining which death-eligible cases advance to a penalty trial and were sentenced to death. However, in 14% (4/29) of the death sentences imposed, the death sentencing rate among other similarly situated offenders was less than 50%.

The discriminating nature of the Nebraska system (in terms of defendant culpability) appears to be principally the product of selectivity on the part of the sentencing judges. Since 1978, the sentencing judges have been required by legislation to consider issues of comparative excessiveness in their sentencing considerations and are no doubt aware of the legislature's expressed concerns about arbitrariness and coinparative excessiveness. The sentencing judges see many death-eligible cases face to face and in the reported cases, and may talk with one another about what qualifies as a death case. Indeed, the data are consistent with the application of a judge made standard to the effect that for cases with three or more statutory aggravating circumstances found, a death sentence is almost certain, for cases with two aggravators found, the outcome can go either way depending on the facts, and for cases with only a single aggravator found, there is a very strong presumption in favor of a life sentence. Only three cases with one statutory aggravating circumstance have resulted in a death sentence The data

[3] See Sections V & IX for detailed findings

suggest that the legislative amendments of 1978 may have had a meaningful impact on the consistency of Nebraska's judicial death sentencing outcomes.

3. The System is Characterized by Sharp Differences in Charging and Plea Bargaining Practices in the Major Urban Counties vis a vis the Counties of Greater Nebraska.[4]

Our third finding is that the system is characterized by sharp differences in charging and plea bargaining practices in the major urban counties vis a vis the counties of greater Nebraska. In the major urban counties, prosecutors appear to apply quite different standards than do their counterparts elsewhere in the state in terms of their willingness to waive the death penalty unilaterally or by way of a plea bargain. The difference is captured in the fact that after adjustment for the culpability of the offender, death-eligible cases in the major urban counties are nearly twice as likely to advance to a penalty trial with the state seeking a death sentence as are comparable cases in greater Nebraska. These geographic disparities have existed since 1973 and have grown larger since 1982.

The geographic disparities in the rates that cases advance to penalty trials are not explained by differing levels of defendant culpability. Nor are they explained by financial considerations, the experience of prosecutors in handling and trying capital cases, or the attitudes of the trial judge about the death penalty.

The data indicate that the differences between charging and plea bargaining practices of prosecutors in the major urban counties and those in greater Nebraska produce a statewide "adverse disparate impact" on racial minorities. This adverse impact flows from the difference in the rates that prosecutors advance similarly situated death-eligible cases to penalty at trial. Although the data indicate that in both segments of the state, prosecutors prosecute whites and minorities evenhandedly, prosecutors in the major urban counties advance cases to penalty trial

4 See Section VI for detailed findings.

at rates that are substantially higher than the rates that prosecutors in the counties of greater Nebraska advance cases to penalty trial.

As a result, because almost 90% of the minority defendants charged with capital murder in Nebraska are prosecuted in the major urban counties, the practical effect of the difference in the rates that prosecutors advance cases to penalty trials is that statewide minority defendants face a higher risk that their cases will advance to a penalty trial (with the state seeking a death sentence) than do similarly white defendants statewide.

The source of this adverse impact is (a) state law, which delegates to local prosecutors broad discretion in the prosecution of death-eligible cases, and (b) the fact that racial minorities principally reside in the major urban counties of Nebraska. This adverse impact on minorities is analogous to the adverse impact on minorities that exists in states where local appropriations for the support of public education are lower in the communities in which minorities reside than they are in predominately white communities. This finding does not suggest or intimate that the Nebraska death sentencing system is racially biased. Our findings are quite to the contrary. One may characterize this adverse disparate impact as simply a fluke produced because minorities happen to Iive in major urban areas at higher rates than they do in greater Nebraska.

The data also indicate that in spite of the adverse impact described above in the rates that cases advance to penalty trials, there is no statewide adverse impact against minorities in the imposition of death sentences. The reason for this is that the sentencing practices of the penalty trial judges offset the adverse impact on minorities of the differential charging practices in the major urban and greater Nebraska counties described above. As we explain in the next section, the judges in the major urban areas impose death sentences at a rate lower than the statewide average, while just the opposite is the case for the judges in the other counties. The bottom line,

therefore, is an essentially evenhanded racial distribution of death sentences among death-eligible offenders statewide. During the entire period covered by this study, the death sentencing rate among all death-eligible offenders has been .16 for white defendants and .14 for defendants who are racial minorities.

4. The System is Characterized by Geographic Disparities in Judicial Death-sentencing rates that Since the Mid-1980s Have Tended to Neutralize the Effects of Geographic Disparities in the Rates That Prosecutors Advance Cases to a Penalty Trial.[5]

In the first decade under the new death sentencing system (1973-1982), the death-sentencing rates in the major urban counties and in the counties of greater Nebraska, adjusted for defendant culpability, were comparable (.37 v. .31). However, because of the considerably higher rates at which death-eligible cases advanced to penalty trial in the major urban counties, compared to the counties of greater Nebraska, the overall death sentencing rate in the major urban areas was 2.4 times as high as it was in the other counties, i.e., (.26/.11)

Since the mid-1980s, changes in sentencing practices in the major urban areas have reversed this disparity. Specifically, since 1982 the judicial death-sentencing rate in the major urban counties has declined 41% (from .37 to .22), while during the same period, the death-sentencing rate in the counties of greater Nebraska has declined only slightly (from .31 to .29). As a result, since 1982 the penalty trial death sentencing rate has been 24% lower in the major urban counties than it has been in the counties of greater Nebraska (.07/.29).

Both the decline in death-sentencing rates documented in the major urban counties since the early 1980s and the decline in the overall death sentencing disparity between the major urban counties and the counties of greater Nebraska may be attributable, in part, to the 1978 legislative amendments that address this issue. As noted above, those amendments require sentencing

5 See Section VI for detailed findings.

judges to conduct a comparative proportionality review in the death sentencing process. These amendments also contain "findings" that serious disparities in capital charging and sentencing outcomes existed in the state, which our data confirm.

A significant consequence of these geographic disparities in judicial death-sentencing rates is that they tend to neutralize the effects of the geographic disparities in prosecutorial decisions. Specifically, since 1982 the penalty trial death-sentencing rates in the major urban centers have minimized the effect of the higher rates that cases advance to penalty trials in those counties. Similarly, the higher than average judicial sentencing practices in the counties of greater Nebraska offset the effects of the lower than average penalty trial rates of their prosecutors. The bottom line is that among all death-eligible cases, the death-sentencing rates in the two areas of the state since 1982 have been .12 in the major urban counties and .13 in the counties of greater Nebraska.

5. The Impact of Defendant and Victim Socio-Economic Status (SES) on Charging and Sentencing Outcomes.[6]

a. There are No Statistically Significant Disparities in Treatment Based on the Socio-Economic Status of the Defendant.

Our statewide sample of 175 death-eligible cases includes five defendants classified as "high" socio-economic status. One of these defendants advanced to a penalty trial and none received a death sentence. However, because of the small sample of cases in this category, the disparity is not statistically significant. Nor are there significant disparities in the treatment of low SES defendants compared to other defendants.

[6] See Section VIII for detailed findings. See infra notes 153 and 154 and accompanying text for a description of the measures of defendant and victim socioeconomic status used in this report.

b. The Data Reveal Significant Disparities in the Treatment of Defendants Based on the Socio-Economic Status of the Victim.

The data document significant statewide disparities in charging and sentencing outcomes based on the socio-economic status of the victim. Specifically, since 1973 defendants whose victims have high socio-economic status have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence. Defendants with low SES victims have faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death. Among all death-eligible cases after adjustment for defendant culpability, the rate that cases advance to a penalty trial is 1.9 (.70/.37) times higher in high SES victim cases than it is in low SES victim cases. Also, the death sentencing rate among all death-eligible cases is 5.6 (.28/.05) times higher in the high victim SES cases than it is in the low SES victim cases.

The SES of the victim effects are substantial in charging and sentencing decisions throughout the state.

1. Introduction

This report examines decision-making in the disposition of 691 Nebraska homicide cases that resulted in a criminal conviction between 1973 and 1999.[7]

The principal focus of the report is on decision-making in 175 death-eligible homicides processed between 1973 and 1999 that resulted in the imposition of 29 death sentences. We identified this pool of death-eligible cases in a case by case screen of our universe of 691 cases.[8] Three defendants sentenced to death have been executed.

In all of these death-eligible cases, we examine prosecutorial charging and plea bargaining decisions as well as prosecutorial decision to advance first-degree murder cases to a penalty trial. In the 89 first-degree murder cases that advanced to a penalty trial with the State seeking a death sentence, we focus on the judicial decisions that resulted in 29 death sentences.

In our analysis of the death-eligible cases, we first examine the impact of defendant culpability on charging and sentencing outcomes. We then examine three issues relating to fairness in the administration of the death penalty: (a) geographic disparities,[9] (b) disparities based on the race, gender, religious preference, and socio-economic status of the defendant and

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[7] This study was undertaken pursuant to a decision of the Nebraska Legislature to support a study of Nebraska homicides with a focus on fairness. Pursuant to the enabling legislation, the Nebraska Commission on Law Enforcement and Criminal Justice. (the "Crime Commission") considered a number of proposals to conduct the study and in 2000 awarded us the contract to conduct it. The universe of the study is all criminal homicide cases occurring after **April** 20, 1973, and before December 31, 1999.

[8] The cases we screened included all cases involving a criminal homicide committed in Nebraska whose crime was potentially death-eligible if the case involved the elements of first-degree murder and the presence of one or more statutory aggravating circumstances. Since July 1, 1982, homicides committed by defendants who were not 18 years of age at time of the offense are not death-eligible. Neb. Rev. Stat. § 28-105.01 (Cum. Supp. 1999). Accordingly. while we collected a large amount of information on these cases, they are not included in the main analysis contained in this report.

[9] The Nebraska Legislature has a long-term commitment to the principle that the death penalty be "applied uniformly throughout the state" and that an "offense which would not result in a death sentence in one portion of the state should not result in death in a different portion." ***See*** infra note 56 and accompanying text. The legislative history of the Nebraska Legislature's decision to fund this research reflects a continuing commitment to that principle.

the victim," and (c) the extent to which the 29 defendants sentenced to death can be meaningfully distinguished from the 156 death-eligible offenders who received a sentence less than death (death sentences that fail to meet this standard are known as "comparatively excessive").[11] Finally, we examine decision-making in the homicides that we have determined were not death-eligible either because the defendant lacked the mens rea (mental state) required to support a first-degree murder conviction or there was no statutory aggravating circumstance present in the case.[12] For these cases, we focus on prosecutorial charging decisions, the crime of conviction, and the sentencing decision.[13] In these analyses, we examine the trend of decisions and the main determinants of the system based on legitimate case characteristics. (For these

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[10] The Nebraska Legislature has committed itself to the principle that the "death penalty . . . should never be imposed arbitrarily nor as a result of local prejudice or public hysteria"; Neb. Rev. Stat. § 29-2521.01(3) (Reissue 1995). The Request for Proposals ("RFP") for this study calls for the collection for each criminal case of criminal homicide of data on the "race, gender, religious preference, and economic status of the defendant and of the victim." RFP at p. 4. The main focus of this report is on the race and socio-economic status of defendants and victims. In Appendix E, we evaluate the impact of additional illegitimate and suspect factors identified by the RFP.

[11] Under Nebraska law, the issue of comparative excessiveness is addressed in the first instance by the sentencing authority (a single judge or a three judge panel) which must determine that any death sentence imposed is not "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (comparative proportionality review). Neb. Rev. Stat. § 29-2522(3) (Reissue 1995). The Supreme Court is also obligated to conduct a similar review of each death sentenced case it reviews "by comparing such case with previous cases involving the same or similar circumstances No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." Neb. Rev. Stat. § 29-2521.01(3) (Reissue 1995).

The legislative history of the appropriation that authorized this study manifests a legislative intent that the finding of the study be made available to the Nebraska Supreme Court for use in its proportionality review of death sentences. Neb. Rev. Stat. § 29-2521.02 (Lexis Pub. Supp. 2000) (the Supreme Court may take "judicial notice of" the results of this study and updates thereof undertaken by the Nebraska Commission on Law Enforcement and Criminal Justice). Toward that end, we have prepared a detailed narrative summary of each death-eligible case that, among another things, can facilitate the conduct of proportionality reviews of death sentences by both the Supreme Court and the penalty trial sentencing judges. We have also prepared for the Crime Commission, a machine readable data base which includes information on all the cases in our universe of criminal homicides.

[12] The presence of both these conditions is necessary to support a capital prosecution: "The Legislature . . determines that the death penalty should be imposed only for the crimes set forth in Section 28-303 [First Degree Murder] and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-250." Neb. Rev. Stat. § 29-2519 (Reissue 1995).

[13] The RFP (p.3) defining the procedural focus of this project calls for an analysis of "all criminal homicides" that models the prosecutorial decision to charge first-degree murder and the cases that were *"tried* as first-degree murder cases compared with those that were not." The RFP also calls for a model of M1 convictions that "resulted in death penalty sentences compared to those that did not." Because death sentences can only be imposed for death-eligible murder, we limit this analysis to the death eligible cases.

the prosecution "shall" present evidence of statutory aggravating circumstances in every sentencing hearing.[37] This narrow discretion approach is exemplified by Office of the Douglas County Attorney. During the period covered by this study, 96% of that county's M1 convictions advanced to a penalty trial.[38] However, prosecutors that adhere to the narrow discretion approach often waive the death penalty in death-eligible cases by reducing an M1 charge or charging less than M1 in the first instance as part of a plea agreement. For example, in Douglas County 36% (25/73) of all death-eligible cases did not advance to a penalty trial.

A number of other prosecutors believe they have the authority to waive penalty trials (in which the court considers aggravation and mitigation) unless the court insists that such a proceeding be he1d.[39] This "broad discretion" approach is exemplified by the office of the Lancaster County Attorney. Prosecutors there take the view that they have the discretion to waive the death penalty unilaterally or as part of a plea bargain in death-eligible cases when they believe that a sentence less than death is appropriate. The standards informing these judgments are the perceived likelihood that the court will impose a death sentence if the case advances to a penalty trial and the prosecutor's considered judgment of whether the deathworthiness of the case justifies a death sentence in the case. During the period covered by this study in 59% (19/32) of the death-eligible cases in Lancaster County, prosecutors offered to waive the death penalty or did so unilaterally. Only 41% of the county's death-eligible cases advanced to a penalty trial.

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[36] Neb Rev Stat § 29-2530 (Reissue 1995)

[37] However, the language that the evidence, which "may" be presented, "shall" include aggravating circumstances can be construed to impose such a requirement.

[38] However, in 11% of those cases our data indicated that the prosecutor did not present evidence of aggravation to the court.

[39] When such a waiver occurs, the court foregoes consideration of the aggravating and mitigating circumstances and simply enters a life sentence.

Legislature's 1978 amendments to the capital sentencing statute and its stated concerns about arbitrariness and geographic disparities in the administration of the death penalty.

2. The Disposition of Capital Cases: 1973-99

We identified Nebraska's cases by screening 691 homicides that have been prosecuted during the period of this research.[58] The test we used for identifying death-eligible cases has two parts. The first part focuses on the first-degree murder (M1) convictions. We classified M1 cases as death-eligible if they (a) advanced to a sentencing hearing under Neb. Rev. Stat. Section 29-2520, (b) there was some evidence of statutory aggravation in the case, and (c) the court addressed the issue of whether the sentence should be life or death. For M1 convictions that did not advance to a sentencing hearing because of a waiver of the death penalty by the state, we classified the case as death-eligible only if the facts clearly established that one or more statutory aggravating circumstances was present in the case.

Second, we classified cases as death-eligible when they resulted in a conviction for a crime less than M1 only if (a) the conviction was pursuant either to an initial charge of less than M1 or a plea bargain that reduced an initial M1 charge to the lesser offense, and (b) the facts clearly established the presence of the mens rea (mental state) required for M1 and one or more statutory aggravating circumstances in the case.[59]

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[58] The project initially reviewed a total of 894 homicide cases to arrive at the universe of 691 cases that we screened for death-eligibility. We excluded from the screen 203 cases as not death-eligible as a matter of law or because we had insufficient information to conduct a screen. First, we excluded 67 homicides committed by persons under 18 after the effective date of legislation that excluded those cases from death eligibility. Second, we excluded 52 cases that resulted in acquittals, dismissals, or judgments of not guilty by reason of insanity. Third, we excluded 26 motor vehicle homicides. Fourth, we excluded 44 second-degree murder retrials for cases in which the initial trial had been included in the study but the conviction was reversed or vacated during the "malice" controversy. Finally, we excluded 14 cases for which we were unable to collect sufficient information to support coding. The large majority of these cases were homicides where the defendant was found guilty of manslaughter and sentenced to probation, with no time served in a Department of Corrections facility.

[59] For this purpose, potential liability for first-degree murder could be based on a theory of premeditated murder or felony murder. Cases tried for M1 that resulted in a guilt trial conviction of less than M1 were not classified as death-eligible because the fact finder determined that the mens rea or felony murder required to support a conviction for M1 was not present, regardless of how strong the evidence of death-eligibility might have been in the case. In

Figure 1 presents an overview of the disposition of Nebraska's death-eligible cases. Box A includes the 185 prosecutions of 175 death-eligible defendants over the period 1973-99. Box B includes 84 death-eligible cases that were terminated short of an M1 conviction with the state seeking a death sentence. These outcomes occurred in a number of ways.

First, in cases charged as M1, prosecutors always have the authority to reduce the charges to M2 or less, either unilaterally or as part of a plea bargain, in which event there can be no penalty trial.[60] Second, for the cases in which the prosecution believes that an M1 conviction (with a mandatory life sentence) is appropriate but that a death sentence is either excessive or unlikely to be imposed by the court, there are three options.

The first is to enter into a formal *plea bargain* to M1 with a complete waiver of the death penalty, in which event the court dispenses with a consideration of aggravation and mitigation and imposes a life sentence.[61] The second option is a unilateral waiver of the death penalty after an M1 conviction is obtained by plea or trial.

The third option is for the prosecutor and defendant to enter into a plea agreement for an M1 guilty plea with the understanding that the prosecutor will present no aggravating evidence in the sentencing hearing and/or make no argument in favor of a death sentence.[62]

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short, for a defendant convicted of less than **M1** to be considered death-eligible, the decision on liability had to have been made by the prosecution on an initial charge of less than m1 or a subsequent charge reduction typically by way of a plea agreement.

[60] We identified 6 death-eligible cases that were originally charged with M2 or less. It is likely that some of these charges were entered pursuant to a pre-indictment plea agreement.

[61] We found at least two cases in which such a plea bargain was rejected by the trial court and a penalty trial was held.

[62] These outcomes may be based on explicit agreements or implicit understandings Our research has documented a broad array of approaches prosecutors use to waive the death penalty with varying degrees of explicitness In this regard, we very much appreciate the willingness of prosecutors and defense attorneys in over 100 cases to describe over the telephone and/or a via a questionnaire the process of negotiation and agreement when the records in the case were unclear about what transpired in this regard.

Box C depicts the M1 cases that resulted in a sentencing hearing with no agreement between the prosecutor and the defendant. Of the penalty trials in which the state sought a death sentence 48% (39/82) were heard by the trial judge alone and the remainder were heard by a three judge panel. [63]

Box D depicts the M1 convictions that tenninated with a *guilty plea* unaccompanied by a plea agreement to waive the death penalty. All of these cases advanced to a penalty trial with the state seeking a death sentence. Two of these cases resulted in death sentences, for a rate of 12% (2/17).

Box E depicts the 84 cases that terminated with an M1 guilt *trial* conviction, 14% (12/84) of which advanced to a penalty trial in which the state did *not* present evidence or statutory aggravation. As noted above, all of these cases resulted in a life sentence.

For the 72 guilt trial cases that advanced to a penalty trial with the state seeking a death sentence, the death sentencing rate was 37% (27/72). The overall penalty trial death-sentencing rate, therefore, was .33 (29/89),[64] and the death sentencing rate among all death-eligible cases was .16 (29/185).[65]

Of the 29 death sentences imposed during the study period, approximately 15 have been reversed and/or the sentence vacated by the Nebraska Supreme Court, or have been vacated by federal courts.[66] At the time of the release of this report, there are 9 inmates on death row. In addition, three death-sentenced prisoners have been executed.

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[63] The death sentencing rate in the single judge cases is .18 (7/39) versus .51 (22/43) in three-judge panel cases.

[64] The overall death sentencing rate reflects the 72 hearings in guilt trial cases (with 27 death sentences) shown in Box E and the 17 cases shown in Box D (with 2 death sentences). In one of these cases, the court did not exercise discretion, and therefore it has been omitted from our subsequent analyses of penalty trial decision making.

[65] We omit from subsequent analyses of death-sentencing rates two cases included in Figure 1 in which the court believed it had no legal authority to impose a death sentence and therefore exercised no discretion concerning the deathworthiness of the defendant.

[66] The Court has not reversed any cases on the grounds of comparative excessiveness, although one case was reversed on a "traditional" ground of excessiveness.

manslaughter is a prison sentence up to 20 years (which can include probation with no time served), a fine up to a $25,000, or both.[74]

2. The Disposition of Non-Capital Cases

Figure 2 presents the disposition of the 548 non-capital homicides documented in this report. It indicates in Row C that 11% (62/548) of those cases resulted in a M1 conviction with a mandatory sentence of life imprisonment. 33% (182/548) of the non-capital cases resulted in a M2 conviction. 27% (50/182) of those offenders were sentenced to life in prison and the balance were sentenced to a term of years. 55% (304/548) of the non-capital homicides resulted in a conviction for manslaughter or less and were sentenced to a term of years.[75]

Figure 3 presents the duration of the sentences imposed in the M2 cases sentenced to a term of years and the manslaughter or less cases. For the 182 M2 cases, the median sentence is 20 years in guilty plea cases and 25 years for the guilt trial convictions. For the manslaughter or less cases, the median sentence is 7.5 years for both guilty plea and guilt trial convictions.

C. Capital and Non-Capital Homicide Over Time: 1973-1999

Table 2 divides the cases by decade and sorts on an annual basis the number of capital and non-capital homicide convictions. For each year we report the total number of convictions and the number and proportion of them that we have classified as "death-eligible."

The data in Table 2 indicate that, with the exception of the period 1992-1996, the number of homicide convictions has been stable over time. Except for the 1992-96 period, when the annual average was 33 convictions, the average number for the other years was 26, with a

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[74] Neb. Rev. Stat.§§ 28-105(1), 28-305 (Reissue 1995).
[75] This footnote has been omitted.

range of 21 to 37 per year. However, the number and proportion of death-eligible cases has declined in the 1990s.

Table 3 presents data, in five-year intervals, on the three principal charging and sentencing outcomes in the capital murder cases that we examine in this report. Column B indicates the rate at which death-eligible cases advance to a penalty trial with the state seeking a death sentence.[76] The Column B analysis embraces all of the death-eligible cases in the study and we sometimes also refer to the outcome as the "penalty trial rate." This outcome is to be distinguished from the measure reported in Column C - the rate that "death sentences are imposed in penalty trials." The Column C outcome does not include cases that did not advance to a penalty trial and is sometimes referred to as the "penalty trial death-sentencing rate." Finally, Column D reports the "death sentencing rate among all death-eligible cases." This analysis embraces all the death-eligible cases, i.e., the penalty trial cases shown in Column C as well as the cases that did not advance to a penalty trial

The brackets associated with each column in Table 3 aggregate the data for subgroups of years to highlight the changes that have occurred since 1987. The data indicate that statewide, since 1987 fewer cases advance to a penalty trial and in these hearings the death sentence rate has declined.[77] Specifically, Column B documents that the rate at which cases advance to a penalty trial with the state seeking a death sentence has declined 14% (7/51).[78] The sharpest decline has been in the penalty trial death sentencing rate - a 25% (9/36) decline from .36 to .27 The combined effect of these trends has been a 29% (5/17) decline in the rate that death sentences are imposed among all death-eligible cases from .17 to .12.

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[76] For this purpose, we characterize a sentencing hearing as a "penalty trial" only if the state presents evidences of statutory aggravating circumstances.
[77] These results do not adjust for the culpability of the offender.
[78] The numerator is the difference in the two rates (.51 and .44); the denominator is the earlier .51 rate.

a variety of legitimate case characteristics. Each of these measures of defendant culpability is based on a different but legally relevant foundation, and each provides an independent basis for estimating the scope and magnitude of geographic, race, and socio-economic status ("SES")[79a] disparities in the system after controlling for defendant culpability. In the analysis of the non-capital cases we apply less comprehensive measures of criminal culpability because we collected less information on these cases. The measures that we use are applied in crosstabular and multiple regression analyses.

1. Case Screening Plan and Data Sources

We identified the potential universe of Nebraska criminal cases from April 20, 1973 to December 31, 1999 with three statewide case lists and other case identifying techniques. The primary source for identifying the universe of Nebraska homicides is a list of Nebraska homicide cases maintained by the State of Nebraska Department of Corrections, as provided by Ron Riethmueller, the Records Administrator for the Department of Corrections. According to the Department of Corrections, this list contains all homicide crimes for which a defendant was convicted and sentenced to serve any amount of prison time.[80] In addition, we conducted a

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[79a] See infra notes 153 and 154 and accompanying text for a description of the SES measures.

[80] The Department of Corrections clarified that its homicide rosters may fail to include a very small number of cases that are omitted because of unusual circumstances First, the homicide rosters do not include any of the extremely limited number of homicide cases when a defendant in the case was not sentenced to prison for any length of time (e.g. when a defendant was sentenced to probation and the defendant never violated his or her parole (which may result in imprisonment)) We identified these cases in a number of ways. First, we did a comprehensive electronic search of all homicide cases that were appealed since the beginning of the study period The search identified, *inter alia*, all manslaughter cases that were appealed by the defendant. Second, we reviewed by hand all the records of presentence investigation reports of Douglas County, Nebraska, a county in which a substantial proportion of all the homicides in the state occurred Finally, we provided the County Attorney in each county with a list of the homicides that were identified in his or her county, and asked them to inform us if the lists were complete This request generated a very small number of cases that we had not identified These were ordinarily cases in which the defendant was sentenced to probation.

The Department of Corrections also indicated that its homicide roster may not include a very small number of cases because of the history of the second-degree murder law in Nebraska For a short period of time in the 1990s, some defendants were successful in challenging their convictions for second-degree murder on the theory that the information was used as the basis for charging them or the jury instructions that were given at their trial did not include the term "malice" as an element of second-degree murder *See* Shurgrue *supra* note 70. The Nebraska Supreme Court held for a portion of the study period that this was reversible error The Department of Corrections notes that in the limited number of such cases where the defendant received post-conviction relief on this basis and

comprehensive electronic search of all reported Nebraska cases to identify other cases to ensure that the Department of Corrections' roster of homicides did not omit some cases that were appealed. Third, we reviewed the Criminal Homicide Reports that each County Attorney is required to file with the State Court Administrator's office following the prosecution of each homicide. Finally, in order to verify the completeness of our identifications, we requested that each County Attorney review our list of homicides that were committed during the study period and identify any cases that were not in our identified universe of cases.

With this information, we developed a screening plan designed to identify (a) all of the homicides committed in Nebraska during the study period that resulted in a homicide conviction and (b) which of these cases were death-eligible under Nebraska law. This effort identified 691 homicides committed in Nebraska between April 20, 1973 and December 31, 1999 that resulted in the criminal conviction of a defendant.[81] For each of these cases we coded a 15 page data collection instrument, known as the Initial Screening Instrument (ISI), a copy of which is in Technical Appendix A. For each of the cases that we identified as death-eligible, we completed a detailed data collection instrument (DCI), a copy of which is in Technical Appendix B. A major challenge in this type of research is obtaining reliable data on the cases. The amount of data available generally depends on the availability of pre-sentence investigation reports (PSI),

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was retried and received a sentence that was a term of years that was shorter than the amount of time they had previously served for the original conviction, they would be released by the trial court Because the defendant's original conviction was vacated as a part of the post-conviction relief, the defendant was never formally "discharged" from the Department of Corrections; he was simply released. If the defendant was never recommitted to the Department of Corrections, the Department would not have a record of his original conviction, sentence, presentence investigation report, or Department of Corrections Classification Study. First, in order to identify these relatively obscure cases, we conducted an electronic search to identify all second-degree murder cases what were appealed, or those cases where a defendant sought post-conviction relief and one of the parties appealed. From the decision. Second, we requested that each County Attorney provide us with a list of all cases where a defendant appealed or sought post-conviction relief on the basis of the "malice" theory. Finally, as discussed above, we sent each County Attorney a list of all homicides the study had identified in their county and asked them to provide us with any unidentified cases. For the most part, County Attorneys were very helpful in this process.

[81] For homicides that occurred after July 1, 1982, we excluded persons under age 18 from our screen because their age excludes them from the risk of a death sentence.

Institution. For those defendants that were not currently an inmate of a Department of Corrections Institution at the time of the data collection, the Department retains the PSI for a period of 4 years from the date of discharge. Once the four year period expires, the Department destroys the PSI.

As a matter of policy, the Department retains a microfilm or microfiche record of the Classification Study for each defendant that was generated by the Department at the time of the intake of each defendant. Although the breadth of the information contained in the classification studies varies substantially, the classification studies contain information that is comparable to that contained in the PSIs, but is ordinarily truncated.

In the cases in which the Department of Corrections did not have a PSI, we contacted each state probation district and requested a copy of the pre-sentence investigation report. The PSIs were often available from the State probation offices. However, sometimes, as a result of the document retention policies of the State Probation Office, PSIs, ultimately, were completely unavailable. In most such cases, the PSIs had been destroyed by State Probation Offices 10 years after the defendant is sentenced, and sometimes earlier. In those cases where a PSI was not available, and our file information was otherwise insufficient to complete the initial screening of the case for death-eligibility, we requested the District Court where the case was originally tried to provide us with the original court record of the case, and any bills of exception that were generated in the case. When feasible, we examined and copied all of this information. Finally, if there was no such information, we interviewed the attorneys in the cases, and reviewed newspaper accounts of the homicides, if available.

We relied on the study files containing the information described above to screen for death-eligibility in the 691 homicides identified in our universe of criminal homicides.

in Table 4.) Finally, one may depict the results of the regression with scales that indicate, for example, the magnitude of the geographic, race, and SES effects observed among three to eight subgroups of cases with ascending levels of culpability (estimated without regard to the race or SES of the defendant or of the victim).

The results might also indicate the overall average difference in death sentencing rates (e.g., 8 percentage points) between two subgroups (such as white and minority defendants) after controlling for the defendant culpability levels that we estimated in the regression analyses. This approach can also indicate the ratio between the death-sentencing rates for the two groups of cases after adjustment for the levels of defendant culpability. An important advantage of this measure is that it is easier to interpret than the odds-multipliers referred to above.

d. A Note on Unadjusted and Adjusted Disparities

In the course of this report, we often refer to "unadjusted" and "adjusted" disparities in charging and sentencing outcomes as they relate to the race and the socio-economic status of the defendant and the victim. An unadjusted disparity refers to a difference in a charging or sentencing outcome that is associated with a particular characteristic of a defendant or victim, without any controls for defendant culpability. For example, the overall rate at which cases advance to a penalty trial is .44 (59/135) in white defendant cases and .58 (29/50) in minority defendant cases. The 14 percentage point difference (.44-.58) in these two rates is an unadjusted disparity.

In contrast, an adjusted disparity measures the association between case characteristics and charging and sentencing outcomes after controlling for defendant culpability. Odds multipliers, say for the defendant's race, estimated in a logistic regression analyses that controls

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influence that the number of aggravating circumstances have in the judicial sentencing process), the explanatory power of the death sentencing models exceeded what we have seen in earlier research. See, infra note 99.

aggravator and mitigator, i.e., the death sentencing rate when the factor is present or found in the case (the shaded bars) and the death sentencing rate for other cases in which the factor was not found or present. The dotted line across each set of bars indicates the .16 overall death sentencing rate for all cases. Also, the asterisks indicate the level of statistical significance between the rates when the factor is present and when it is not.

For example, Column A in Part I indicates that when the "l(a)" factor (Defendant record of murder, terror, or serious assault) is present in the case, the death sentencing rate among all death-eligible cases is .33, which is 23 points above the rate when it is not present and 17 points above the .16 average rate among all death-eligible offenders.[90]

Part I of Figure 4 indicates that seven of the statutory aggravators are associated with death-sentencing rates well above both the .16 average rate (as well as the rates in the cases in which the factor is not present). Also, six of them, (1(a) through 1(f)), have a statistically significant effect in explaining death sentencing outcoines among all death-eligible defendants. The results of a multiple regression analysis show comparable results.[91]

Part II of Figure 4 indicates that while the presence of individual mitigating circumstances draws down the death-sentencing rates among all death-eligible cases, the impacts are much less substantial than the impact of the aggravating circumstances, and none of the

[90] The numbers assigned to each aggravator and mitigator are, at the foot of each bar, are drawn from the statutory aggravating and mitigating circumstances identified in Table 1 supra.

[91] In explaining death-sentencing rates among all death-eligible offenders, the following statutory aggravators were significant beyond the .05 level: l(a) - 1(e). In explaining the rates that cases advanced to a penalty trial, only factor 1(c) was significant beyond the .05 level.

mitigators by itself has a statistically significant effect.[92] This result is also confirmed in a multiple regression analysis.[93]

B. The Number of Statutory Aggravating and Mitigating Circumstances in the Case

1. The Number of Aggravating Circumstances

The most significant factor explaining the pattern of capital charging and sentencing outcomes in Nebraska is the number of statutory aggravating circumstances in the cases. Figure 5 documents their impact on our three principal outcomes. The Figure presents the overall rates in Column A and then sorts the cases according to the number of aggravators in the cases (Rows B- E). The three bars in each column document the impact of the number of aggravators on the three outcomes - (1) the rate at which cases advance to penalty trials (the first bar), (2) the penalty trial death-sentencing rate (the second bar), and (3) the death sentencing rate among all death-eligible cases (the third bar). The rates in Column A provide a good point of comparison.

Thus in Column B, for the cases with a single statutory aggravating circumstance, the rate at which cases advance to a penalty trial is .41, the penalty trial death sentencing rate is .06, and the death sentencing rate among all death-eligible defendants is .03.

Scanning the bars, one sees the dramatic impact of each additional aggravating circumstance on the charging and sentencing outcomes. The sharp rise in the overall death-sentencing rates among all death-eligible offenders (the right adjusted bars in Columns C, D, and E) is principally explained by the dramatic association between the number of aggravating circumstances and the judicial death-sentencing rates (the middle bars).

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[92] The lack of significance in several of the categories with substantial disparities, e.g. Columns B, E, and F is explained by the small number of cases in which the factor is present.

[93] In the model of death sentencing outcomes among all death-eligible cases, none of the statutory mitigators was significant at the .05 level. In the analyses of the cases that advanced to a penalty trial, the catchall mitigator was significant at the .001 level.

Cases with three or more aggravators, represented in Columns D and E, account for 48% (14/29) of the total number of death sentences imposed. Moreover, among these cases, the death sentencing rate is 74% (14/19), which is significantly higher than any death sentencing rate we have observed in a category of cases defined by legitimate case characteristics.

The striking impact of the number of aggravating circumstances sentencing outcomes is also apparent in the logistic regression models presented in Table 4. No other variable comes close to it in explaining the charging and sentencing outcomes.

The most plausible explanation for the significant role of the number of aggravating circumstances in predicting the outcomes of the cases is that the Nebraska system allocates the death sentencing responsibility exclusively to judges and the statute requires the sentencing judges to assure themselves that any death sentences they impose are proportionate to the "penalty imposed in similar cases, considering both the crime and the defendant."[94] The judges have access to all the reported sentenced cases and in the sentencing hearings defense counsel regularly present information on other comparable cases sentenced to life or less. For a rule of thumb in defining similar cases, the number of aggravating circumstances in the case measure has a firm foundation in the statute and is relatively easy to apply. Also, the data are consistent with the application of a rule that for three or more aggravator cases, a death sentence is almost certain, .93 (14/15), for the two aggravator cases it is a close issue, .48 (12/25), and for the single aggravator case, there is an enormous presumption in favor of a life sentence, .06 (3/48). These data suggest that the 1978 legislative amendments requiring comparative proportionality review by the sentencing judges may have had a real impact on judicial sentencing practices.

The data in Figure 5 suggest that the number of aggravating circumstances have considerably less impact on prosecutorial decision-making than they do on the judicial death-

sentencing decisions. Indeed, in the single aggravator category in which a death sentence is a rare event, 41% of the cases advance to a penalty trial. The regression results in Table 4 tell a similar story.[95]

2. The Number of Mitigating Circumstances

In contrast to the results shown in Figure 5 and Table 4, an analysis of the impact of the number of mitigating circumstances in the cases indicates that they have only a weak effect on outcomes. The regression results shown in Table 4 (Row 1b, Column D through I) document only a weak non-significant association.

The marginal impact of the statutory mitigating circumstances on death sentencing outcomes is also highlighted in Figure 6, which breaks down all of the death-eligible cases according to the number of aggravating and mitigating circumstances found or present in the cases. The rows (1-4) group the cases according to the number of aggravating circumstances found or present, while Columns B-G group the case according to the number of mitigators found or present in the cases.

The Part 1 data (one aggravating circumstance), suggest a slight effect for the mitigators because the three death sentences in that category had only one or two mitigators. In Part 2 (two aggravating circumstances), there is an apparent effect with the rates declining as the number of mitigators increases from 1 to 5. In Rows 3 and 4, which contain the highly aggravated cases, small differences in mitigation have no effect at all. Thus, it is only in the few close cases in Row 2 that we can perceive the effect of mitigation (a result consistent with the expectation that individual case characteristics have their greatest impact in the mid-range of

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[94] Neb. Rev. Stat. § 29-2522 (3) (Reissue 1995).

[95] The regression coefficient for the number of statutory aggravators in the model for the judicial decisions (2.9: Row 1a, Column F) is 5.7 times higher than the coefficient for that variable in the model for the prosecutorial decisions (.52. Row 1a, Column D).

cases where the room for the exercise of discretion is greatest).[96] In the single aggravator cases (Row 1), there is little to mitigate in the first place, while in the most aggravated cases (Rows 3 and 4), the aggravation overwhelms fairly significant levels of mitigation, i.e., the death-sentencing rates are very high in the face of two or three mitigating circumstances.

C. Salient Factors of the Case

We next applied the salient factors of the case measure of culpability, which is presented in Appendix A. This measure assigns each case to a single category identified by its most serious aggravating circumstance. (By way of contrast, in Figure 5 a case with multiple aggravating circumstances would appear in as many sub-tabulations as it had aggravators.)

Column B of Figure 7 documents the significant impact of three of the statutory aggravating circumstances (1(a), 1(c), and 1(e)) when they are accompanied by another statutory aggravating circumstances and two or fewer mitigating circumstances. For example, Part II, Column B indicates that among the "l(e)" multiple victim cases with low mitigation and an additional aggravating circumstance, the death sentencing rate was .43 (6/14). However, Parts 5 and 6, Coluinn A indicate that two of the aggravators most commonly charged and found (1(b) and l(d)) have lower death-sentencing rates than the overall average (.16) and only a marginal impact on charging and sentencing outcoines even in the presence of additional aggravation and low mitigation (Column B).

Figure 7 also demonstrates that the highest death sentencing rate among any of the five salient factors categories with more than 5 cases is only .43 (Part II, Column B). Thus, in terms of distinguishing the cases that result in death sentences from those that do not, the salient

[96] Mid-range refers to the mid-range in terms of defendant culpability.

factors measure does less well than the measure based on the number of statutory aggravating circumstances in the cases.

D. Regression Based Measures and Scales

We also conducted multiple regression analyses of the key charging and sentencing outcomes. Because of the small numbers of death sentences imposed and the strong impact of the number of aggravating circumstances in the cases at all decision points, the nuinber of variables in the models is quite small.[97] The models are presented in Table 4. With them we created culpability scales that reflect the impact of the legitimate factors only in explaining charging and sentencing outcomes.

Figure 8 presents the death-sentencing rates among all death-eligible cases controlling for the regression based scales. Part I presents the results for death sentences imposed among all death-eligible cases, controlling for defendant culpability on a 4 level culpability scale. Part II shows similar results on a 4 level scale limited to the penalty trials in which the state sought a death sentence.

The culpability scales in Figure 8 distinguish quite well between the cases in which death sentences are routinely imposed from those in which they are not. In the two most aggravated case categories in Part I (Columns D and E), we find all but three of the death sentences imposed. Moreover, in the most aggravated category, we find 69% (20/29) of the death sentences imposed in Part I and 48% (14/29) in Part II. The death-sentencing rate among those cases is .87 in Part I and .93 in Part II.

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[97] We conducted extensive screening of variables to identify those beyond the number of statutory aggravating and mitigating circumstances that would add additional explanatory power to the charging and sentencing outcomes Because of the small samples of capital murder cases and death sentences in our data base and the unusually strong influence of the number of aggravating circumstances as an explanatory variable, we had much less success in this endeavor than we have enjoyed in research in other states But see infra note 99 on the explanatory power of the models.

In *McCleskey v. Kemp* (1987) Justice Powell commented that the data before the Court concerning charging and sentencing decisions in Georgia's capital charging and sentencing system "results in a reasonable level of proportionality among the class of murderers eligible for a death penalty."[98] We think the same can be said of the Nebraska system. Indeed, the levels of defendant culpability measured by four separate measures appear to explain the outcomes of the Nebraska system even better than they did in the Georgia data.[99] This outcome is most likely attributable to the fact that the entire system is under the control of experienced prosecutors and judges, many of whom are likely aware of the pattern of death-sentencing rates in cases with varying levels of culpability. Moreover, as noted above, the Nebraska statute imposes on the sentencing judges an obligation to consider the risk of comparative excessiveness in any death sentences that they impose. As noted above, the sentencing outcomes of the system are consistent with the application of a judicial sentencing standard that is substantially driven by the number of statutory aggravating circumstances in the cases.

VI. Geographic disparities in charging and sentencing outcoines

A. Unadjusted Geographic Disparities

In this section we examine the impact of geography on charging and sentencing outcomes in Nebraska. We document distinct disparities in prosecutorial charging and judicial sentencing practices in the state's major urban areas vis a vis the rest of the state. We consider several

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[98] McCleskey v. Kemp, 481 U.S. 279, **313** (1987)("the system sorts out cases where the sentence of death is highly likely and highly unlikely, leaving a midrange of cases where the imposition of the death penalty in any particular case is less predictable").

[99] A good measure of the consistency of the Nebraska system vis a vis the Georgia system is the R^2 estimated for comparable regression models. The core 39 variable model in the Georgia research for the imposition of death sentences among all death-eligible cases produced an R^2 of .35. EQUAL JUSTICE AND THE DEATH PENALTY, supra note 47 at 631. The R^2 for the corresponding Nebraska model is .51. For the prosecutorial outcome of advancing death-eligible cases to penalty trial, the R^2 in the Georgia research was .45. Id. at 643. The R^2 in the comparable Nebraska model of prosecutorial decision-making is .15. For the jury death-sentencing model, the R^2 in the Georgia research was .42 (Id. at 645) while the comparable measure for the Nebraska judicial death-sentencing model was .52. See infra note 176 and accompanying text for a comparison of the level of consistency in Nebraska's system with the New Jersey system, which imposes death sentences at about the same rate as Nebraska.

possible explanations for these disparities.

Our principal measure of geographic disparity contrasts Nebraska's three largest and most urban counties (Douglas County (including the City of Omaha), Lancaster County (including the City of Lincoln), and Sarpy County (including the City of Bellevue and parts of Omaha)), with the rest of the state, which we describe as "greater Nebraska." The three counties we define as major urban centers contain 46% of the state's population.[100] They also account for 67% (366/548) of the state's non death-eligible homicides, 61% (113/185) of the state's death-eligible murder prosecutions, 75% (67/89) of the state's penalty trials, and 69% (20/29) of the state's death sentences.

The distinction we draw here and below between the major urban centers of the state and greater Nebraska is not an "urban" v. "rural" distinction. Greater Nebraska as we define it contains a number of smaller cities and major suburban areas.[101] We also recognize that there are important differences, some of which we noted above, in prosecutorial charging and plea bargaining practices in Nebraska's two largest counties, Douglas and Lancaster.[102] When our substantive analysis reveals important differences between these two counties, we note them.

Figure 9, Part I presents unadjusted geographic disparities in charging and sentencing outcomes between the major urban counties and the counties of greater Nebraska for the entire 1973-99 period. Column A documents a 28 percentage point disparity in the rates that death-eligible cases advanced to a penalty trial. This means that the risk of a penalty trial was 1.9 (.59/.31) times higher in the major urban counties than in the counties of greater Nebraska. In contrast, the penalty trial death-sentencing rate, shown in Column B, is 13 percentage points (.43

[100] Nebraska's major urban counties accounted for 49% of the total population in 1990 Nebraska's total population in 2000 was 1,711,263. U.S. Bureau of the Census – Census 2000, unadjusted, PL94-171 Released. Processed by Nebraska Department of Natural Resources, FSCPE, March 16, 2001.

[101] For example, there are sizeable cities in many Nebraska counties.

- .30) higher in greater Nebraska than in the inajor urban counties. Part II of Figure 9 presents comparable disparities when the outcomes are adjusted for offender culpability.

Figure 10 depicts Nebraska charging and sentencing practices in the major urban and greater Nebraska counties in five-year intervals since 1973. The vertical bars for each time period present the (a) the rates at which cases advance to a penalty trial (penalty trial rate), (b) the judicial penalty trial death sentencing rate, and (c) the death sentencing rate among all death-eligible cases, without adjustment for defendant culpability. The data reveal three striking patterns. First, in the major urban counties the judicial death-sentencing rates are uniformly lower than the rates at which prosecutors advance cases to a penalty trial. However, in the greater Nebraska counties, with the single exception of the first five years (Column B), the penalty trial death sentencing rate exceeds the rate at which prosecutors advance cases to a penalty trial. This suggests that outside the major urban counties, prosecutors are more discriminating in advancing to penalty trials those cases in which the judge is likely to impose a death sentence.[103]

The second pattern of interest in Figure 10 is the sharp decline in judicial death-sentencing rates in the major urban counties since 1982, while in the greater Nebraska counties the rates have actually increased. The third pattern of interest in Figure 10 is a sharp decline in the rate that cases advance to a penalty during the last 10 years in greater Nebraska, while the penalty trial rate has remained more stable in the major urban counties during this same period. Indeed, it is the combination of this decline in the penalty trial rate in the counties of greater Nebraska and the sharply lower judicial death-sentencing rates in the major urban areas that

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[102] See supra note 37 and accompanying text for a description of differential approaches in the two groups of counties to plea bargaining in capital murder cases.

produced the very sharp statewide decline in death sentences among all death-eligible cases documented in Column D of Table 3.

Figure 10 sheds light on another issue: the Legislature's perception in early 1978 of "radically differing results" in different parts of the state.[104] A comparison of Column B in Part I and Part II suggests what the Legislature may have had in mind.[105] This contrast documents judicial death-sentencing rates in the major urban counties for the period 1973-1977, which are twice as high as the rates in the other counties (.44 v. .20). Similarly, the disparity in the unadjusted rates that cases advanced to a penalty trial was substantially higher in the major urban centers (.56 v. .42).

In Figure 11, we focus more sharply on the trends suggested by Figure 10 by disaggregating the penalty trial death-sentencing rates before and after 1983, when the decline in penalty trial death-sentencing rates in the major urban counties began. The data in Figure 11 present unadjusted geographic disparities for our three principal outcomes. Part I presents data on prosecutorial decision-making. A comparison of Columns B and C of Part I indicates that a smaller proportion of cases advanced to a penalty trial after 1982 in both geographic areas, but the disparity is essentially the same in each time periods: 28 and 31 percentage points, both statistically significant.

Part II shows two statistically significant disparities in penalty trial death-sentencing rates in both periods. However, the direction of the disparities changed completely. In the earlier period (Column B) the rate was nearly twice as high (.57 v. .27) in the major urban counties

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[103] We are modeling a case winnowing process. The penalty trial death-sentencing rates vis a vis the rate at which cases advance to a penalty trial is a measure of how discriminating prosecutors are in advancing cases to penalty trials in terms of the criteria the judges use in imposing death sentences.

[104] *See supra* note 56 and accompanying text.

[105] Because the Legislature was unlikely to have had substantial information on the culpability of the individual death penalty defendants, it is likely that the disparities unadjusted for culpability informed the Legislative perceptions.

while in the later period (Column C) it was 3.5 times (.60 v. .17) higher in greater Nebraska.[106]

The data in Part III depicting death-sentencing rates among all death-eligible cases show the effects of the dramatic changes in penalty trial death-sentencing rates in the major urban areas documented in Part II. In the earlier period, the death sentencing rate among all death-eligible cases was 3.7 (.37/.10) times higher in *the major urban counties* while in the later period it was 1.4 times higher (.14/.10) in the *greater Nebraska counties.*

These data raise some obvious questions about the reasons for these striking geographic disparities and the changes that occurred in sentencing practices between the two periods. In the balance of this section we consider the following possible differences in the two geographic areas that could explain the disparities: defendant culpability, resources available to prosecutors to conduct capital litigation, the experience of prosecutors in handling capital cases, and judicial attitudes toward the death penalty. Our analysis on each of these issues presented below indicates that none of these factors explain away the geographic disparities in prosecutorial charging and plea bargaining practices (measured by the rates that cases advance to a penalty trial with the state seeking a death sentence). However, the story is different with respect to the disparities in the penalty trial death-sentencing rates. These disparities are largely explained by different levels of defendant culpability in the two areas.

B. Geographic Disparities after Adjustment for Defendant Culpability

One possible explanation for the unadjusted geographic disparities in charging and sentencing outcomes is different levels of defendant culpability in the major urban and other counties. The data in Figure 12 test this hypothesis by comparing urban and rural charging and sentencing practices after controlling for the number of aggravating circumstances in the cases between 1973 and 1999. Parts I and II present the data for the major urban and greater Nebraska

[106] Although the sample of cases in the greater Nebraska counties is small, each disparity is statistically significant.

areas respectively. Column A reports the charging and sentencing outcomes for all of the cases in each area, while Columns B-E depict the case outcomes according to the number of aggravating circumstances in the cases.[107]

Note first that the penalty trial rate for both the major urban and greater Nebraska counties increases with the number of aggravating circumstances in the cases. However, in each condition, the rate at which cases advance to a penalty trial is substantially higher in the major urban counties. After adjustment for the number of statutory aggravating circumstances the overall average geographic disparity in penalty trial rates was 30 percentage points (.58-.28).[108]

Figure 12 sheds less light on penalty trial sentencing decisions since only in the subgroups with two or three aggravators (Column C and D) are the sample sizes large enough to make a meaningful comparison. Overall, among these two groups of cases, the penalty trial death-sentencing rate is .69 (9/13) in the greater Nebraska counties vs. .52 (11/21) in the major urban counties. However, in the three-aggravator category (Column D), the rate is higher in the major urban counties while in the two-aggravator category (Column C), it is higher in the counties of greater Nebraska. The disparity after adjustment for the number of aggravating circumstances (shown in Figure 12, note 1) is a non-significant 2 percentage points (.27-.29) lower rate in the major urban counties than in the greater Nebraska counties. The adjusted disparity for death-sentencing rates in Figure 12 (shown in Figure 12, note 1) among all death-eligible cases (reflecting the combined impact of both the prosecutorial charging and judicial sentencing decisions) was a non-significant 5 percentage points: .15 for the major urban areas and .10 for the other counties.

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[107] Although, the "four or more" aggravator category in Column E sheds no light on the issue since all of those crimes were committed in major urban areas, it does suggest that the capital offenses committed in the major urban areas may be more aggravated on average.

[108] This adjusted disparity, which is not shown in Figure 12, is significant at the .0003 level.

Part III presents the adjusted geographic disparities in the rates that death sentences were imposed among all death-eligible cases. Column B indicates that in the earlier period, for the major urban counties, the rate remains substantially and significantly higher (15 percentage points) than the rate in the greater Nebraska counties. In the later period, the disparity changes direction and is much smaller, declining from 15 percentage points to a non-significant 1 point. These results indicate the importance of evaluating sentencing practices on the basis of death sentencing outcomes that have been adjusted for defendant culpability. The results (Figure 13, Part II, Column B) also suggest that in the period 1973-1982 judges in the major urban and other counties shared quite a similar conception of what constitutes a "death case," although in the post-1982 period, the data (Part II, Column C) document somewhat higher judicial death-sentencing rates in the counties of greater Nebraska.

Our first conclusion is that adjustment for defendant culpability does not explain the geographic disparities in the rates that capital cases advance to a penalty trial either before or after 1983 (Figure 13, Part I). Moreover, during the pre-1983 period, defendant culpability does not explain the geographic disparities in the rates that death sentences are imposed among all death-eligible cases (Part III, Column B), even though it does explain the disparities in penalty trial death-sentencing rates during this period (Part II, Column B). During the post-1983 period, defendant culpability explains[109] a significant portion of the geographic disparities in both sentencing rates (Part II, Column C) and in the rates that death sentences are imposed among all death-eligible cases.

Our second conclusion is that since 1982, judicial sentencing policies have tended to offset and partially cancel out prosecutorial charging and plea bargaining practices. Specifically,

counties of greater Nebraska. Once one controls for the location of the prosecutions, the disparities disappear.

As we explain in more detail below, the data within the major urban counties document only small, non-significant race-of-defendant disparities. In the counties of greater Nebraska, the disparities are slightly larger but they are not significant and the number of minority defendants is very small. As a result, in both the major urban and other areas, the data do not support an inference that the cases of similarly situated defendants advance to penalty trial at different rates because of their race.[138] Rather, the data supports a finding that there is no differential treatment based on race.

A. Evidence of Disparate Treatment in Death Sentencing Outcomes

Race-of-Defendant Disparities. Among all death-eligible cases, the death-sentencing rate for white offenders is .16 (22/135) and for racial minorities it is .14 (7/49). In the penalty trial death-sentencing decisions, the rate is .37 (22/60) for white defendants and .25 (7/28) for minority defendants. Neither of these disparities is statistically significant. When we introduce controls for defendant culpability, the disparities are inconsistent in terms of the defendant's race and none is statistically significant.[139] The results were the same in the major urban counties and the counties of greater Nebraska. The data, therefore, do not support an inference that similarly situated defendants are sentenced to death differently on the basis of their race.

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[138] As noted supra, page 47, disparate treatment refers to the differential treatment of similarly situated offenders.

[139] Disparities were calculated for the penalty trial death sentencing rates statewide, and for death sentences imposed among all death-eligible cases, while applying a number of controls number of aggravating circumstances, number of aggravating and mitigating circumstances, the salient factors measure, the regression based scale, and the logistic regression analysis. None of the disparities were statistically significant.

Race-of-Victim Disparities. Among all death-eligible cases, the death-sentencing rate in white-victim cases is .17(26/152) and for minority-victim cases it is .10 (3/30). Neither of these disparities is statistically significant. When we introduce controls for defendant culpability there are no significant race-of-victim effects in the data.[140] The results were the same in the major urban counties and the counties of greater Nebraska. Because the disparities are inconsistent with different measures and none is statistically significant, the data do not support an inference that similarly situated defendants are sentenced to death differently on the basis of their victim's race.

Defendant/Victim Racial Combinations. Among all death-eligible cases, the death-sentencing rate in minority defendant/white victim cases is .20 (5/25) and .15 (24/159) for all other cases. In the penalty trial death-sentencing decisions, the rate is .33 (5/15) for the minority defendant/white victim cases and .33 (24/73) for all other cases. Neither of these disparities is statistically significant. When we introduce controls for defendant culpability, there are no significant race effects in the data.[141] The results are the same within the major urban counties

[140] Disparities were calculated for the penalty trial death sentencing rates statewide, and for death sentences imposed among all death-eligible cases, while applying a number of controls: number of aggravating circumstances, number of aggravating and mitigating circumstances, the salient factors measure, the regression based scale, and the logistic regression analysis. None of the disparities were statistically significant.

[141] Disparities were calculated for the penalty trial death sentencing rates statewide, and for death sentences imposed among all death-eligible cases, while applying a number of controls: number of aggravating circumstances, number of aggravating and mitigating circumstances, the salient factors measure, the regression based scale, and the logistic regression analysis. None of the disparities were statistically significant.

and the counties of greater Nebraska. In contrast to the analysis of the race-of-defendant and race-of-victim effects in judicial sentencing described above, the analyses of minority defendant/white victim effects in judicial sentencing show a consistent pattern of higher death-sentencing rates in the minority defendant/white victim cases. Nevertheless, because these analyses involve small samples and none of the disparities is statistically significant, the results do not support an inference of disparate treatment.

B. Evidence of Disparate Treatment in Prosecutorial Charging and Plea Bargaining

The statewide data on the prosecutorial decisions are presented in Figures 14, 15, and 16. Figure 14 presents statewide data on the rates at which cases with white and minority defendants terminate in a negotiated plea bargain (Part I) and advance to a penalty trial (Part II) after adjustment for the number of aggravating circumstances in the cases. The unadjusted disparity in Column A, suggests that white defendants enjoy a distinct advantage. The data also indicate that after adjustment for defendant culpability white defendants are more likely than minority defendants to negotiate a plea bargain and less likely than minority defendants to see their cases advance to a penalty trial.[142] These effects are most prominent in the one and two aggravator categories (Columns B and C) involving good sample sizes.

Figure 15 presents a similar analysis of minority defendants whose victim(s) were white. Part I (plea bargains) and Part II (advancing to penalty trial) show substantial race effects with

[142] For death-eligible defendants there is a subtle but important distinction between obtaining a negotiated plea or unilateral waiver of the death penalty (Part I) and simply avoiding a penalty trial in which the state seeks a death sentence at the end of the day (Part 11) The reason is that a defendant with a plea bargain or unilateral waiver in hand is assured from that point on that there will be no penalty trial with the state seeking a death sentence Figure 1 *supra* indicates that defendants who do not negotiate such a plea or obtain a unilateral death penalty waiver face a continuing risk of death even though in a number of such cases the state ends up not presenting evidence of aggravation, which to date has always assured a life sentence outcome Thus, in terms of avoiding the risk of a death sentence, a defendant with a plea bargain or unilateral waiver is in a more secure position earlier in the process.

minority defendants whose victims are white receiving less favorable treatment at both levels of analysis. The disparities are concentrated in the single aggravator category (Column B), where the disparities are large and statistically significant.

Figure 16 presents a similar analysis of white defendant disparities with controls for defendant culpability based on a regression based culpability scale. The results are comparable to those shown in Figure 15. We analyzed these race effects using our other measures of defendant culpability. The results are generally to the same effect.[143]

C. Race Disparities After Adjustment for the Place of Prosecution (in Major Urban Counties v. the Counties of Greater Nebraska)

Without further analysis, the statewide race effects presented above suggest the possibility of disparate treatment of minority offenders, especially those whose victim(s) were white. At first blush, this interpretation might appear plausible because the disparities are concentrated in the low to middle range of defendant culpability where there is the greatest room for the exercise of discretion.[144] An alternative is that these disparities are explained by something other than differential treatment of similarly situated white and minority defendants.

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[143] For the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances the disparity, on average, is 12 points ($p = .11$) lower for white defendants; controlling for the salient factors measure, the disparity is 16 points ($p = .06$) lower for white defendants; controlling for the regression based scale, the disparity is 11 points ($p = .06$) lower for white defendants; in the logistic regression analysis the white defendant coefficient is --.45 and not statistically significant.

For the rates that cases resulted in the waiver of the death penalty through a negotiated plea or unilateral waiver, controlling for the number of aggravating and mitigating circumstances, the disparity is 19 points ($p = .02$) higher in the white-defendant cases; controlling for the salient factors measure, the disparity is 21 points ($p = .02$) higher in the white-defendant cases; controlling for the regression based scale, the disparity is 15 points ($p = .04$) higher in the white-defendant cases; in the logistic regression analysis the coefficient for the white defendant variable is .67 and not statistically significant.

Because defendants do not always accept plea bargain offers offered to them by the state, we created an additional variable which reflects when the state either offered a plea agreement (with a death penalty waiver) or unilaterally waived the death penalty, even though the defendant may have rejected an offer of a plea agreement. For that outcome, controlling for the number of aggravating circumstances, the disparity is 18 points ($p = .05$) higher for white defendants; controlling for the number of aggravating and mitigating circumstances, the disparity is 12 points ($p = .08$) higher for white defendants; controlling for the salient factors measure, the disparity is 10 points ($p = .18$) higher for white-defendants.

[144] See, for example, Columns B and C of Figure 14.

And this alternative is exactly what emerged as a more plausible explanation when we estimated the race effects separately for the major urban and other counties of greater Nebraska.

The results of that analysis are presented in Figure 17, which estimates white defendant disparities separately in the major urban and other counties in the rates that cases advance to a penalty trial, after controlling for the number of aggravating circumstances in the cases. (Contrast these results with the comparable statewide analysis shown in Figure 14 Part II.) Column A indicates that for the large urban counties there is a -1 percentage point disparity. After controls for culpability are introduced, white defendants appear to enjoy a slight advantage in two subgroups of cases (Columns C and D). However, the disparities are small, not significant, and involve small samples. If there were a significant race effect in the major urban counties, it almost certainly would have appeared in the one statutory aggravator cases, with good sample size (Part I, Column B). For the counties of greater Nebraska, Part II, Column A shows unadjusted disparities that are consistent with disparate treatment. However, when controls for defendant culpability are introduced (Columns B-D), the disparities are not significant and the samples are very small. Therefore, in both areas of the state, the evidence does not establish a practice of differential treatment on the basis of the race of the defendant.

Figure 18 expands the major urban v. other county analysis to embrace all three outcomes with a focus on disparities associated with both white defendants and minority defendants whose victim(s) are white. The disparities in this Figure have been adjusted for defendant culpability with a regression based culpability scale. None of the disparities in Figure 18 is statistically significant.

Part I documents the white defendant effects. In the major urban counties (Row A) it shows no effects in charging and plea bargaining (Column B), a higher penalty trial death

sentencing rate for whites (Column C) and a small disparity among all death-eligible cases (Column D).[145] In the counties of greater Nebraska (Row B), white-defendants fared better in penalty trials (Column C), but there was only 1 minority defendant and the disparity is not statistically significant

Part II of Figure 18 focuses on the minority defendant/white victim disparities and shows somewhat stronger effects. In the major urban areas (Row A), there is a modest but not significant effect in the rates that cases advance to a penalty trial (Column B) and in the penalty-trial death-sentencing decisions (Column C).[146] However, Column D indicates that after adjustment for defendant culpability in a scale tailored to death sentences imposed among all death-eligible cases, the death sentencing rate is lower for minority defendants with white victims. The data for the other counties show minority defendant/white victim effects that are consistent with a theory of disparate treatment (Column D), but because of the small samples, they fall well short of establishing differential treatment of similarly situated defenders.

The weak evidence of race effects in the two separate analyses of the major urban counties and the counties of greater Nebraska suggests that the statewide race effects in prosecutorial decision-making are primarily an artifact of the greater rate that cases advance to a penalty trial in the major urban areas. The detail of Figure 18 indicates the mechanism producing this result. Specifically, Part I, Column B of the Figure reveals 50 minority capital defendants statewide, 90% (45/50) of whom are prosecuted in the major urban counties. Part II,

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[145] When the data for the major counties are disaggregated an we compare Lancaster County with Douglas and Sarpy counties combined, the data thin out in Lancaster. In each place, the adjusted disparity is a higher rate for white defendants and not statistically significant, i.e., 9 pts. (p = .38) in Douglas/Sarpy and 5 pts. (p = .47) in Lancaster County.

[146] When the comparison is between Douglas/Sarpy counties and Lancaster County the data indicate a 10 pt. non-significant (p = .44) disparity in Douglas/Sarpy with a higher penalty trial rate in the minority defendant/white victim cases. In Douglas County, the rate for the minority defendants with white victims is 5 points lower (p = .86).

Column B reveals 26 minority defendants with white victims statewide, 85% (22/26) of whom are prosecuted in the major urban counties.[147]

If this analysis concerning the source of the race effects in prosecutorial decision-making is correct, it presents a classic example of Simpson's paradox, a situation that exists when a strong correlation between two variables suggesting a causal relationship between them is substantially reduced or reversed when the data are disaggreated on the basis of a third variable.[148] Here we initially see strong statewide race disparities in prosecutorial charging and plea bargaining practices but these perceived disparities virtually evaporate when we distinguish between and control for the differing practices of prosecutors in the major urban and other counties.[149]

D. Evidence of the Disparate Impact of State Law and Policy

1. The concept of disparate impact

In the proceeding section, we considered evidence that there is no compelling evidence that defendants with comparable level of culpability/deathworthiness are charged or sentenced differently on the basis of the race of the defendant or victim. However, the impact of differential prosecutorial policies in the urban counties and the counties of greater Nebraska statewide presents an example of an "adverse disparate impact" on minorities.

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[147] Specifically, Part I, Panels A and B (dark bars) indicate a statewide total of 50 minority defendants with 45 prosecuted in the major urban counties. Part II Panels A and B (dark bars) indicate a statewide total of 26 minority defendants with white victims, 22 of who were prosecuted in the major urban counties.

[148] E.H. Simpson, *The Interpretation of Interaction in Contingency Tables,* B13 J.Rov. Stat. Soc. 238-41 (1951).

[149] A particularly striking and comparable example of Simpson's paradox is a study in the 1970's, which documented that overall women applicants to graduate programs at the University of California-Berkeley were rejected at a much higher rate than were male applicants. However, closer scrutiny revealed that the women tended to apply to the more selective departments such as English and History and the men tended to apply to the less selective departments (such as science and mathematics). When the study disaggregated the data by the department of application, the selection rate for women was higher than it was for men both in the individual departments and overall after adjustment for the department of application. Peter J. Bickel et al., *Sex Bias in Graduate Admissions: Data from Berkeley,* in STATISTICS AND PUBLIC POLICY 113-130 (William B. Fairley and Frederick Mosteller eds., 1977).

The adverse impact exists even though there is no significant evidence of the disparate treatment of minorities within either the major urban counties or the counties of greater Nebraska. The concept of adverse disparate impact has emerged in several areas of anti-discrimination law over the last 30 years.[150] Disparate impact exists when the evenhanded application of a facially neutral policy has the unintended effect of disadvantaging minorities, or some other protected class, as a group. A common example arises in employment law when an employer adopts a job qualification that is applied evenhandedly to all job applicants, but in its application it excludes a disproportionately high proportion of minorities or women. An example noted earlier is a minimum height and weight requirement, of say 5 ft. 8 inches and 150 pounds. Because on average women are shorter than and weigh less than men, a higher proportion of women than men are excluded by the evenhanded application of this otherwise neutral job qualification.[151] The adverse impact is not intentionally caused. It exists because men and women are on average physically different.

Public education provides an example of an adverse impact on minorities that is produced by state law and policy. In most states funding of public schools is primarily a local responsibility, funding levels per student vary widely across many states. If minorities largely reside in the communities with below average per student appropriations for public education, they experience an adverse disparate impact by virtue of where they reside and the state law that delegates discretion for school financing to local officials.

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[150] Griggs v. Duke Power Co., 401 U.S.424 (1972).

[151] In employment and housing law, a policy that produces an adverse impact is not unlawful per se. Proof of an adverse disparate impact shifts to the employer or landlord the duty of justifying the policy producing the adverse impact in terms of "business necessity." If such a justification is valid - e.g. if minimum height and weight requirements are necessary for fire fighters -- the policy may stand. If it cannot be justified, it may not be used.

in the counties of greater Nebraska. The evidence of a low SES victim effect appears throughout the state.

Figure 19 presents the statewide victim SES effects on charging and sentencing outcomes. The data presented in Column A, Part I, II, and III provide an overview of the unadjusted effects for our three principal outcome measures. The bars indicate the unadjusted outcomes for the three victim SES groups: low, middle, and high. Column A, Part I indicates that the rates cases advance to a penalty trial are .40 for low SES cases, .51 for middle SES cases, and .70 for high SES cases. The same pattern is also apparent in Parts II and III. The Part III data indicate that the death sentencing rate among all death-eligible defendants is 3.0 (.3/.1) times higher when the victim is high SES than when it is low SES.

Rows B-E of Figure 19 introduce controls for the number of statutory aggravating circumstances. Part I indicates that the effect of victim SES on the rates that cases advance to a penalty trial is concentrated in the one, two, and three aggravator cases. In the sentencing decisions, shown in Parts II and III, the effects are concentrated in the two and three aggravator cases. Figure 20 presents data on the statewide impact of victim SES controlling for the number of aggravating circumstances in the cases.[156] Column A indicates the impact on the rates that cases advance to penalty trial while Columns B and C indicate the impact on penalty trial death-sentencing rates and death-sentencing rates among all death-eligible cases. In each column the incremental increase in the relevant rate is indicated. For example, Column C indicates for death-sentencing rates among all death-eligible cases, the disparity between the low and middle victim SES categories is 10 percentage points, a ratio of 3.0 (.15/.05), and that the disparity

[156] These data are comparable to those presented in Figure 19, Column A, but after adjustment for defendant culpability.

between the middle and high victim SES categories is 13 percentage points, a ratio of 1.9:1 (.28/.15). In each column the association between the outcome variable and three victim SES levels is statistically significant at the .01 level or higher.

The importance of victim SES is reflected in the regression models in Table 4 (Row 2, d). In all of the models, the victim SES variable is statistically significant. In terms of practical importance, it is useful to compare the regression coefficient for victim SES with the coefficient for the number of statutory aggravating circumstances in the two models for prosecutorial decision-making (Columns B-E). The coefficients for victim SES (disregarding the sign of the coefficient) range from .59 to .72, while the coefficients for the number of aggravating circumstances range from .51 to .72. This suggests that each change in victim SES status has an impact on prosecutorial decision-making that is comparable to the impact of each additional statutory aggravating circumstance in the cases. The practical significance of victim SES in the system is also suggested by a comparison of the data in Figure 20 with the data in Figure 5, which documents the impact of the number of statutory aggravating circuinstances on charging and sentencing outcomes. The comparison indicates how the impact of each increment in victim SES level on charging and sentencing outcomes compares to the impact of an additional statutory aggravating circumstance in the case.

Figures 21 and 22 present separately, statewide data on the impact of high and low victim SES before and after adjustment for the number of statutory aggravators in the cases. Figure 21 presents the data on victims with high socio-economic status. Column A reports an unadjusted disparity of 17 percentage points. The overall statistically significant disparity (not reported in Figure 21) is 20 percentage points (.29/.09) after adjustment for the number of aggravating

circumstances in the cases. The effects are almost exclusively concentrated in the two aggravators cases (Column C), where the room for the exercise of discretion is broad.

Part II offers a picture of the impact of high-victim SES on (a) the rates cases advance to a penalty trial (Column A), (b) judicial sentencing decisions (Column B), and (c) death sentencing among all death-eligible cases, after adjustment for the number of aggravating circumstances in the cases. The data indicate statewide victim SES effects in both charging (Column A - 28 percentage points) and sentencing (Column B - 23 percentage-points) decisions. It is the presence of disparities at both these decision points that produces the overall 20 point impact among all death-eligible cases shown in Part II Column C and reported in footnote 1.[157]

Figure 22 presents a comparable analysis of low-victim SES disparities, a category of cases in which 8 death sentences were imposed. Part I (Column A) indicates an unadjusted -12 percentage point disparity in death-sentencing rates among all death-eligible cases, while footnote 2 reports a statistically significant -15 percentage point disparity after adjustment for the number of aggravating circumstances in the cases. Columns C and D identify the two and three aggravator cases as the principal types of cases in which these disparities appear.

Part II of Figure 22 indicates that the disparities appear in both the prosecutorial charging (Column A) and judicial sentencing decisions Column B), which combine to produce the -15 percentage point impact among all death-eligble cases (Column C).

We estimated the impact of victim SES with a variety of measures of defendant culpability. The results show a pattern of statewide effects that is consistent with the data in Figures 13 and 14.[158] The victim low SES effects are stronger than the victim high SES effects.

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[157] In the analysis of race effects, the disparities appeared in the prosecutorial decisions but not in the judicial sentencing decisions.

[158] High Victim SES Effects: concerning the impact of victim high SES effects on the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the statewide disparity is

2. Disparities in the Major Urban and Greater Nebraska Counties

We explored next the relationship between these statewide victim SES effects and decision-making in the major urban counties and the counties of greater Nebraska. Recall that the race-of-victim and defendant effects documented statewide in prosecutorial charging and plea bargaining decisions were largely the product of evenhanded but different charging and plea bargaining practices in the major urban and other counties, even though the data indicate that when considered independently, minority and white defendants in each group of counties were treated evenhandedly.

Figure 23 replicates the three level victim SES analysis presented in Figure 19 separately for the major urban counties and greater Nebraska. The victim SES effects are apparent in both areas of the state. The specific patterns of SES effects in prosecutorial charging and judicial sentencing decisions vary in the two areas, but the bottom line of disparities among all death eligible cases is strong and consistent in both areas.

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12 points (p = .01); controlling for the salient factors measure, the disparity is 17 points (p = .24); controlling for the regression based scale, the disparity is 25 points (p = .01); in the logistic regression analysis in Table 4, Column E, the coefficient for the victim SES scale is -.61, and statistically significant.

For the penalty trial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the high victim SES disparity is 3 points (p = .01); controlling for the salient factors measure, the disparity is 6 points (p = .12); controlling for the regression based scale, the disparity is 21 points (p = .01); in the logistic regression analysis in Table 4, Column G, the coefficient for the victim SES scale is -1.2 and statistically significant. For death sentences imposed among all death-eligible cases controlling for the number of aggravating and mitigating circumstances, the high victim SES disparity is 8 points (p =.01); controlling for the salient factors measure, the disparity is 7 points (p = .08); controlling for the regression based scale, the disparity is 15 points (p = .04). In the logistic regression analysis in Table 4, Column I, the coefficient for the victim SES scale is –1.2 and statistically significant.

Low Victim SES Effects: concerning victim low SES effects statewide, for the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances, the disparity is –20 points (p = .01); controlling for the salient factors measure, the disparity is -12 points (p = .14); controlling for the regression based scale, the disparity is -.17 points (p = .02).

On the penalty trial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the victim low SES disparity is –19 points (p = .03); controlling for the salient factors measure, the disparity is –20 points (p = .02); controlling for the regression based scale, the disparity is -18 points (p = .02). For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the low victim SES disparity is –14 points (p = .01);controlling for the salient factors measure, the disparity is –13 points (p = .01); controlling for the regression based scale, the disparity is –9 points (p = .01).

Figure 24 highlights these patterns by focusing separately on the high and low victim SES effects in the major urban and other counties after adjustment for the number of aggravating circumstances in the cases. The data in Part I, which focus on the high SES victim effects document patterns in both parts of the state that are quite comparable in terms of magnitude and levels of statistical significance. Part II tells a similar story for the low SES victim effects. These data strongly suggest that defendants whose crimes are comparable in terms of their criminal culpability are treated differently on the basis of the SES status of their victims by both prosecutors and sentencing judges. The disparities documented in Figures 23 and 24 after adjustment for the number of statutory aggravating factors in the case are replicated in other analyses that we conducted with alternative measures of defendant culpability.

Recall that Figure 21 documented statewide significant high SES victim effects. Figure 24 indicates that those statewide effects reflect a pattern of high (Part I) and low (Part II) SES victim disparities in charging and sentencing decisions in both the major urban counties and greater Nebraska. To the extent that they are real, victim SES effects indicate that a circumstance of the cases unrelated to the culpability of the defendant may be a factor in prosecutorial and judicial decision-making. Our measure of victim prestige does not speak directly to the character or quality of the victim and what he or she may have meant to his or her family, which are legitimate considerations when victim impact statements are considered. Indeed, it may be that the high victim SES effects we see outside the major urban counties are explained in part by a correlation between high victim SES status and the victim's character, quality, and importance to his or her family.[159] Such an association is a less plausible explanation of the low SES victim effects documented statewide.

[159] Also, several high status victims are police officers, who are a protected class under the Nebraska death sentencing statute, i.e., the murder of a police officer may implicate statutory aggravating circumstances 1(g), 1(h), or 1 (I). ***See***

similar cases, considering the crime and the defendant."[168] The case files indicate that in Nebraska penalty trials defense counsel do present to the court examples of other "comparable" cases in which a sentence of less than death was imposed either in a life/death sentencing hearing or as a result of the state having waived a death sentence in the case.[169]

However, the methodology used by the sentencing courts on this issue is less clear. We know from the sentencing orders that discussions of comparison cases generally appear only in cases that result in a death sentence. Moreover, in the life sentenced cases, the judges rarely suggest that a concern about comparative excessiveness was a factor in the decision to impose a life sentence. As for the comparison cases consulted by the judges, the sentencing orders indicate that before 1986, some judges followed the lead of the Nebraska Supreme Court and used life sentenced first-degree murder cases as comparison cases. The sentencing orders also indicate that since 1986, defense counsel continue to request the court to consider cases with life sentences or less and the trial courts continue to do so.

C. Evidence of Inconsistency and Comparative Excessiveness

The following analysis has two parts. First, we present evidence of the consistency of the Nebraska system in imposing 29 death sentences during the period covered by this study. The approach we apply is known as the "frequency approach" to proportionality review. It is designed to estimate for each individual death sentenced offender the risk that his death sentence is inconsistent and comparatively excessive in the sense that we describe the concept above. The frequency approach is factually based and attempts to estimate for each death sentenced offender

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[168] ***Supra*** note 47 and accompanying text.

[169] Our data sources do not clearly indicate, however, the frequency with which comparative disproportionality arguments and data are presented in the sentencing hearings.

We calculated the frequency of death sentencing among each death sentenced defendant's group of near neighbors by utilizing an average estimate based on our principal measures of defendant culpability: (a) the number of aggravating circumstances in the case, (b) the number of aggravating and mitigating circumstances in the case, (c) the salient factors of the case measure, and (d) regression based culpability scale.[171] Specifically, each of these measures identifies an overlapping but different group of near neighbors. For each of those groups, we calculated the death-sentencing rate among them. (The estimate for each offender under each measure in presented in Appendix B.) We then averaged those rates for each death sentenced defendant. That average determines where each case is classified in Figure 25.

Part I, Column I limits the pool of potential near neighbors to penalty trial defendants. It indicates that for 11 of the death sentenced defendants, the average death-sentencing rate among the cases we classified as their near neighbors was above .80.[172] We characterize these death sentences as presumptively or *prima facie* evenhanded and comparatively non-excessive. A final judgment on the issue would require close analysis of the records of the cases that we have identified as near neighbors to assure that they are properly classified as comparable in terms of defendant culpability. Part I also indicates that there are no death sentenced cases in which the average death-sentencing rate estimated among near neighbors was less than .10.

The analysis in Part II of Figure 25 expands the pool of potential near neighbors to embrace all death-eligible cases. As a consequence, the results shown in this Part of Figure 25 reflect the impact of both prosecutorial charging and judicial sentencing decisions.

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[171] *Supra* note 84 and accompanying text.

[172] The numbers above .80 are the average of 4 different estimates of death-sentencing rates among similarly situated offenders in categories on the culpability scale in which there were three or more offenders The estimates for each death sentenced defendant under each measure are presented in Appendix B. We used only estimates based on three or more near neighbor cases.

Column I indicates that none of the death sentenced cases fall in the category in which .80 or more of his near neighbors result in a death sentence. In one death sentenced case (Column A), the rate of death sentencing among near neighbors is less than .10.[173] Columns A - E of Part II indicate that for 52% (15/29) of the death sentenced cases, the rate of death sentencing among near neighbors is less than 50%.

Assuming the validity of the culpability classifications of each of the death sentenced cases shown in Figure 25, what do these data tell us about the extent to which the system as a whole distributes death sentences consistently in cases with comparable levels of criminal culpability? In a highly selective system, one would find that virtually all death sentences were limited to defendants in culpability categories in which 80-100% of similarly culpable offenders received a death sentence. In addition, all of those cases would fall into the most aggravated category of cases on each culpability scale. In other words, all of the death sentenced cases would be classified under Column I, which meets both these requirements. This condition would exist in Part I of Figure 25 if all of the sentencing judges applied a common conception of which offenders were truly death worthy. The same condition would exist in Part II if the prosecutors and sentencing judges shared that conception.

Compare those results with what one would see in a substantially random system in which the culpability and deathworthiness of the offenders had little or nothing to do with who received a death sentence. In such a system, each group of near neighbors would approximate a random sample of all of the cases in each analysis. In Part I, all of the cases would be more or less equally distributed above and below Column D, which embraces the .33 average penalty-

[173] This footnote has been omitted.

trial death-sentencing rate.[174] In Part II, the cases would be distributed above and below Column B, which embraces the .16 average death-sentencing rate among all death-eligible cases.

The data in Parts I and II of Figure 25 indicate that the system clearly does *not* allocate death sentences *randomly* in terms of criminal culpability. This is because all but one of the death sentences imposed are classified in a category in which the death-sentencing rate among the defendant's near neighbors is higher, and often very much higher, than the average death-sentencing rate among all cases. Indeed, Figure 25 and Appendix B indicate that the cases with death-sentencing rates of .70 or higher among that defendant's near neighbors account for .48 (14/29) of the cases in Part I and 17% (5/29) of the cases in Part II.

The data in Figure 25 also suggest that the system falls short of the goal of complete consistency because many of the death sentences are imposed in categories in which the death-sentencing rate among the defendant's near neighbors is well below .80 in Part I and well below .50 in Part II.

The data in Part I suggest that the Nebraska system is more discriminating than do the data in Part II because (a) a larger portion of the cases in Part I are classified in categories (the Columns) in which a very high proportion of the defendant's near neighbors are sentenced to death and (b) in Part I there are fewer cases classified in categories in which the death-sentencing rate among the defendant;s near neighbors is at or near the average rate. For example, under Column I, in the category of cases with a death-sentencing rate greater than .80, we find 11 cases in Part I and no cases in Part II. These two pictures are different because the data in Part I (confined to the penalty trial near neighbors) reflect the judgments of only the sentencing

[174] If the average death-sentencing rate were .35 and there were 10 near neighbor cases, the standard deviation around .35 would be plus or minus 15 percentage points and 1 case in 20 would be in the .65 or the .05 category.

judges, while the data in Part II (which embraces near neighbors drawn from the whole universe of death-eligible cases) reflect the judgments of both prosecutors and judges.[175]

Even though we based our estimates on four different measures of defendant culpability, Table 5 indicates that the average of those estimates is highly correlated with the number of aggravating circumstances in the cases. Column A classifies the cases in tenns of the number of aggravating circumstances. Columns B and C list for each of those subgroups of cases the average rate that death sentences are imposed among each death sentenced defendant's near neighbors; Column B presents the estimates based on the penalty trial cases and Column C presents the estimates based on all death-eligible cases. For example, Row 2, Column B indicates that for the cases with two aggravating circumstances, death sentences are imposed on average 54% of the time among similarly situated offenders. The parenthetical below that estimate in the table indicates that the range of those estimates was from 40% to 62%. These data clearly indicate that the greatest risk of inconsistency and comparative excessiveness exists in cases involving one or two aggravating circumstances.

2. A Comparative Assessment

How well does the Nebraska system work vis a vis other jurisdictions? We have comparable data only for the New Jersey system (1983-91).[176] The two states have similar lists of statutory aggravating and mitigating circumstances. The principal distinction between them is that New Jersey has exclusively jury death sentencing while Nebraska has exclusively judicial death sentencing conducted by appointed judges. In addition, as noted above, the Nebraska

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[175] Of course the sentencing judges make no formal determination of the deathworthiness of the death-eligible cases that do not advance to a penalty trial. The impact of the prosecutorial decisions is felt in every case.

It is important to note that the approach we use here for estimating death-sentencing rates among similar cases can be viewed as biasing the results somewhat in the direction of suggesting more consistency than actually exists. The reason for this is that in each category of cases in which a death sentenced offender was classified, we counted that defendant's death sentence as a death sentence that was imposed among similarly situated cases.

judges operate under a statute that requires them to consider the risk of comparative excessiveness when they impose death sentences. Against this background, we should expect to see less risk of comparatively excessive death sentences in the Nebraska system. As we explain below, the data are consistent with this expectation.

We compare the two systems with three measures. The first is the proportion of death sentences that are imposed in cases in which 70% or more of the defendant's near neighbors receive a death sentence. The second and third measures are the proportion of the death sentences imposed in cases in which the death-sentencing rate among the death sentenced offender's near neighbors is (a) *lower than* 50% or (b) *lower than* the average death-sentencing rate among all cases considered in the analysis.

a. Death sentenced cases in which 70% or more of the defendant's near neighbors received a death sentence

When we limit the first measure to penalty trial near neighbors, the Nebraska system appears to be more consistent than New Jersey's. Specifically, in 48% (14/29) of death sentences imposed in Nebraska the death-sentencing rate among penalty trial near neighbors is 70% or higher. The comparable figure in New Jersey is 29% (10/34).[177]

When the near neighbors are drawn from the universe of all death-eligible cases and the numbers reflect the impact of both prosecutorial charging and penalty trial sentencing decisions, the Nebraska system is still more evenhanded. In Nebraska, 17% (6/29) of the death sentences meet the 70% standard while in New Jersey, 15% (5/34) meet it.[178]

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[176] David C. Baldus, Special Master, Proportionality Review Project, FINAL REPORT TO THE NEW JERSEY SUPREME COURT (September 24, 1991).
[177] *Id.* at Table 19.
[178] *Id.* at Table 20.

b. Death sentenced cases in which fewer than 50%of the defendant's near neighbors receive a death sentence

On the second issue concerning the proportion of death sentences imposed in cases in which the rate of sentencing among near neighbors is below 50%, the Nebraska system is also more effective than the New Jersey system. When the focus is limited to death-sentencing rates among near neighbors whose cases advanced to a penalty trial, the death-sentencing rate among near neighbors is less than fifty percent 21% (6/29) of time in Nebraska and 35% (12/34) of the time in New Jersey.

When the focus expands to embrace death-sentencing rates among comparable defendants in the entire population of death-eligible offenders, the death-sentencing rate among near neighbors is less than fifty percent 52% (15/29) of the time in Nebraska death cases and 62% (21/34) of the time in the New Jersey death cases.

c. Death sentenced cases in which the death-sentencing rate among defendant's near neighbors is less than the overall average rate

The third issue focuses on the proportion of death sentences imposed in cases in which the rate of sentencing among the defendant's near neighbors is below the average death-sentencing rate. Here we find that the overall average death-sentencing rates in Nebraska and New Jersey are comparable. The penalty trial death-sentencing rates are .33 in Nebraska and .30 in New Jersey. For death sentencing among all death-eligible cases, the rate is .16 in Nebraska and .15 in New Jersey. When the near neighbors are limited to penalty trial defendants, the death-sentencing rate among near neighbors is less than the overall average 3% (1/29) of the time in Nebraska and 8% (3/34) of the time in New Jersey.

When the near neighbors are drawn from all death-eligible cases, the death sentencing rate among near neighbors is less than the overall average 3% (1/29) of the time in Nebraska and 6% (2/34) of the time in New Jersey.

Overall, these data suggest that the Nebraska death sentencing system is more effective than the New Jersey system in avoiding the risk of inconsistent and comparatively excessive death sentences. This is particularly evident in Nebraska's allocation of 48% (14/29) of its death sentences to the most aggravated categories of cases, i.e., those in which there is a substantial consensus among the sentencing judges about the deathworthiness of the cases, which produces a death-sentencing rate among penalty trial near neighbors of 70% or higher. The data also suggest that in both jurisdictions there are a number of death sentences imposed in cases in which the cases of the defendant's near neighbor result in a death sentence less than 50% of the time.

In our judgment, the more consistent death sentencing outcomes of the Nebraska death penalty system, compared to the New Jersey system, is most likely the product of Nebraska's system of exclusively judicial sentencing under a statute that requires the sentencing judges to assess the risk of comparative excessiveness associated with each death sentence they impose.

X. Non-Capital Homicide Cases: The Impact of Race and Victim SES Disparities on Charging and Sentencing Outcomes

We also examined charging, adjudication, and sentencing decisions in over 500 non-capital homicides. The purpose of this inquiry was to detennine the extent to which race and SES disparities documented in the analysis of the capital cases may also be reflected in the outcomes associated with the processing of the non-capital cases. Since the processing of the two sets of cases occurs in the same system, a finding of race and SES effects in the non-capital

system (with much larger samples) that were comparable to those documented in the capital system would add credibility to the findings from the analysis of the smaller sample of capital cases.

When we examined the key decision points in the processing of the non-capital homicide cases, with no controls applied for the gravity of the crime, the data documented distinct race-of-victim effects, i.e., killers of whites, especially when the defendant was a minority, were more likely to result in more severe convictions and sentences. The data also suggested race-of-defendant effects, with minority offenders more likely to receive more punitive treatment. These results are presented in Figure 26.

We also estimated race and SES effects after controlling for the gravity of the crime. On this point, it is clear from a cursory examination of the flow charts on the non-capital cases shown in Figures 2 and 3 that, at a minimum, the crime of conviction and the manner of conviction, whether by a guilt plea or trial conviction, has a significant impact on the type and severity of the punishments. In addition, we collected information on the mens rea of the offenders and several other elements of the offenses that bear on the defendant's criminality. We emphasize however, that in contrast to our analysis of the 185 death-eligible cases, we had much less rigorous controls for defendant culpability and blameworthiness in our analysis of the non-capital cases.

Table 6 presents the results. The data indicate that when we introduce controls for case characteristics bearing on the offender's culpability in a logistic regression analysis, the race-of-defendant and race-of-victim effects lose significance (Table 6, Rows 3 and 4). Especially important in minimizing the race effects was the mens rea (mental state) of the defendant which

dominate the charging and conviction analyses (Row 1). Victim SES effects (Row 5) are a statistically significant degree in none of the analyses (Column E).

XI. Summary of Principal Findings and Conclusions

1. Our first finding is that there is no significant evidence of disparate treatment on the basis of the race-of-defendant or victim in either the major urban counties or the counties of greater Nebraska on the part of either prosecutors or judges. There are some disparities but because they are small, based on small samples, and not statistically significant, they do not support a conclusion that Nebraska's system treats offenders differently on the basis of the race of the defendant or victim.

2. Our second finding is that compared to other jurisdictions on which data are available, the Nebraska capital charging and sentencing system appears to be reasonably consistent and successful in limiting death sentences to the most culpable offenders. A good measure of the consistency of the system is that when compared to other penalty trial cases, 48% (14/29) of the death sentences were imposed in cases in which over 70% of other offenders with a similar level of culpability were sentenced to death. In this regard, the number of statutory aggravating circumstances has a particularly important influence in determining which death-eligible cases advance to a penalty trial and were sentenced to death. However, in 28% (8/29) of the death sentences imposed, the death-sentencing rate among other similarly situated offenders was 50% or less. When the comparison embraces all death-eligible cases, 17% (5/29) of the death sentences were imposed in cases in which over 70% of the defendant's near neighbors were sentenced to death, and in 52% (15/29) of the death sentences, the death sentencing rate among similarly situated offenders was 50% or less.

The discriminating nature of the Nebraska system (in terms of defendant culpability) appears to be principally the product of selectivity on the part of the sentencing judges. Since 1978, the sentencing judges have been required to consider issues of comparative excessiveness in their sentencing considerations and are no doubt aware of legislative concerns about arbitrariness and comparative excessiveness. The sentencing judges see many death-eligible cases and may talk with one another about the meaning of a "death case." Indeed, the data are consistent with the application of judge made standards to the effect that for cases with three or more statutory aggravating circumstances found, a death sentence is almost certain, for cases with two aggravators found the outcome could go either way, depending on the facts of the case, and for cases with only a single aggravator found, there is a very strong presumption in favor of a life sentence. Indeed only three of 48 cases with a single statutory circumstance have resulted in the death sentence.

3. Our third finding is that the system is characterized by sharp disparities in charging and plea bargaining practices in the major urban counties vis a vis the counties of greater Nebraska. In the major urban counties prosecutors appear to apply quite different standards than do their counterparts elsewhere in the state in terms of their willingness to waive the death penalty unilaterally or by way of a plea bargain. The difference is captured in the fact that after adjustment for the culpability of the offender, death-eligible cases in the major urban counties are about twice as likely as comparable cases in other counties to advance to a penalty trial with the state seeking a death sentence. The different rates are not explained by differing levels of defendant culpability. Nor are they explained by financial considerations, the experience of prosecutors in handling and trying capital cases, or the attitudes of the trial judge about the death penalty.

Disparities in the rates that penalty trial judges impose death sentences are much less pronounced. In the major urban counties before 1983, the unadjusted death-sentencing rate was about twice as high (.57 v. .27) as it was in greater Nebraska. However, since 1982, there has been a reversal of the death sentencing practices in the major urban counties vis a vis greater Nebraska. Specifically, since 1982 the death-sentencing rate in the counties of greater Nebraska has been 3.5 times (.60/.17) higher than the rate in the major urban counties when the rates have not controlled for defendant culpability.

However, most of the geographic disparities in penalty trial death-sentencing rates are explained by differing levels of defendant culpability. After adjustment for defendant culpability, before 1983, the death-sentencing rate in the major urban areas was only 6 percentage points higher (.37 -.31) than it was in the greater Nebraska counties, and since 1982 it has been 7 points lower (.22-.29).

A significant consequence of these two different patterns of disparity (in prosecutorial and judicial decision-making) is that the judicial sentencing policies in both areas of the state tend to neutralize the effects of the prosecutorial decisions. Specifically, the penalty trial death-sentencing rates in the major urban centers minimize the effect of the higher rates that cases advance to penalty trials in those counties, and the higher than average judicial sentencing practices in the counties of greater Nebraska offset the effects of the lower than average penalty trial rates of their prosecutors The bottom line is that among all death-eligible cases, the death-sentencing rates in the two areas of the state are quite comparable.

The evidence suggests that the 1978 legislative amendments to Nebraska's death sentencing statute may have influenced the changes that we have documented in judicial sentencing practices. These amendments contain "findings" that serious disparities in capital

charging and sentencing outcomes existed in the state, which our data confirm. The amendments adopted to ameliorate the problem included a requirement that the sentencing judge conduct a comparative proportionality review in the death sentencing process. As noted above, sentencing practices in the major urban areas since then have substantially reduced the overall geographic disparity in death sentences imposed among all death-eligible offenders.

The "canceling out" effect of the judicial sentencing decisions does not change the fact, however, that siinilarly situated offenders in major urban centers face a higher risk of advancing to a penalty trial strictly by virtue of where they are prosecuted than do similarly situated offenders in other counties. Also, of the offenders that have advanced to a penalty trial since 1982, those tried in greater Nebraska have faced a 32% (7/22) higher risk of receiving a death sentence than have similarly situated offenders tried in the major urban areas.

4. Our fourth finding is that the differential charging and plea bargaining practices of prosecutors in the major urban counties and the counties of greater Nebraska produce a statewide "adverse disparate impact" on racial minorities. This adverse impact flows first from the difference in prosecutorial practices in the major urban counties and the counties of greater Nebraska. The data indicate that the prosecutors in the major urban counties of Nebraska treat whites and minorities evenhandedly. The data also indicate that those prosecutors advance death-eligible cases to a penalty trial at a substantially higher rate than do their counterparts in the counties of greater Nebraska, after adjustment for defendant culpability. Because almost 90% of the minority defendants charged with capital murder in Nebraska are prosecuted in the major urban counties, minorities are more impacted than whites by the greater willingness of prosecutors in these counties to advance death-eligible cases to penalty trial. Therefore, by virtue of the counties in which their crimes are committed and/or prosecuted, minority

defendants statewide face a higher risk that their cases will advance to a penalty trial (with the state seeking a death sentence) than do similarly situated white defendants statewide.[179]

The source of this adverse impact, therefore, is (a) state law; which delegates to local prosecutors broad discretion in the prosecution of death-eligible cases, and (b) the fact that racial minorities principally reside in the major urban counties of Nebraska. This adverse impact on minorities is analogous to the adverse impact on minorities that exists in states where local appropriations for the support of public education are lower in the communities in which minorities reside than they are in predominately white communities. This finding does not suggest or intimate that the Nebraska death sentencing system is racially biased. Our findings are quite to the contrary. One may characterize this adverse disparate impact as simply a fluke produced because minorities happen to live in major urban areas at higher rates than they do in greater Nebraska.

Given the adverse impact of prosecutorial charging decisions on minorities statewide, one would reasonably expect to see an adverse impact against minorities in the imposition of death sentences. Indeed, if the sentencing judges imposed death sentences at the same rate across the state, this is exactly what one would see because statewide a higher proportion of minority defendants advance to a penalty trial. However, this does not occur. The reason it does not is that the sentencing practices of the penalty trial judges offset the adverse impact on minorities of the differential charging practices in the major urban and other counties. Specifically, the judges in the major urban areas impose death sentences at a rate lower than the statewide average while just the opposite is the case for the judges in the other counties. The bottom line, therefore, is an evenhanded racial distribution of death sentences among all death-

[179] The discretion of prosecutors to which we refer has nothing to do with non-capital homicide: it pertains strictly to the discretion authorized with respect to cases that are death-eligible under Nebraska law.

eligible offenders, even though statewide the rates at which the cases advance to a penalty trial are quite different for white and minority defendants.

The statewide adverse impact on minorities produced by current state law and policy raises an important issue that recurs in other areas of anti-discrimination law. For, example in employment and housing discrimination cases, facially neutral policies of defendants (such as employers and landlords) that produce an adverse impact on minorities are not prohibited per se. However, such policies will not be sustained unless the defendant can offer compelling reasons that the rule producing the adverse impact is necessary.

5. The statewide data document disparities in charging and sentencing outcomes based on the socio-economic status of the victims. Specifically, since 1973, defendants whose victims have high socio-economic (SES) status have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence. Defendants with low SES victims have faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death. The SES of the victim effects are substantial in charging and sentencing decisions throughout the State.

6. Our analysis of Nebraska's non-capital homicide was much less well controlled than our analysis of the death-eligible cases as a result the findings are only suggested. The results indicate that defendant mens rea is the controlling factor and that the race and socio-economic status of the defendant are not significant factors in explaining these outcomes.

A New Table of Contents

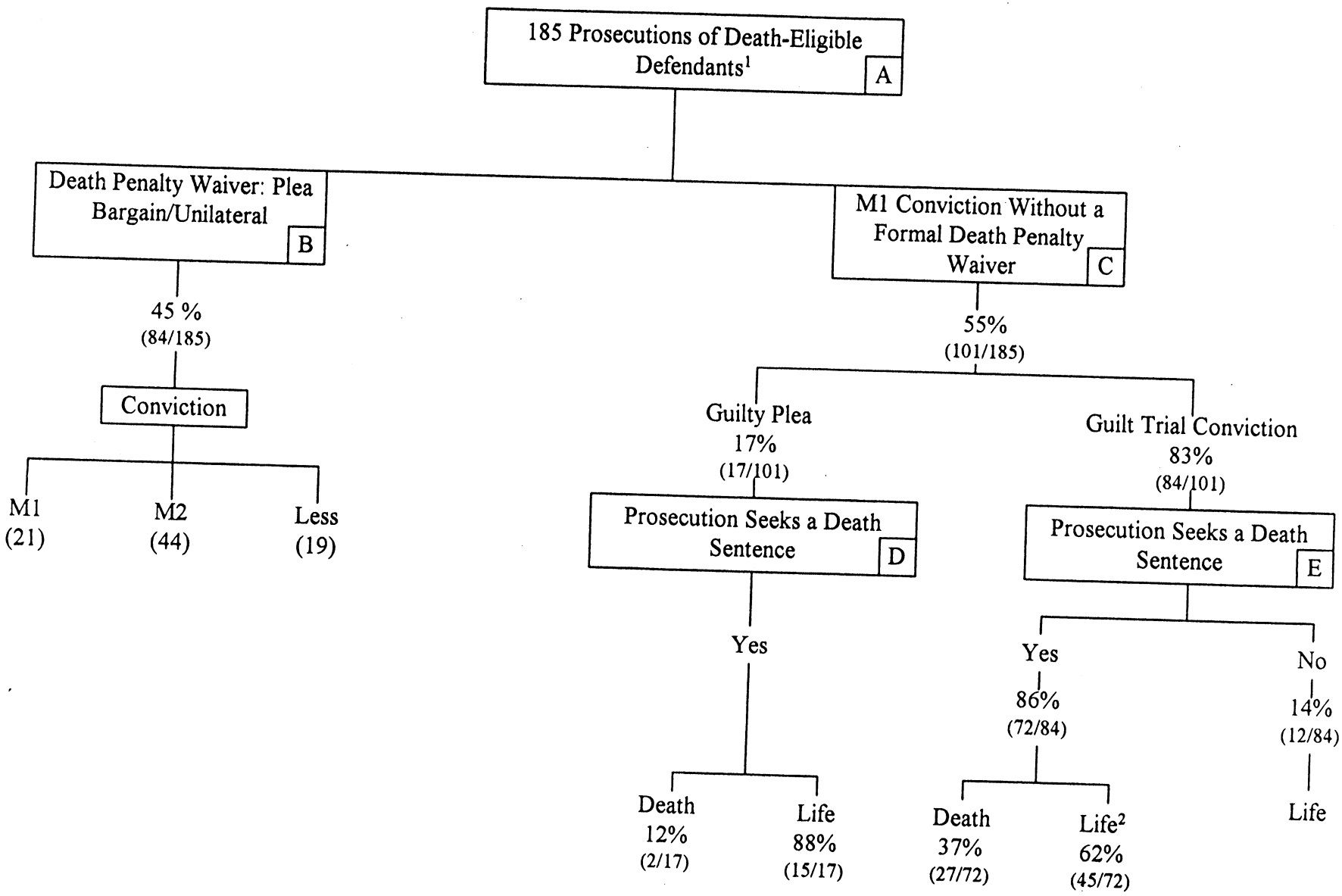
Volume 1

(NOTE: If you have a copy of Volume 1 of the original report released July, 2001, this sheet is printed so when inserted in the original report, it will provide a corrected copy of the report as accepted by the Crime Commission July 26, 2002.)

New Figures and Tables
Volume 2

(NOTE: If you have a copy of Volume 2 of the original report released July, 2001, these sheets are printed so when inserted in the original report, they will provide a corrected copy of the report as accepted by the Crime Commission July 26, 2002.)

FIGURE 1
DISPOSITION OF DEATH-ELIGIBLE MURDER CASES, NEBRASKA: 1973-1999



[1] This Figure includes 9 cases that involved a second or third prosecution following the vacation/reversal of a death sentence or first degree murder conviction in an earlier prosecution that resulted in a death sentence. Four of these cases resulted in a second death sentence and in one case a third death sentence was imposed.

[2] In one case in this category, the sentencing court believed it had no discretion under the law to impose a death dentence. We include that outcome as a life sentence here but have deleted the case from all subsequent analyses of the exercise of judicial sentencing discretion.

FIGURE 2

DISPOSITION OF NON-CAPITAL MURDER CASES RESULTING IN A CRIMINAL CONVICTION, NEBRASKA: 1973-1999

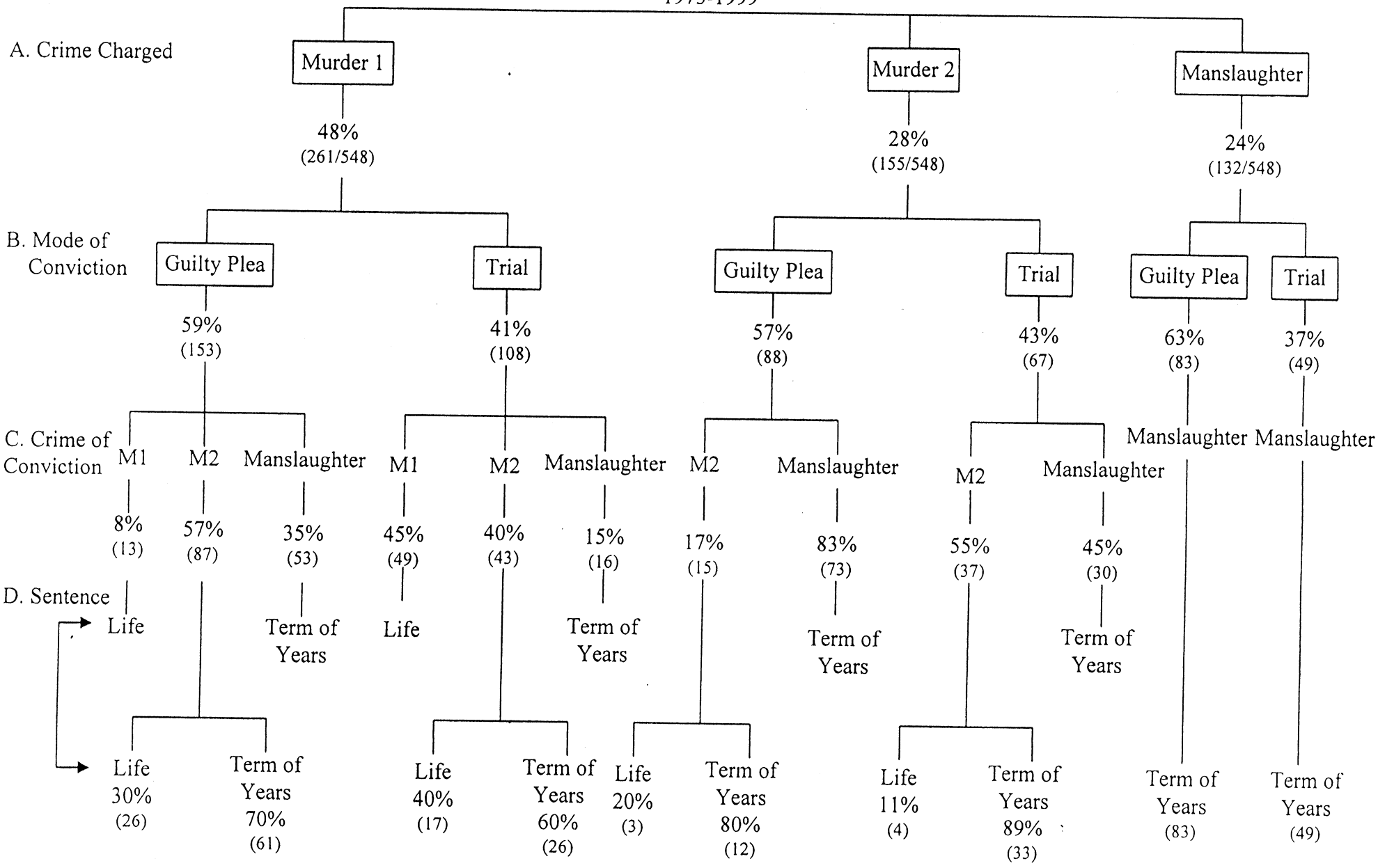
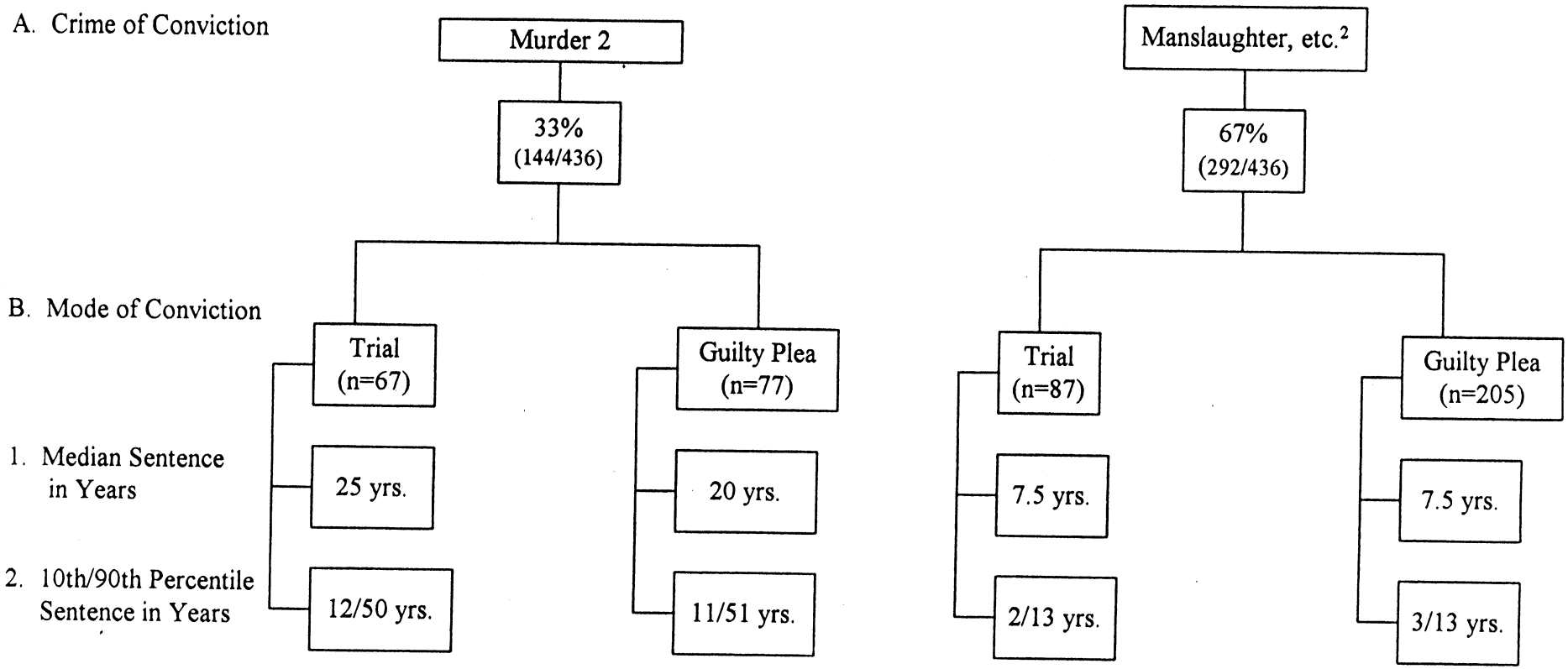


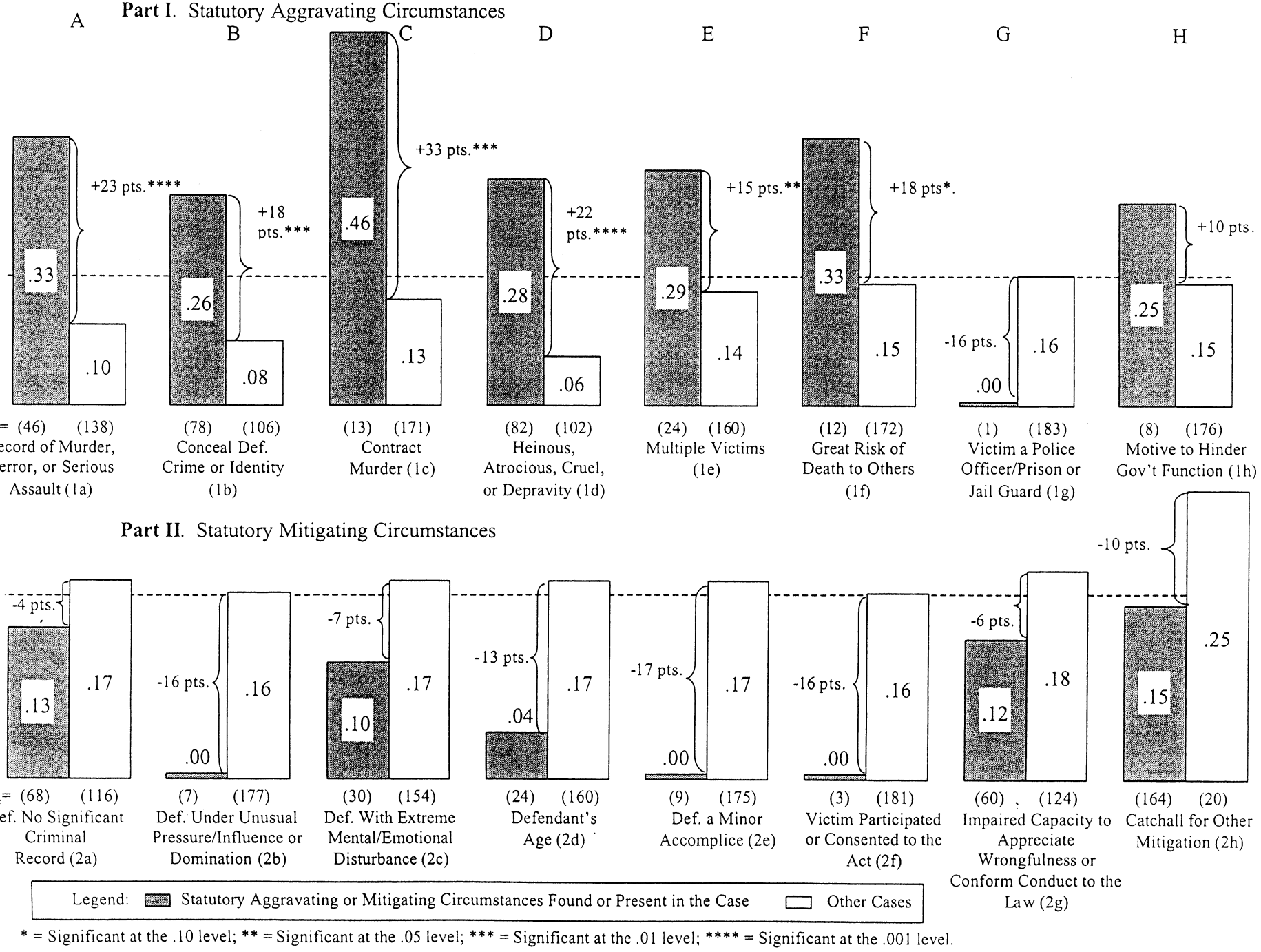
FIGURE 3

LENGTH OF PRISON SENTENCES IMPOSED IN 436 NON-CAPITAL HOMICIDE CASES, CONTROLLING FOR THE CRIME OF CONVICTION AND MODE OF CONVICTION: NEBRASKA, 1973-1999[1]



[1] There are 112 non-capital cases included in Figure 2 that are not reported here because they resulted in a life sentence for first or second degree murder.
[2] This category of cases includees a small number of homicides in addition to manslaughter.

FIGURE 4: THE IMPACT OF STATUTORY AGGRAVATION AND MITIGATION ON DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE DEFENDANTS, NEBRASKA: 1973-1999 (the bars indicate the death-sentencing rates for the subgroups of cases)



* = Significant at the .10 level; ** = Significant at the .05 level; *** = Significant at the .01 level; **** = Significant at the .001 level.

FIGURE 5

CHARGING AND SENTENCING OUTCOMES AMONG ALL DEATH-ELIGIBLE CASES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES FOUND OR PRESENT IN THE CASES, NEBRASKA: 1973-1999

(for each category of cases the bars represent (a) the rates at which death-eligible cases advance to a penalty trial, (b) the rates that death sentences are imposed in penalty trials, and (c) the death-sentencing rates among all capital cases)

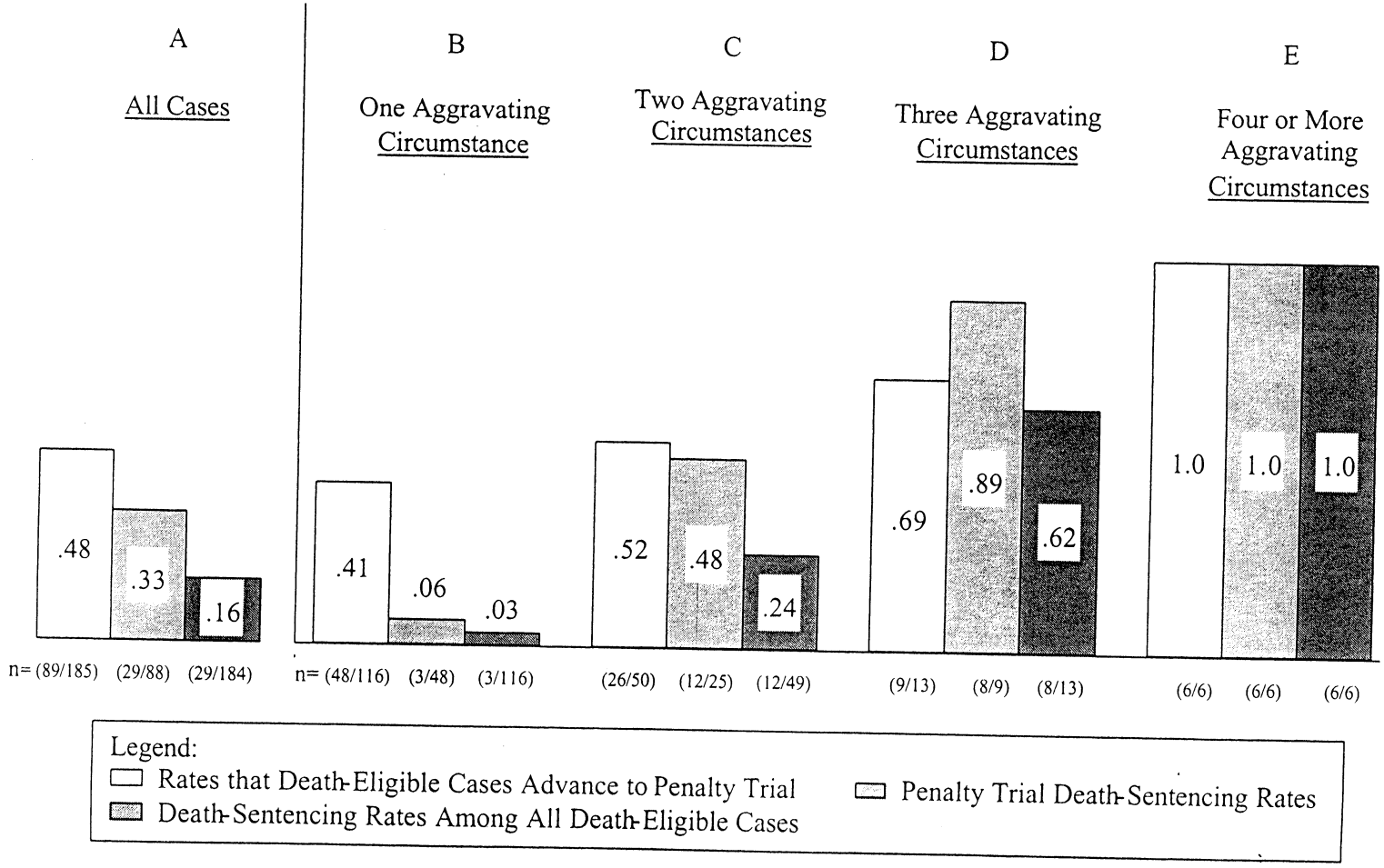
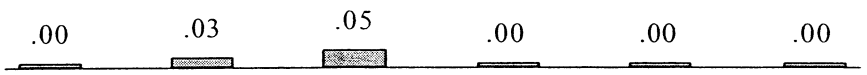


FIGURE 6

DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE CASES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES FOUND OR PRESENT IN THE CASES, NEBRASKA: 1973-1999

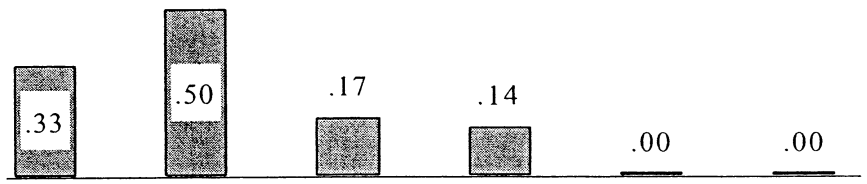
A	B	C	D	E	F	G
Number of Statutory Aggravating Circumstances	Number of Statutory Mitigating Circumstances					
	None	One	Two	Three	Four	Five or More

Part I. One Aggravating Circumstance



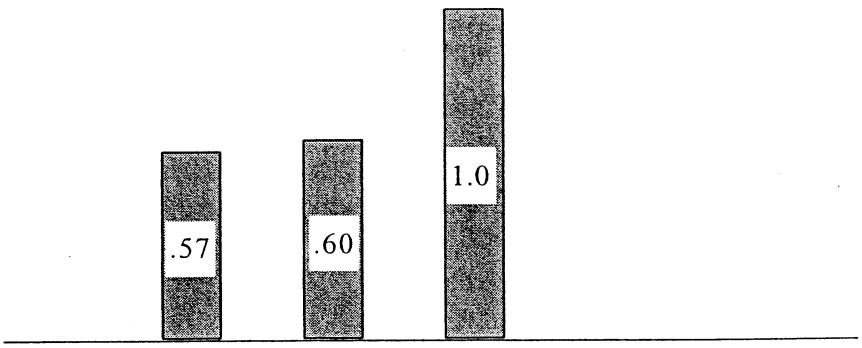
n=	(3)	(1/35)	(2/41)	(23)	(11)	(3)

Part II. Two Aggravating Circumstances



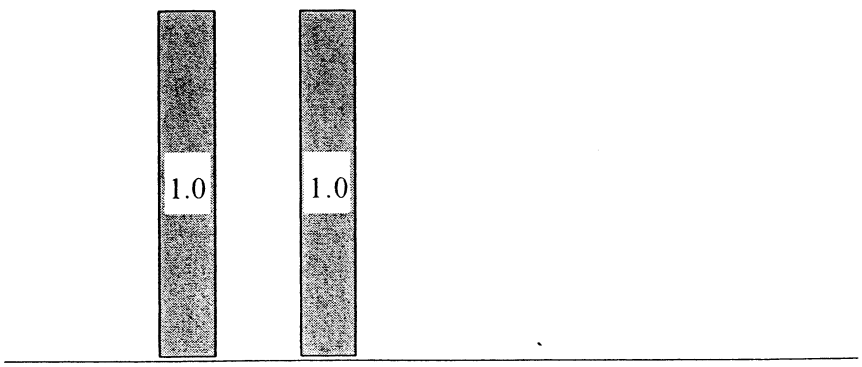
n=	(2/6)	(5/10)	(4/24)	(1/7)	(1)	(1)

Part III. Three Aggravating Circumstances



n=	(4/7)	(3/5)	(1/1)

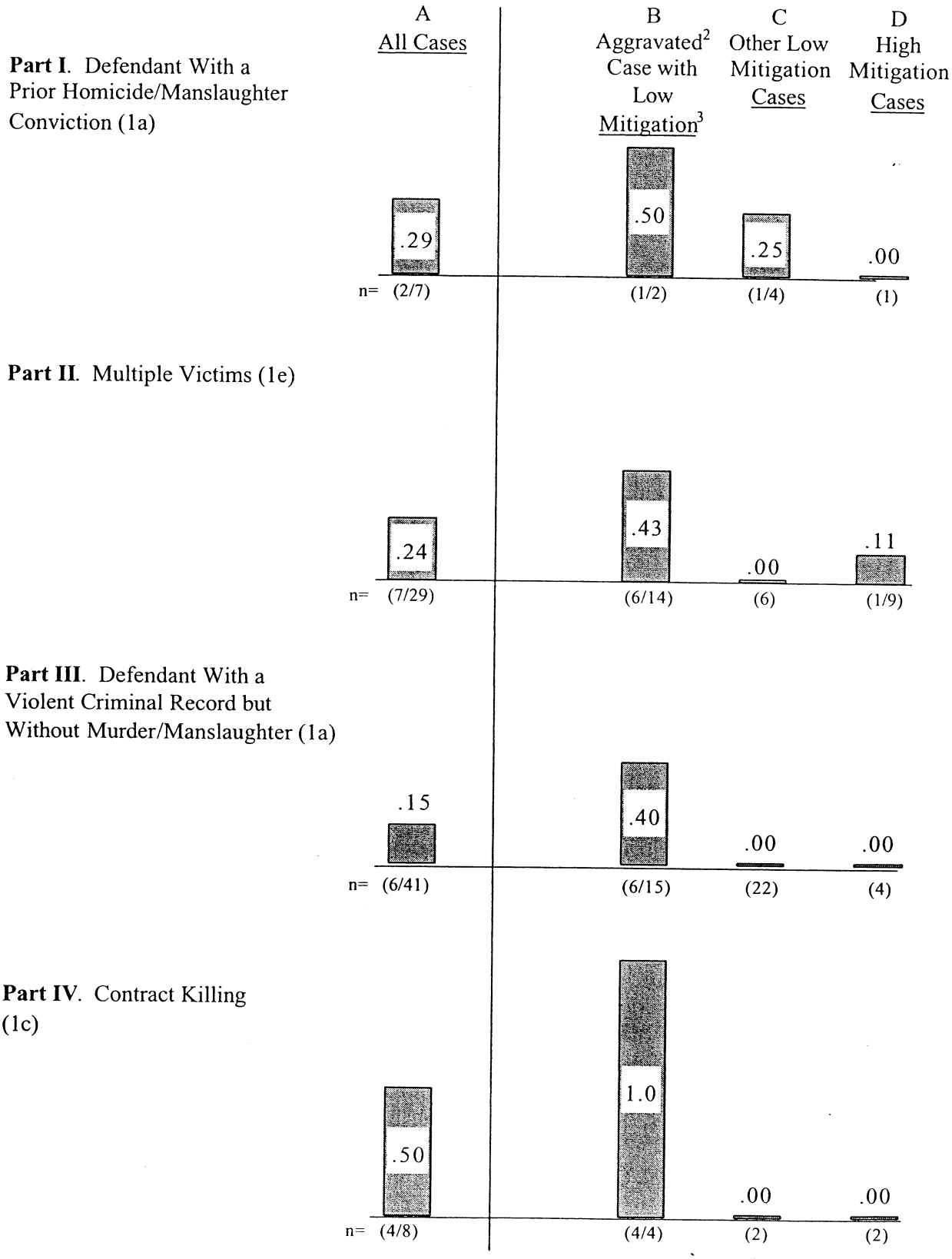
Part IV. Four or More Aggravating Circumstances



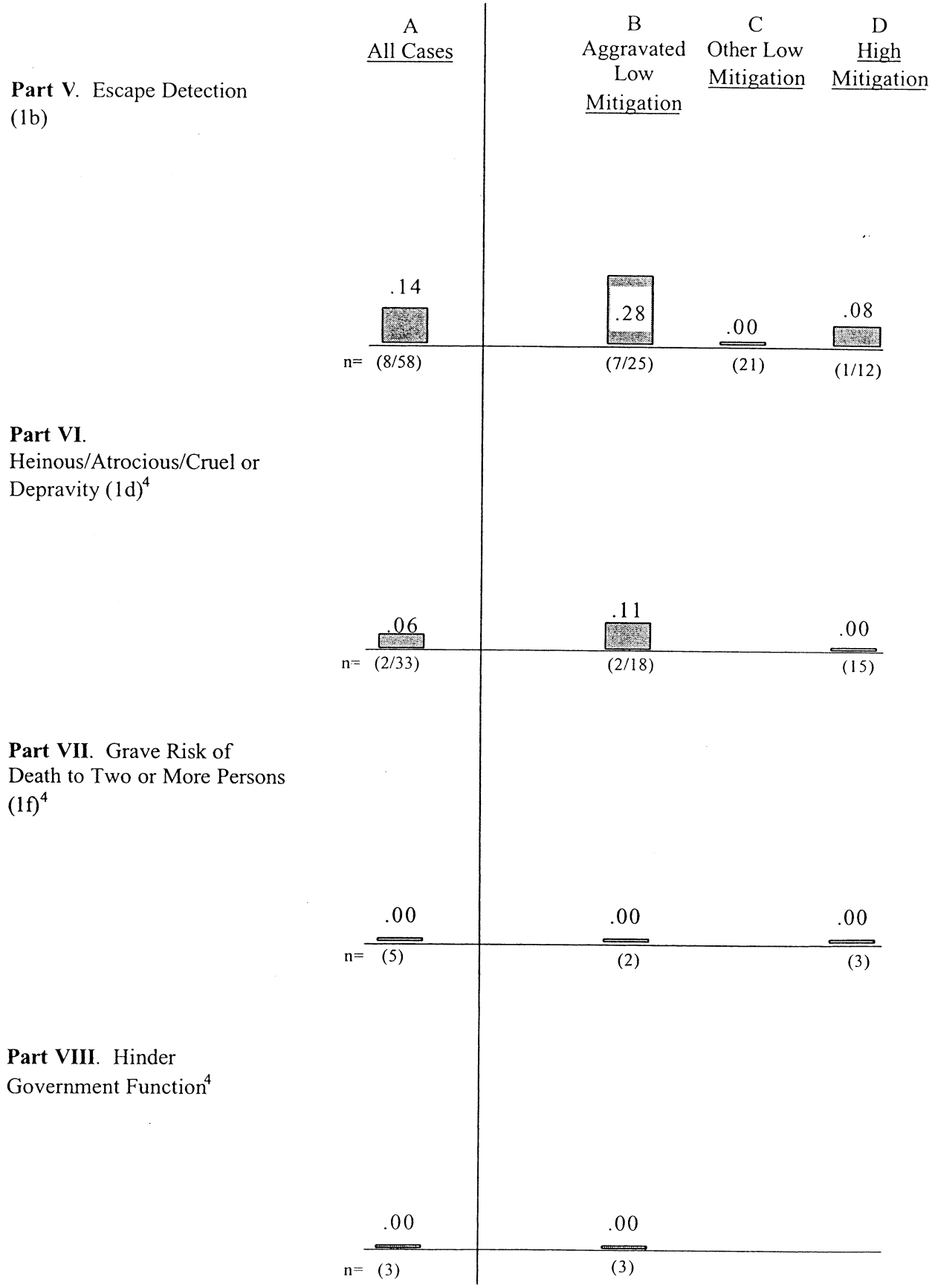
n=	(2/2)	(4/4)

FIGURE 7

DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE CASES CONTROLLING FOR THE CLASSIFICATION OF EACH CASE UNDER THE SALIENT FACTORS MEASURE OF DEFENDANT CULPABILITY: NEBRASKA, 1973-1999[1]



Continued on Next Page


A
All Cases
B
Aggravated Low Mitigation
C
Other Low Mitigation
D
High Mitigation
Part V. Escape Detection (1b)
.14
.28
.00
.08
n= (8/58)
(7/25)
(21)
(1/12)
Part VI. Heinous/Atrocious/Cruel or Depravity (1d)[4]
.06
.11
.00
n= (2/33)
(2/18)
(15)
Part VII. Grave Risk of Death to Two or More Persons (1f)[4]
.00
.00
.00
n= (5)
(2)
(3)
Part VIII. Hinder Government Function[4]
.00
.00
n= (3)
(3)

[1] The designation at the conclusion of each part's description indicates the principal statutory aggravating circumstance in these cases, e.g., for Part I cases, the principal aggravator is (1a). See Table 1 for a list of the statutory aggravators.

[2] An "aggravated" case includes one or more additional aggravating circumstances, except for Part II in which "aggravated" refers to the presence of a contemporaneous felony, such as robbery or arson.

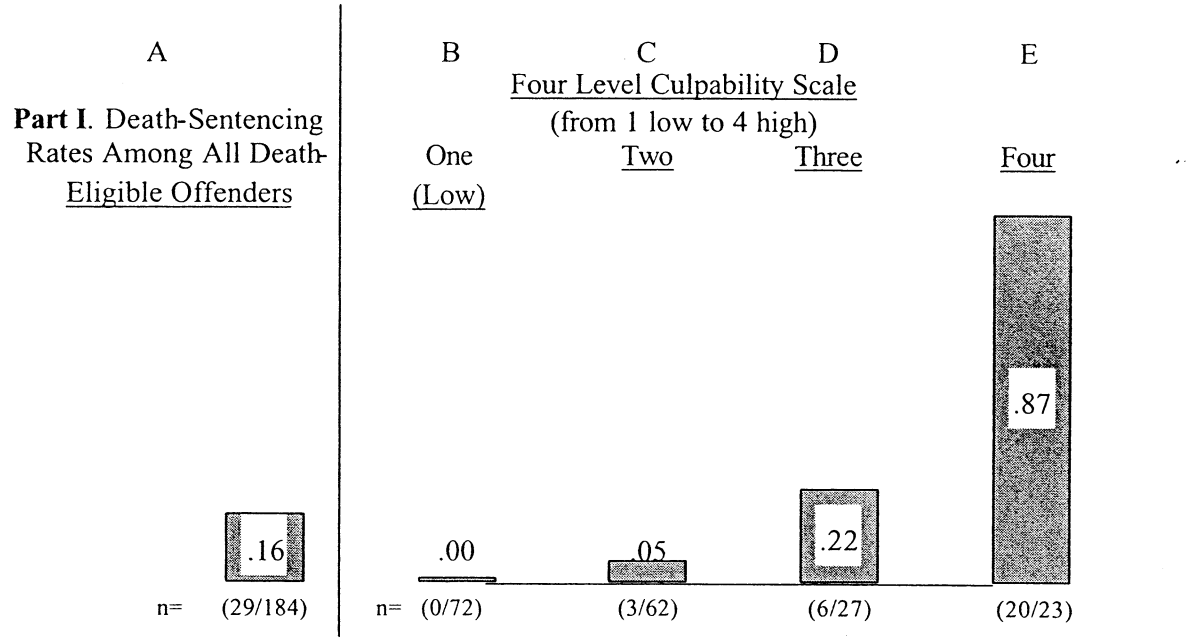
[3] A low mitigation case has two or fewer statutory mitigating circumstances (a) found or recognized by the court in a penalty trial case or (b) present in a non-penalty trial case.

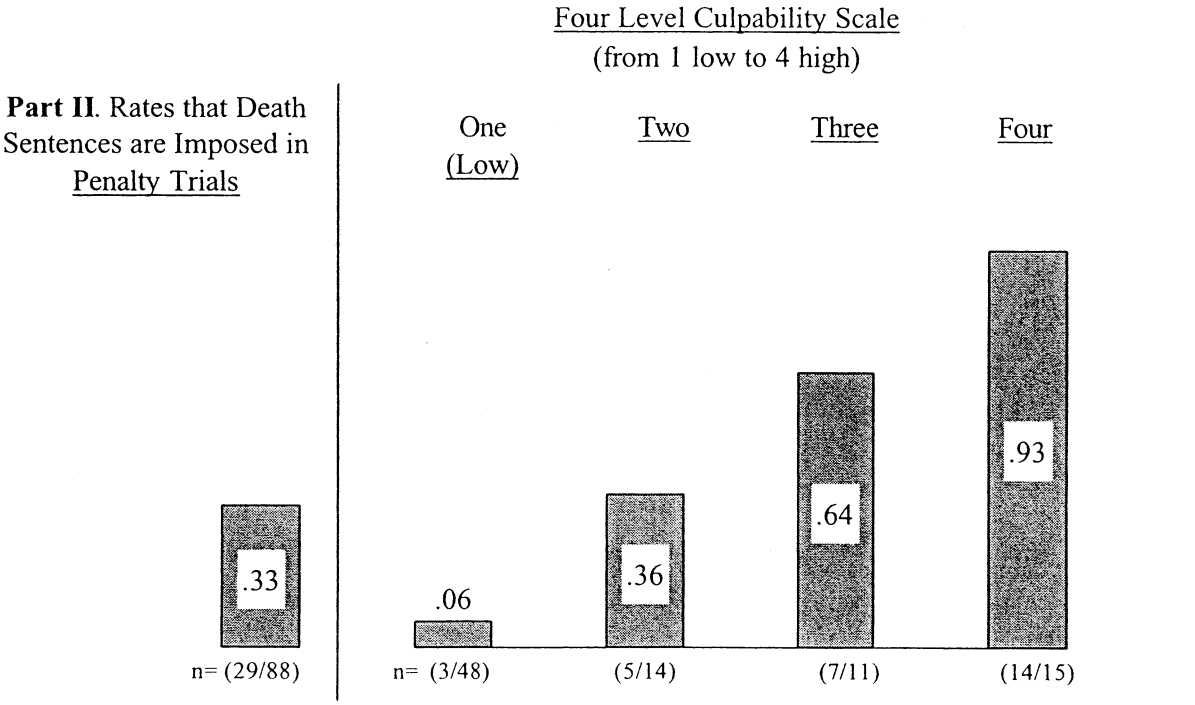
[4] These cases are subclassified only in terms of high and low mitigation.

FIGURE 8

DEATH- SENTENCING RATES AMONG ALL DEATH-ELIGIBLE CASES (PART I) AND IN PENALTY TRIALS (PART II), CONTROLLING FOR DEFENDANT CULPABILITY ON REGRESSION BASED CULPABILITY SCALES

(the bars indicate the death sentencing rates among each category or cases defined in terms of defendant culpability estimated on a regression based scale)





[1] This Figure does not include one death eligible case in which the sentencing court did not believe it had discretion to impose a death sentence.

Seven Level Culpability Scale
(from 1 low to 7 high)

Part III. Rates that Cases Advance to a Penalty Trial

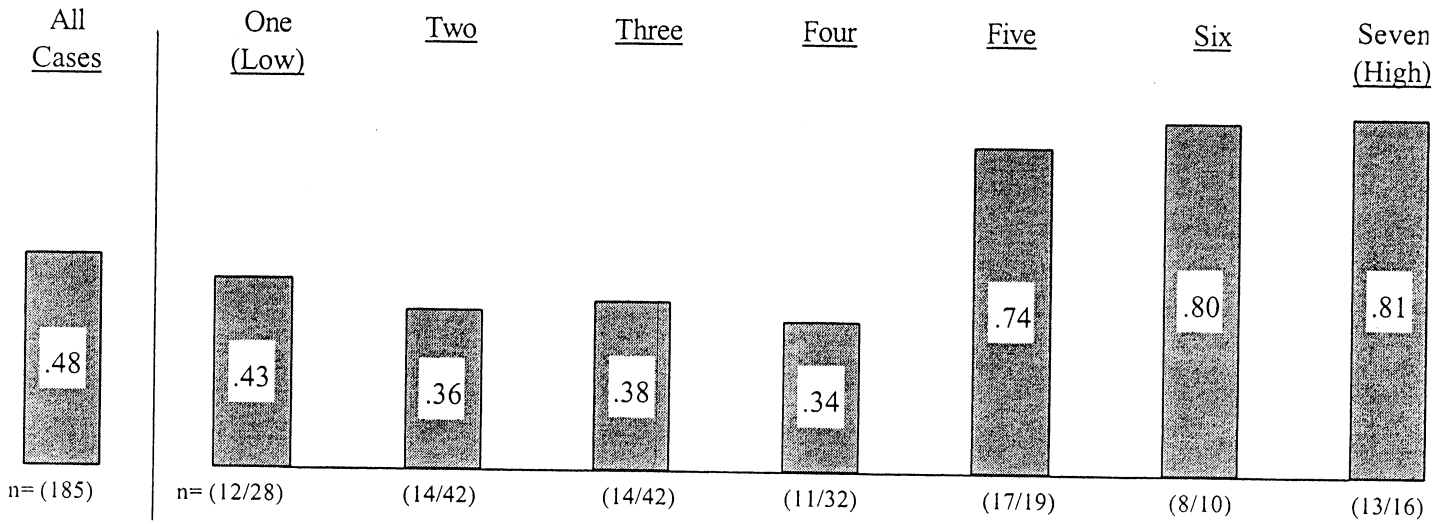
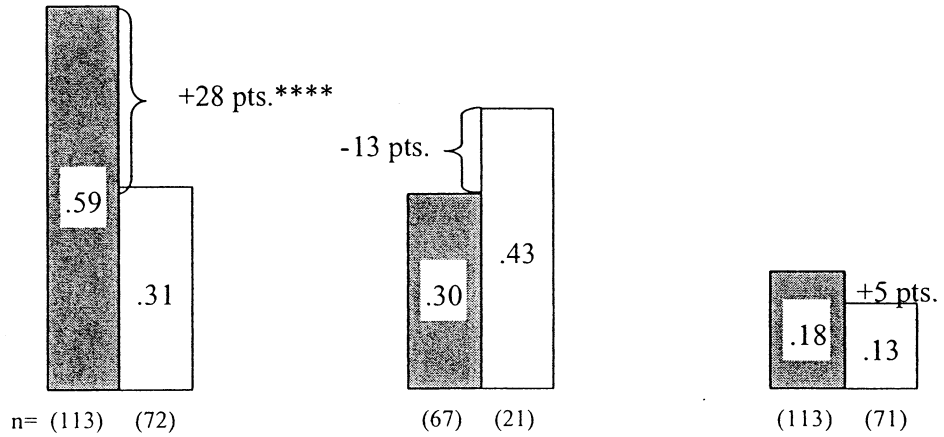


FIGURE 9

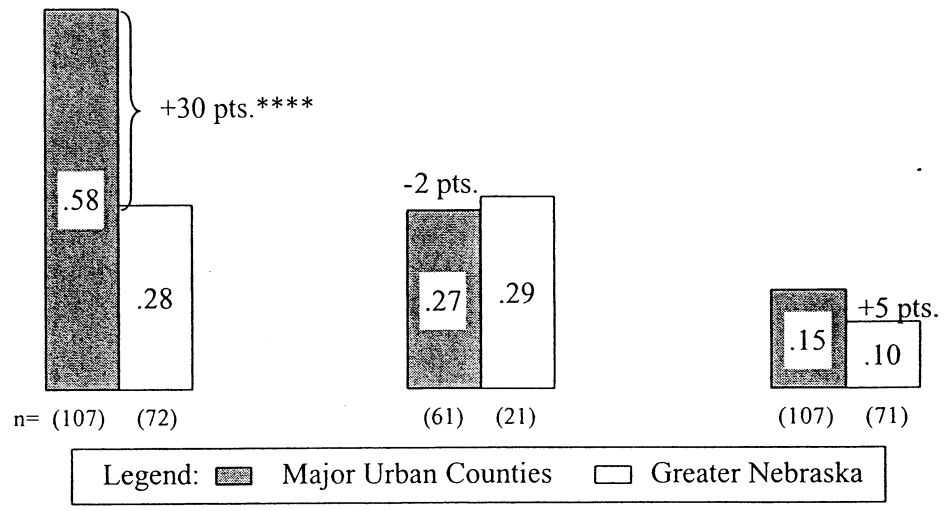
UNADJUSTED AND ADJUSTED DISPARITIES BETWEEN MAJOR URBAN COUNTIES AND GREATER NEBRASKA IN CAPITAL MURDER CHARGING AND SENTENCING OUTCOMES: NEBRASKA, 1973-1999

A	B	C
Rates at which Cases Advance to a Penalty Trial With the State Seeking a Death Sentence[1]	Rates that Death Sentences are Imposed in Penalty Trials[2]	Death-Sentencing Rates Among All Death-Eligible Cases[3]

Part I. Unadjusted Geographic Disparities



Part II. Geographic Disparities Adjusted for the Number of Aggravating Circumstances in the Cases[4]



**** = disparity significant at the .0001 level

[1] The penalty trial rates were .67 (54/81) in Douglas and Sarpy Counties; .41 (13/32) in Lancaster County; and .31 (22/72) in greater Nebraska.

[2] The penalty trial death-sentencing rates were .28 (15/54) in Douglas and Sarpy Counties; .38 (5/13) in Lancaster County; and .43 (9/21) in greater Nebraska.

[3] The death-sentencing rates among all death-eligible offenders were .19 (15/81) in Douglas and Sarpy Counties; .16 (5/32) in Lancaster County; and .13 (9/71) in greater Nebraska.

[4] The reduced number of major urban county cases in Part II is explained by the fact that all cases with 4 or more aggravators (n=6) were prosecuted in major urban counties. Because there are no greater Nebraska cases with compable levels of culpability these 6 cases are omitted from the adjusted rates calculation in Part II.

FIGURE 10

UNADJUSTED CHARGING AND SENTENCING OUTCOMES IN CAPITAL MURDER CASES IN MAJOR URBAN AND GREATER NEBRASKA COUNTIES, OVER TIME, NEBRASKA: 1993-1999

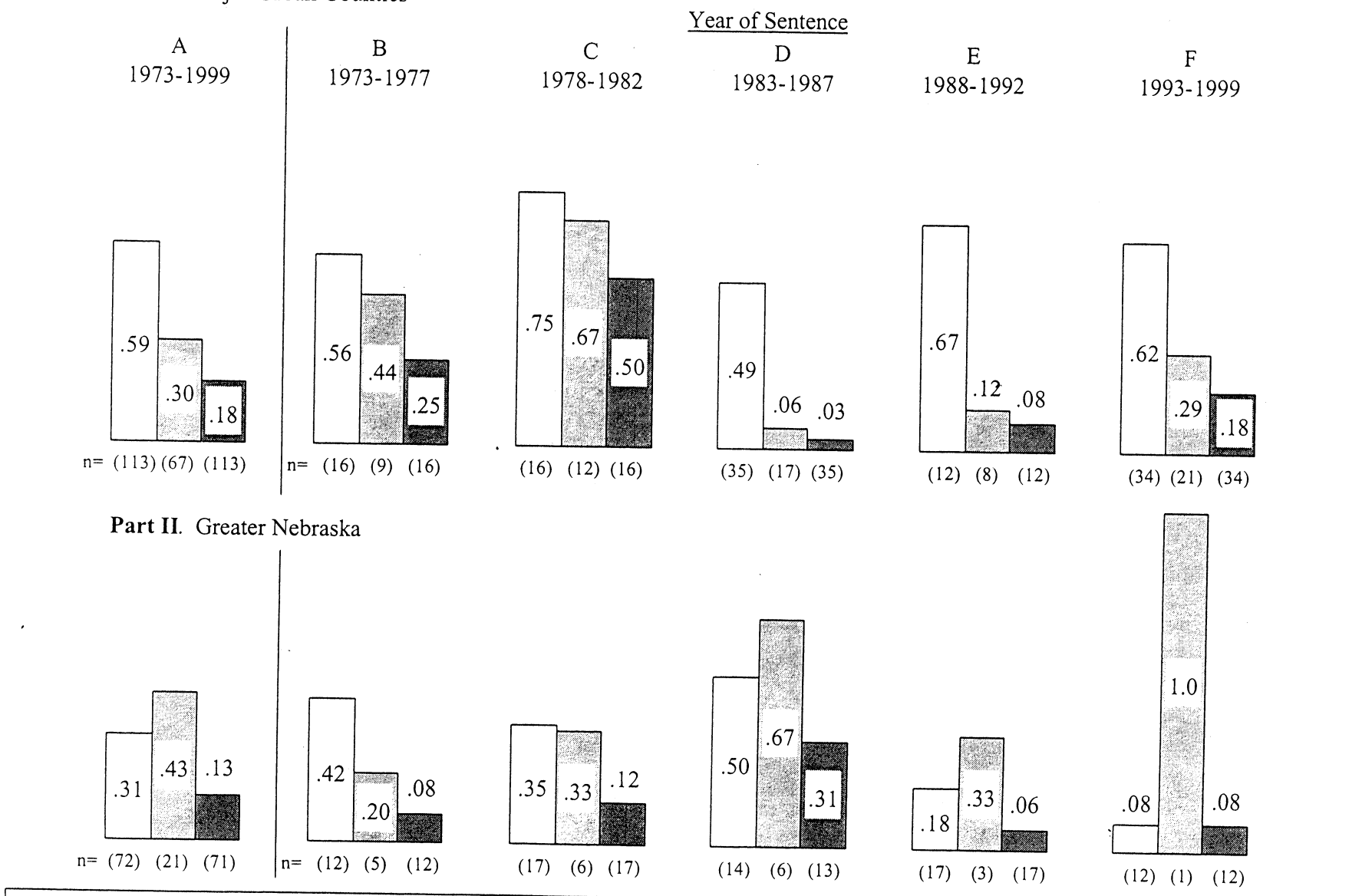
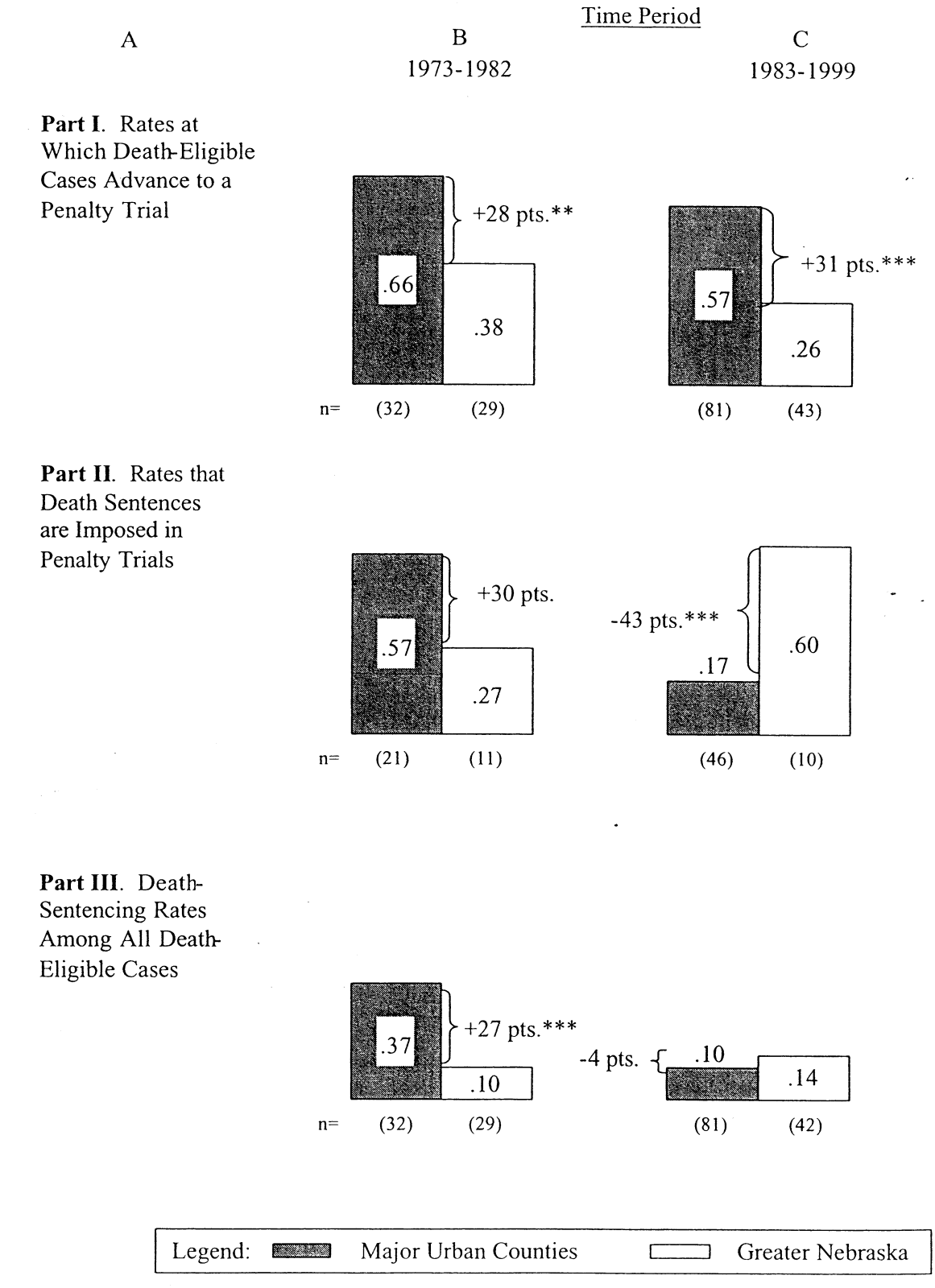


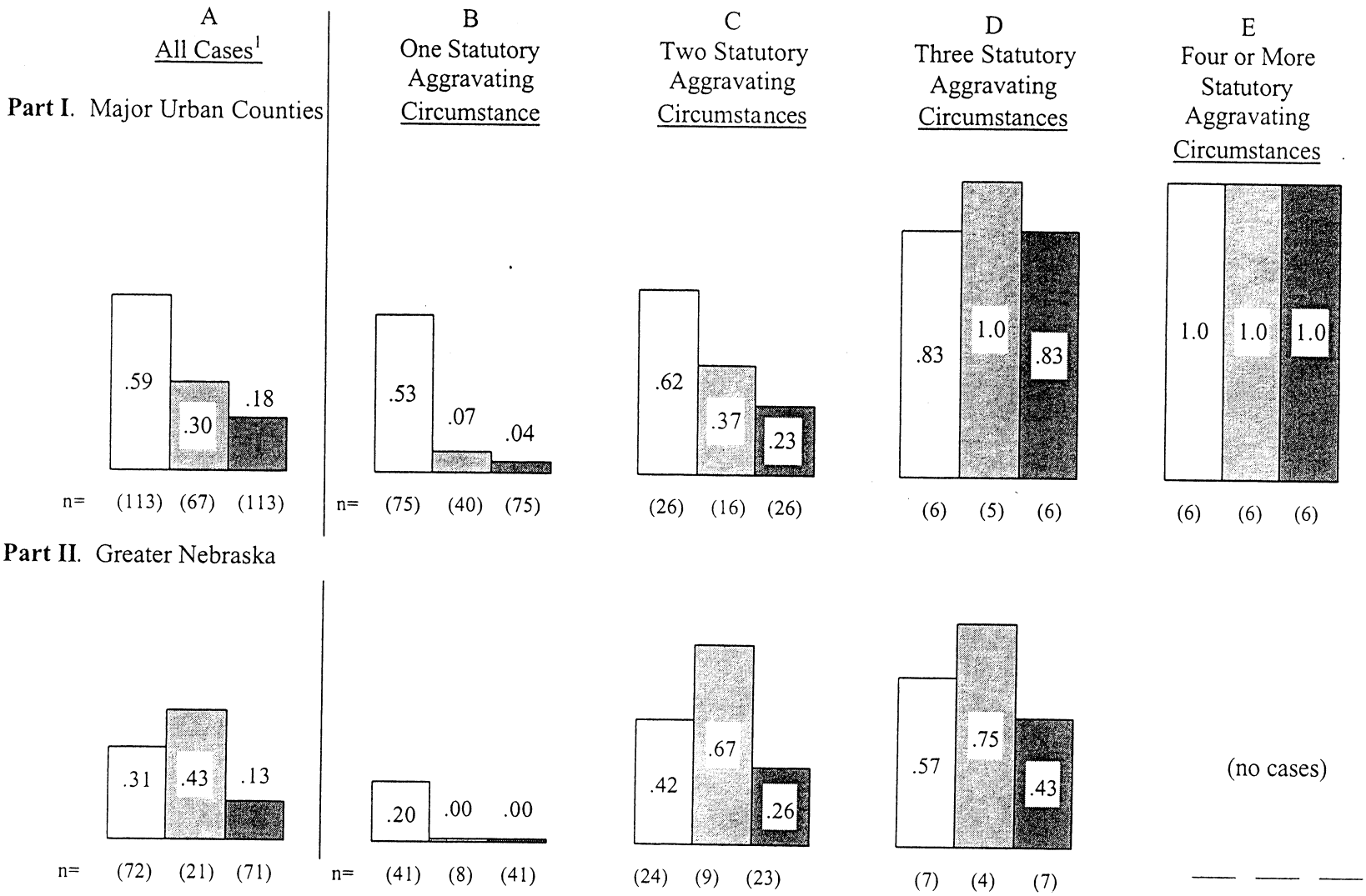
FIGURE 11
UNADJUSTED GEOGRAPHIC DISPARITIES IN CHARGING AND SENTENCING OUTCOMES: 1982 AND EARLIER V. 1983-1999, NEBRASKA



Levels of statistical significance of disparity: *=.10; **=.05; ***=.01 and beyond

FIGURE 12

CHARGING AND SENTENCING OUTCOMES IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999.

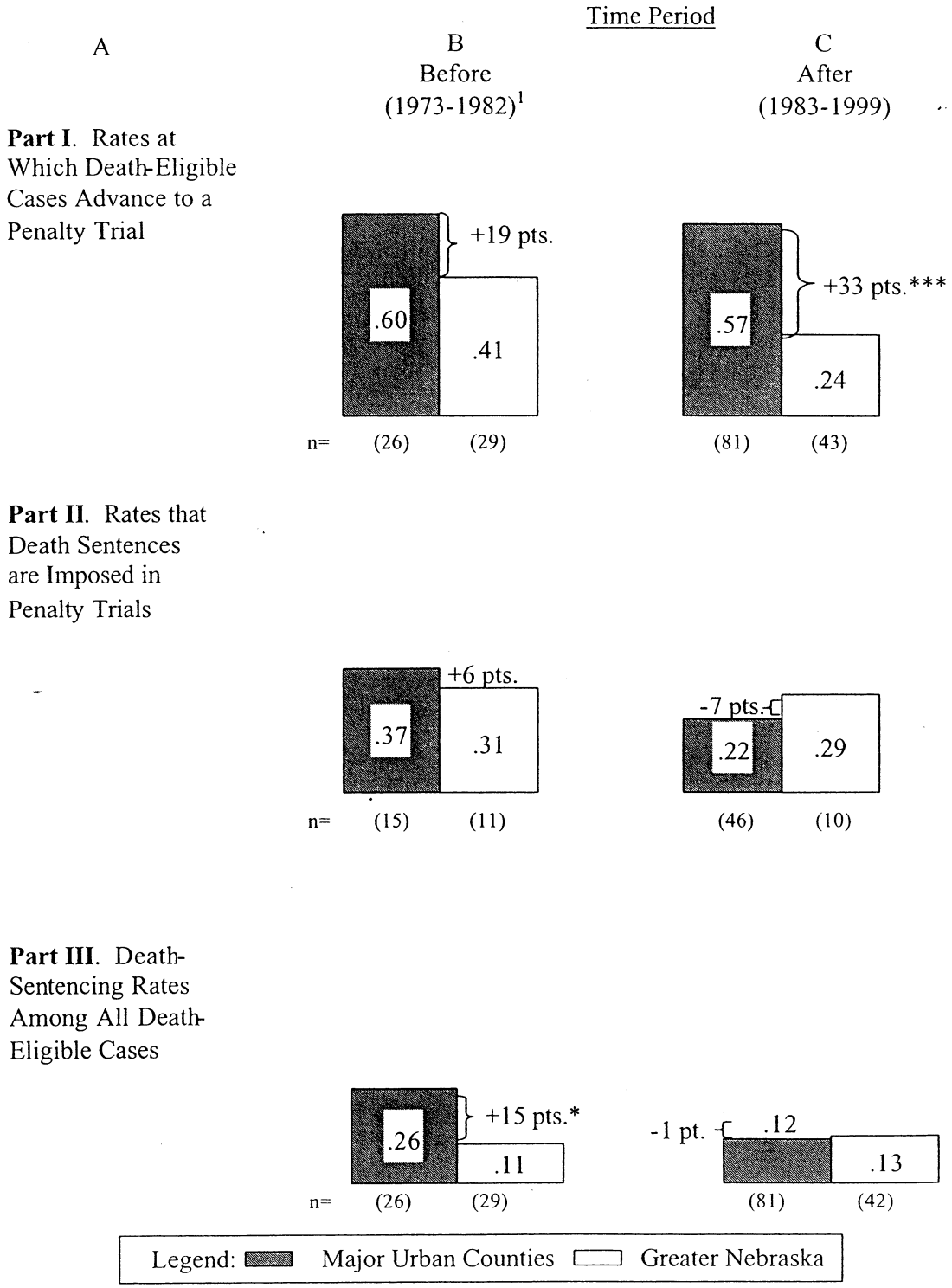


[1] After adjustment for the number of aggravating circumstances in the cases: (a) the death-sentencing rate among all death-eligible cases was .15 in the major urban areas and .10 in greater Nebraska (p=.31); the penalty trial death-sentencing rate was .27 in the major urban counties and .29 in greater Nebraska (p=.67); and the rate at which cases advance to a penalty trial was .58 in the major urban counties and .28 in greater Nebraska (p=.0001).

FIGURE 13

GEOGRAPHIC DISPARITIES IN CHARGING AND SENTENCING OUTCOMES: 1982 AND EARLIER V. 1983-1999, CONTROLLING FOR THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES, NEBRASKA

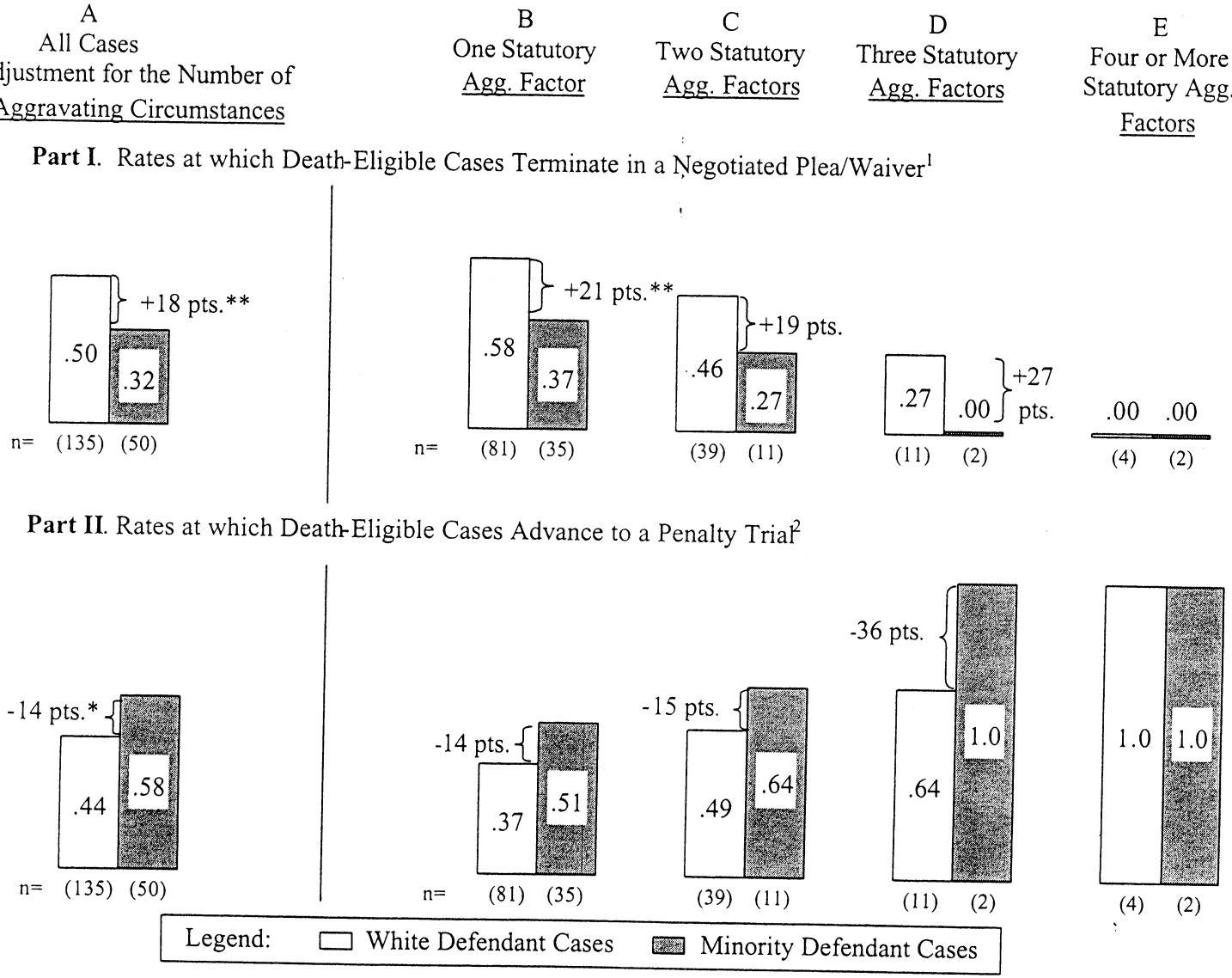
(the bars indicate the penalty trial rates (Part I) and death-sentencing rates (Parts II & III) after adjustment for the number of statutory aggravating circumstances in the cases)



[1] The '82 and earlier cases reported below do not include 6 death sentenced cases from the major urban centers because those cases involved 4 or more aggravating circumstances and there were no cases with more than 3 aggravators in greater Nebraska.
Levels of statistical significance of disparity: *=.10; **=.05; and ***=.01

FIGURE 14

STATEWIDE WHITE DEFENDANT DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES (A) TERMINATE IN A NEGOTIATED PLEA/WAIVER AND (B) ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999



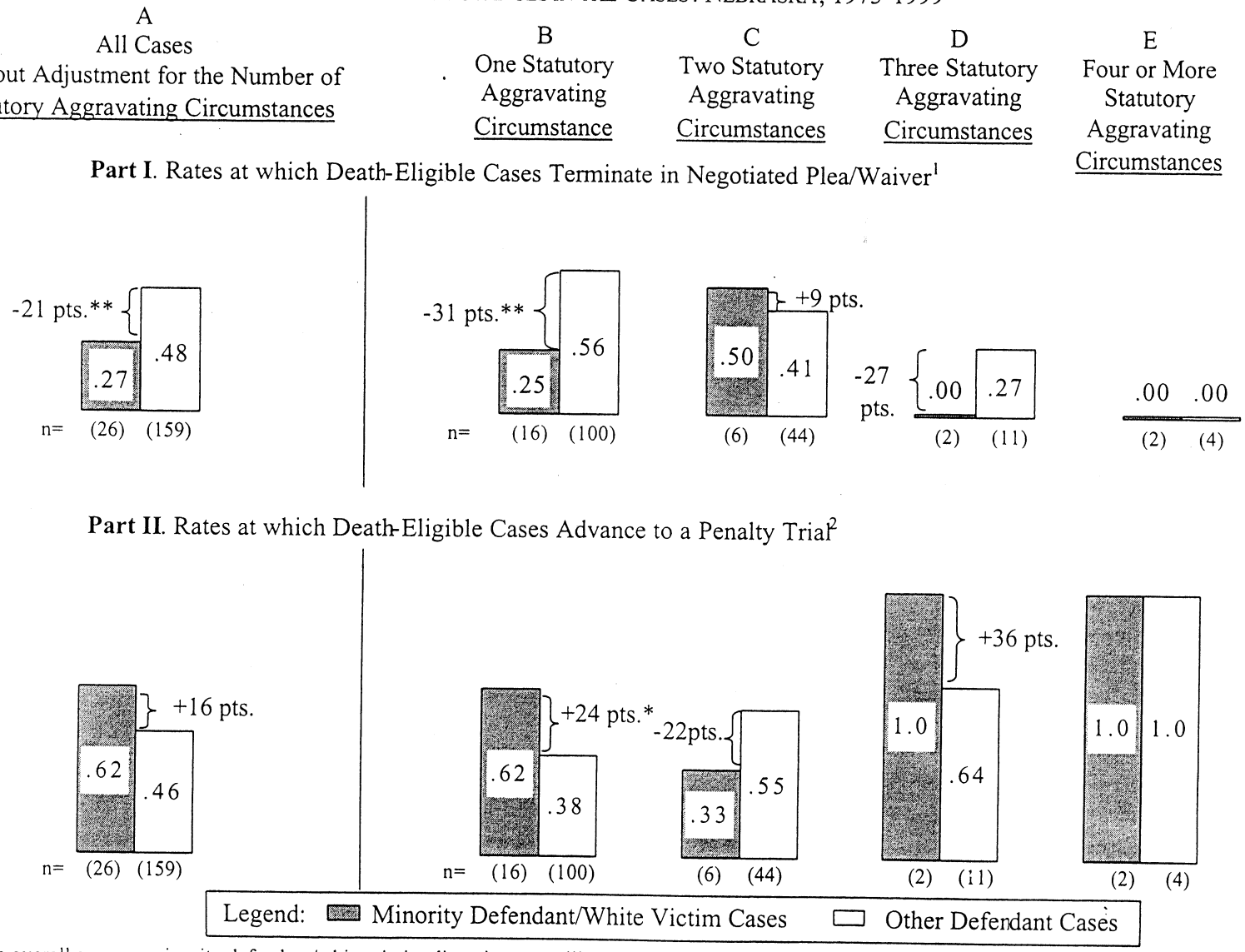
[1] After adjustment for the number of statutory aggravating circumstances, the overall white defendant disparity was +19 percentage points (.51 - .32), significant at the .01 level.

[2] After adjustment for the number of statutory aggravating circumstances, the overall white defendant disparity was -15 percentage points (.44 - .59), significant at the .06 level.

Level of Significance or Disparity: * = .10; ** = .05.

FIGURE 15

STATEWIDE MINORITY DEFENDANT/WHITE VICTIM DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES (A) TERMINATE IN A NEGOTIATED PLEA/WAIVER AND (B) ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999



[1] The overall average minority defendant/white victim disparity controlling for the number of statutory aggravating circumstances is -19 percentage points (.29 - .48), significant at the .06 level.

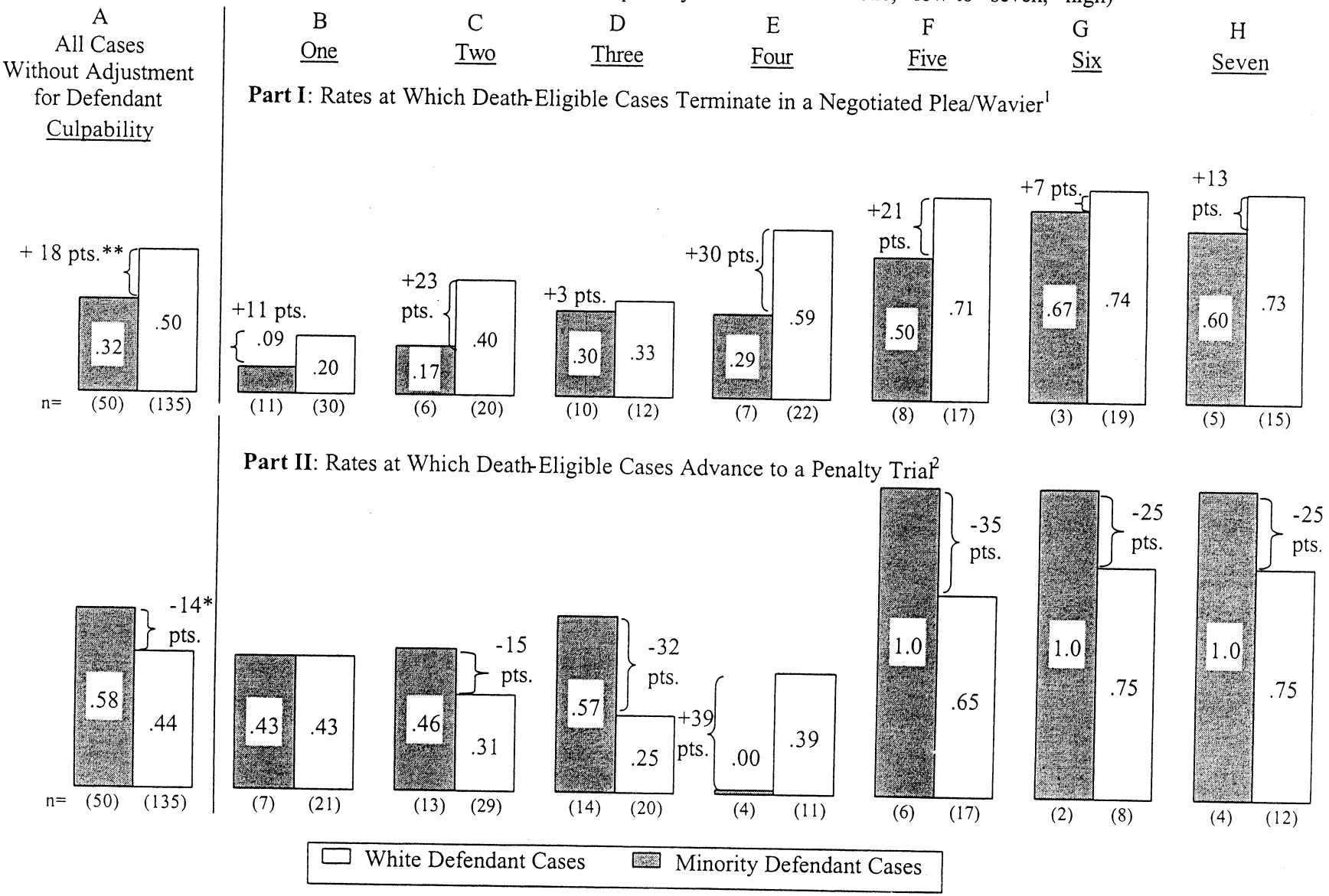
[2] The overall average disparity controlling for the number of statutory aggravating circumstances is +12 percentage points (.58 - .46), significant at the .18 level.

Level of Significance of Disparity: * = .10; ** = .05.

FIGURE 16

STATEWIDE WHITE DEFENDANT DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES (A) TERMINATE IN A NEGOTIATED PLEA/ WAIVER AND (B) ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR DEFENDANT CULPABILITY WITH A REGRESSION BASED SCALE: NEBRASKA, 1973-1999

(the height of each bar indicates the negotiated plea and penalty trial rates for the subgroup of cases at each level of culpability estimated with a regression based scale; the culpability levels are from "one," low to "seven," high)



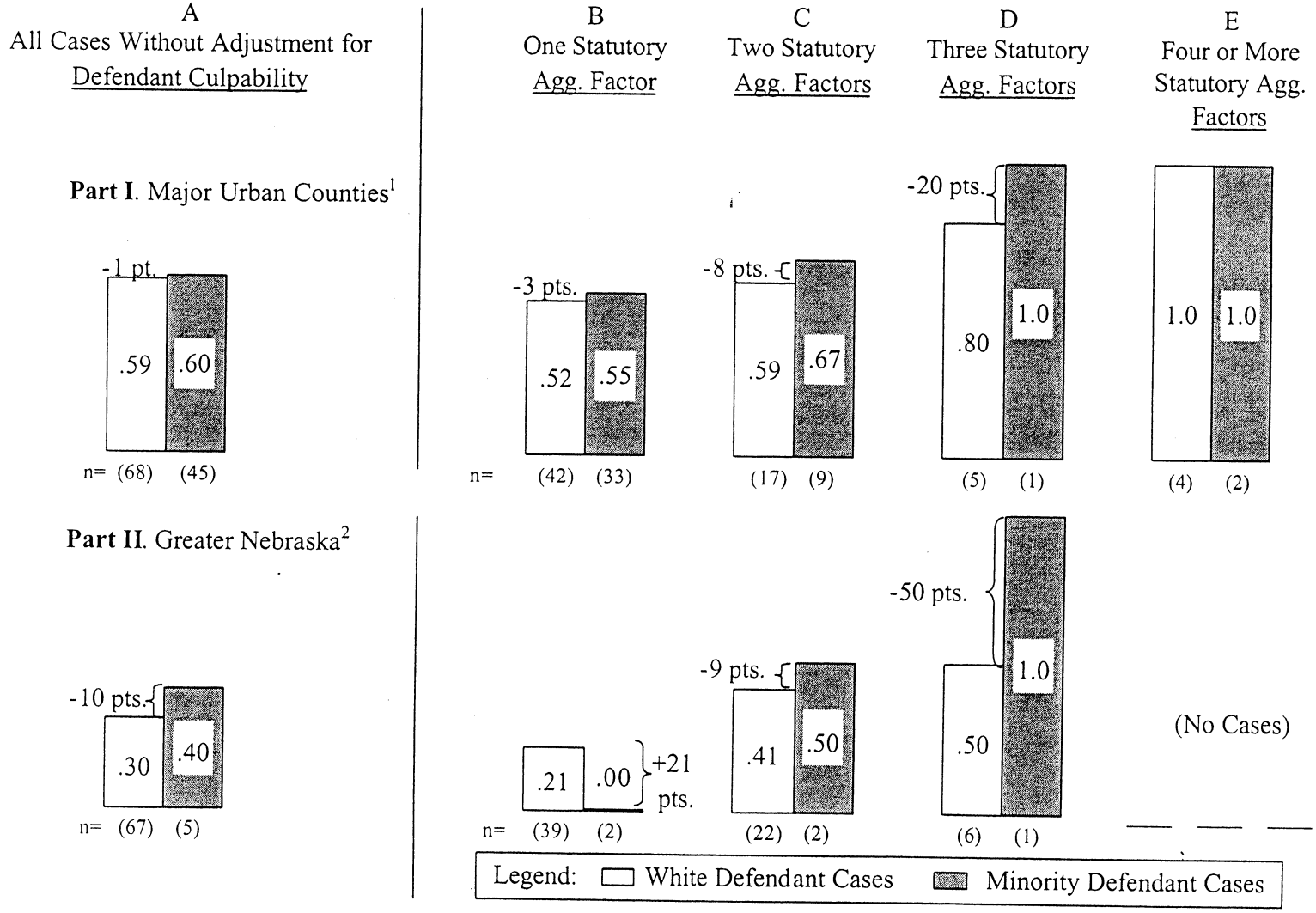
Level of Significance of Disparity: *=.10; **=.05; ***=.01.

[1] The overall adjusted white defendant disparity is +16 percentage points (.50 - .34), significant at the .04 level.

[2] The overall adjusted white defendant disparity is –10 percentage points (.44 - .54), significant at the .06 level.

FIGURE 17

WHITE DEFENDANT DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR THE PLACE OF DECISION (MAJOR URBAN COUNTIES V. GREATER NEBRASKA) AND THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES, NEBRASKA 1973-1999



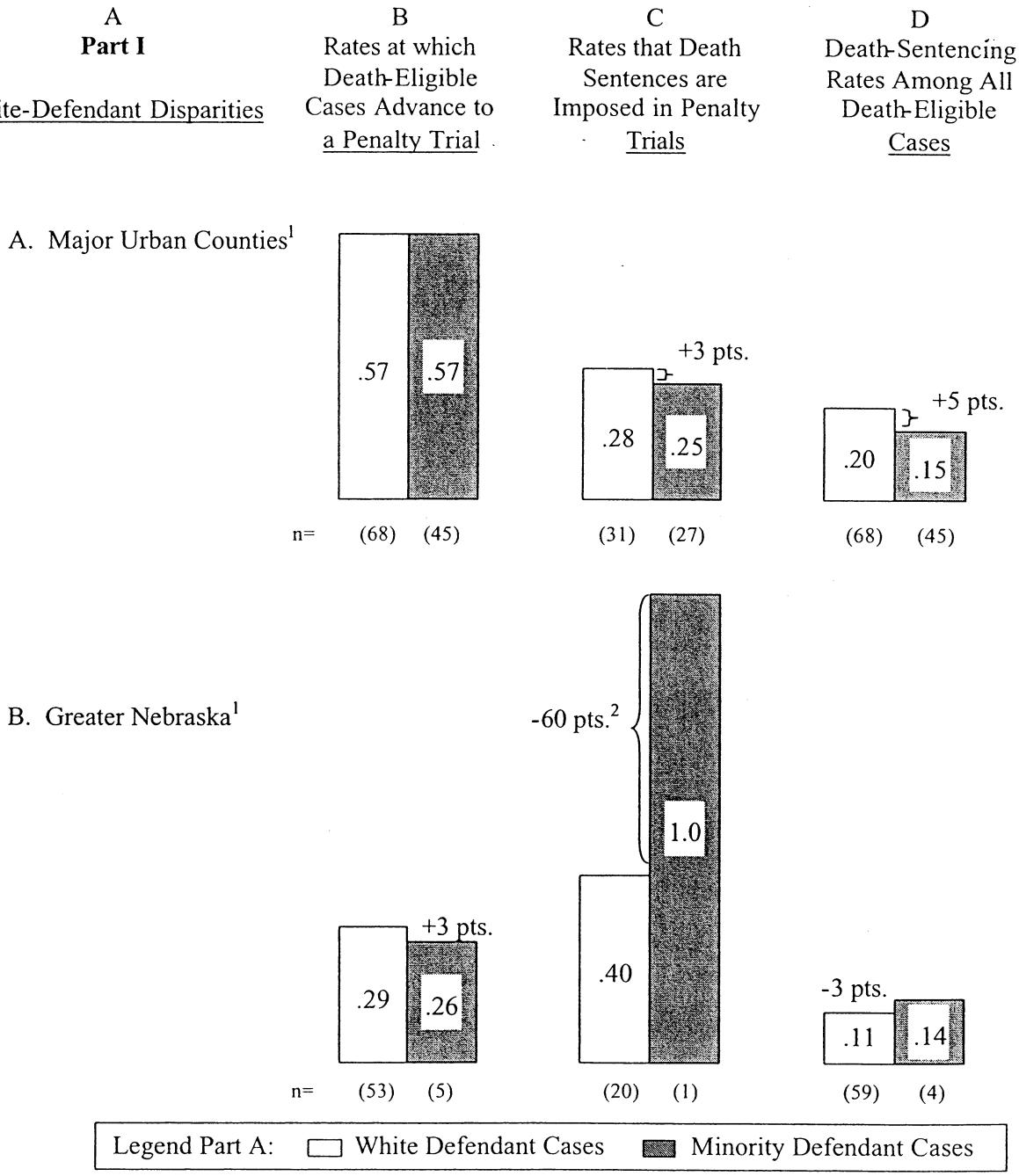
[1] After adjustment for the number of statutory aggravating circumstances, the overall white defendant disparity was -5 percentage points (.57 - .62), significant at the .68 level.

[2] After adjustment for the number of statutory aggravating circumstances, the overall white defendant disparity was +4 percentage points (.30 -.26), significant at the .84 level.

FIGURE 18

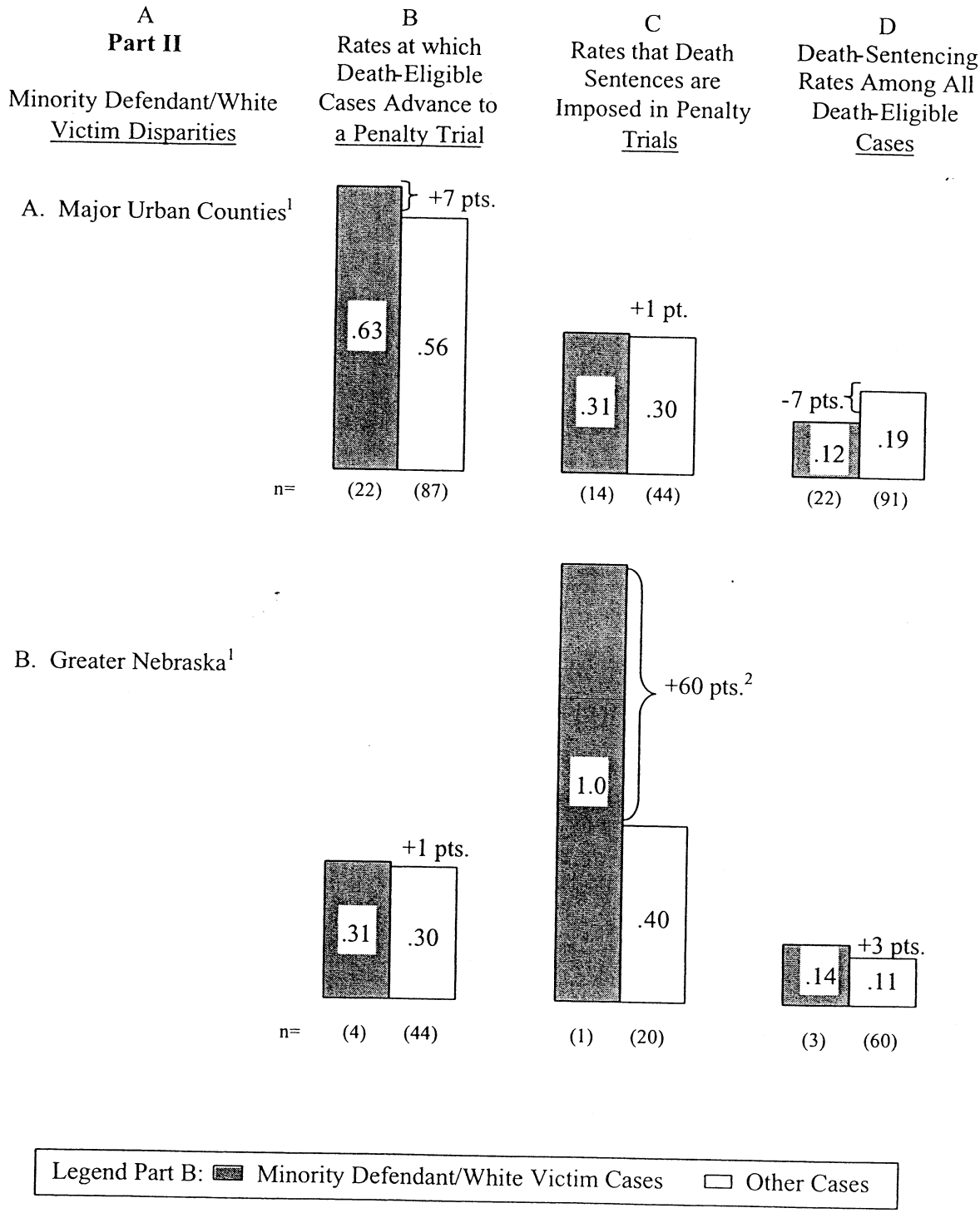
WHITE-DEFENDANT DISPARITIES (PART I, PAGE 1) AND MINORITY DEFENDANT/WHITE VICTIM DISPARITIES (PART II, PAGE 2) IN CHARGING AND SENTENCING DECISIONS IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, CONTROLLING FOR DEFENDANT CULPABILITY WITH A REGRESSION BASED SCALE

(the bar indicates the penalty trial and death-sentencing rates after adjustment for culpability with a regression based scale)



[1] The sample sizes in Columns B and D may vary because cases are omitted from the adjusted analysis if there is not at least one case in each racial category (e.g., white v. others) for a given culpability level.

[2] Because of the sparseness of the data in the adjusted analyses, the effects reported in Part I, Panel B, Column C and Part II, Panel B, Column C are unadjusted disparities.

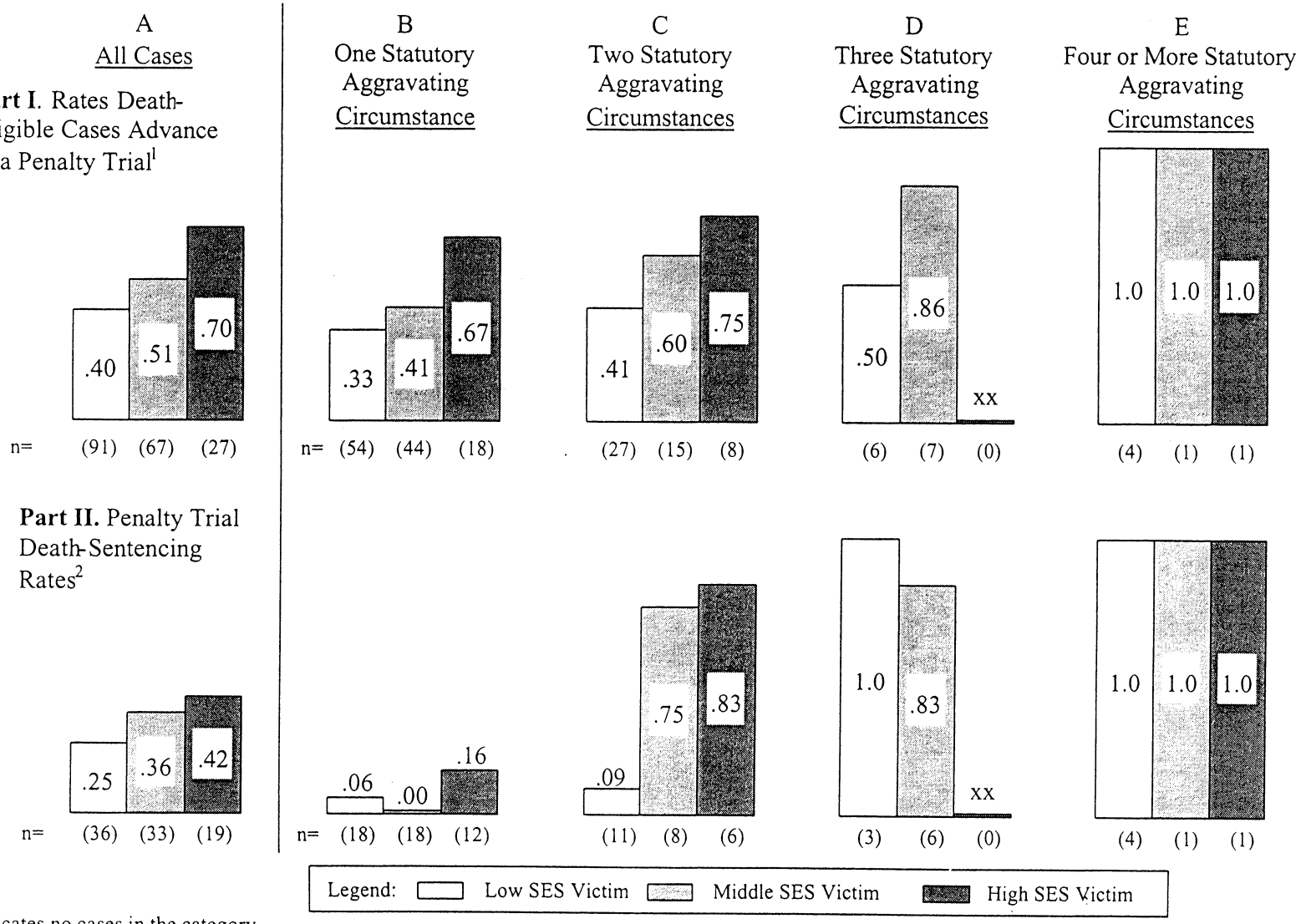


[3] The unadjusted disparity is 21 percentage points .50 (2/4) for the minority defendant/white victim cases and .29 (20/68) for the "other cases." Twenty four "other cases" were omitted fro m the adjusted analysis reported here because of an absence of minority defendant/white victim cases at the same level of culpability.

FIGURE 19

STATEWIDE VICTIM SOCIOECONOMIC (SES) EFFECTS IN CAPITAL CHARGING AND SENTENCING OUTCOMES, ALL CASES (COLUMN A) AND CONTROLLING FOR THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES (COLUMN B-E)

(the bars indicate the penalty trial rates (Part I) and death-sentencing rates (Parts II and III) for the three SES subgroups)



xx Indicates no cases in the category.

[1] The overall average victim SES effect after adjustment for the number of aggravating circumstances in the cases is significant at the .002 level.

[2] The overall average victim SES effect after adjustment for the number of aggravating circumstances in the cases is significant at the .003 level.

[3] The overall average victim SES effect after adjustment for the number of aggravating circumstances in the cases is significant at the .001 level. Part III does not include one middle victim SES case shown in Part I in which the sentencing court did not believe it had discretion to impose a death sentence.

Part III. Death-Sentencing Rates Among All Death-Eligible Cases[3]

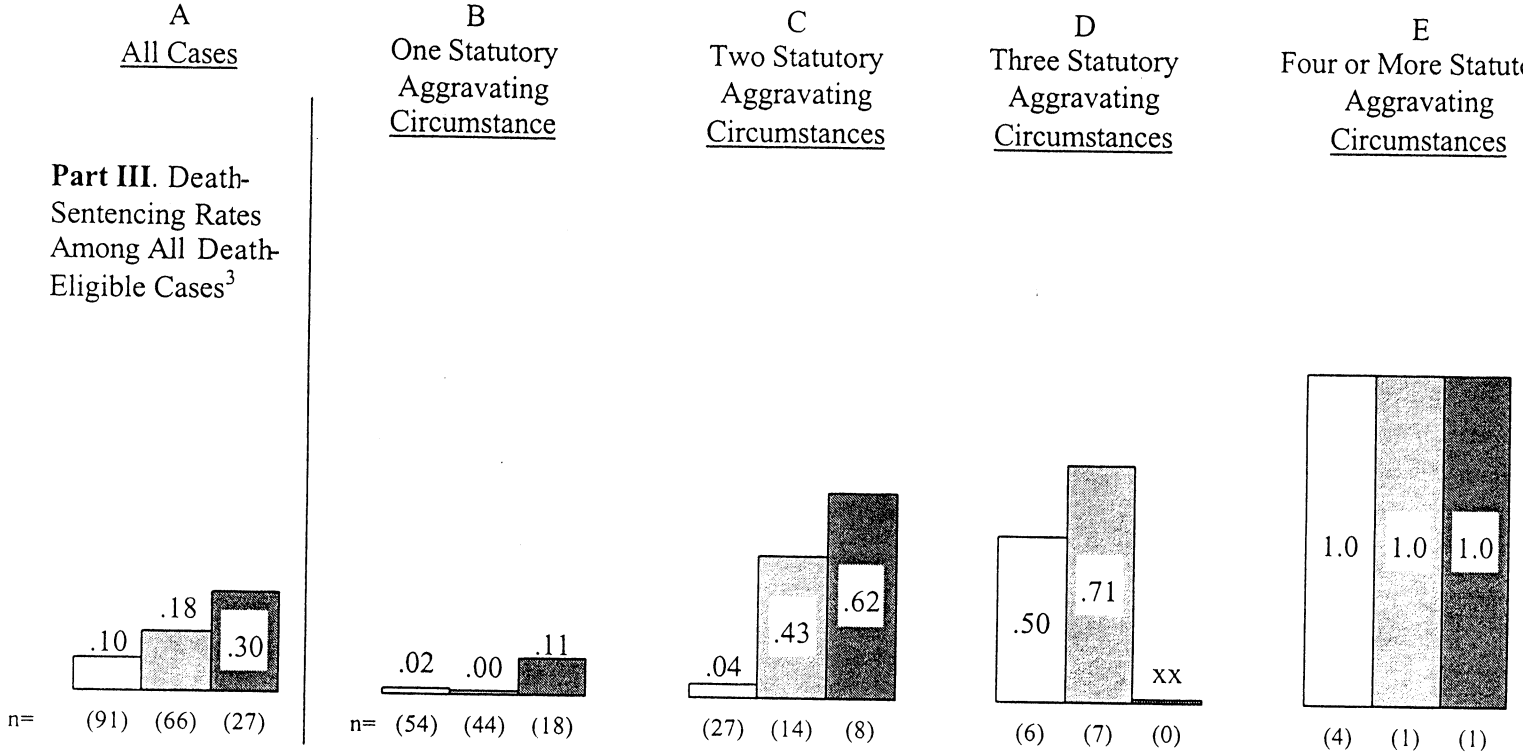
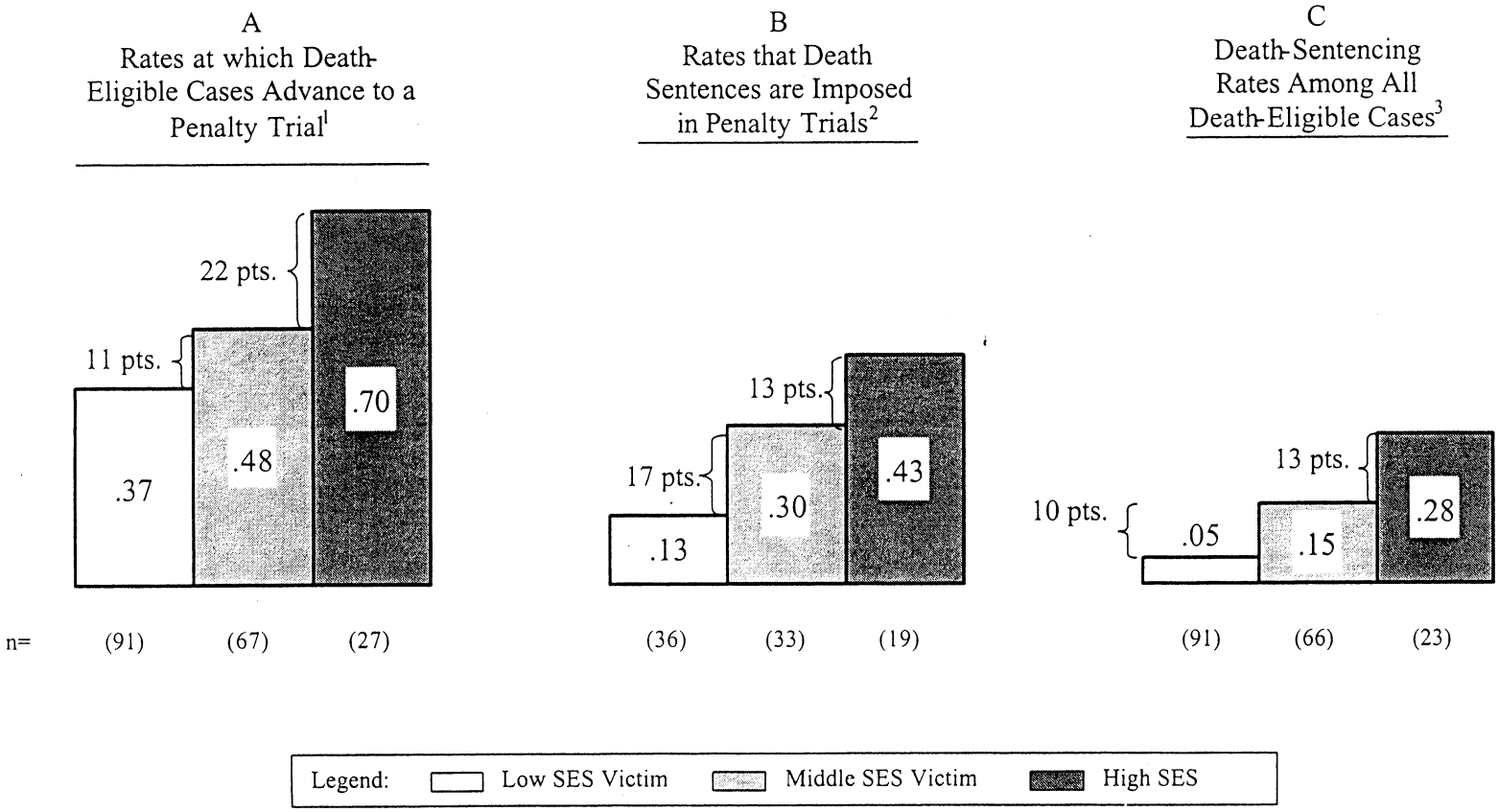


FIGURE 20

VICTIM SOCIOECONOMIC STATUS (SES) EFFECTS IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES

(the bars indicate the death-sentencing rate in each subgroup of cases adjusted for the number of aggravators in the cases)



[1] The victim SES effects are significant at the .002 level after adjustment for defendant culpability.

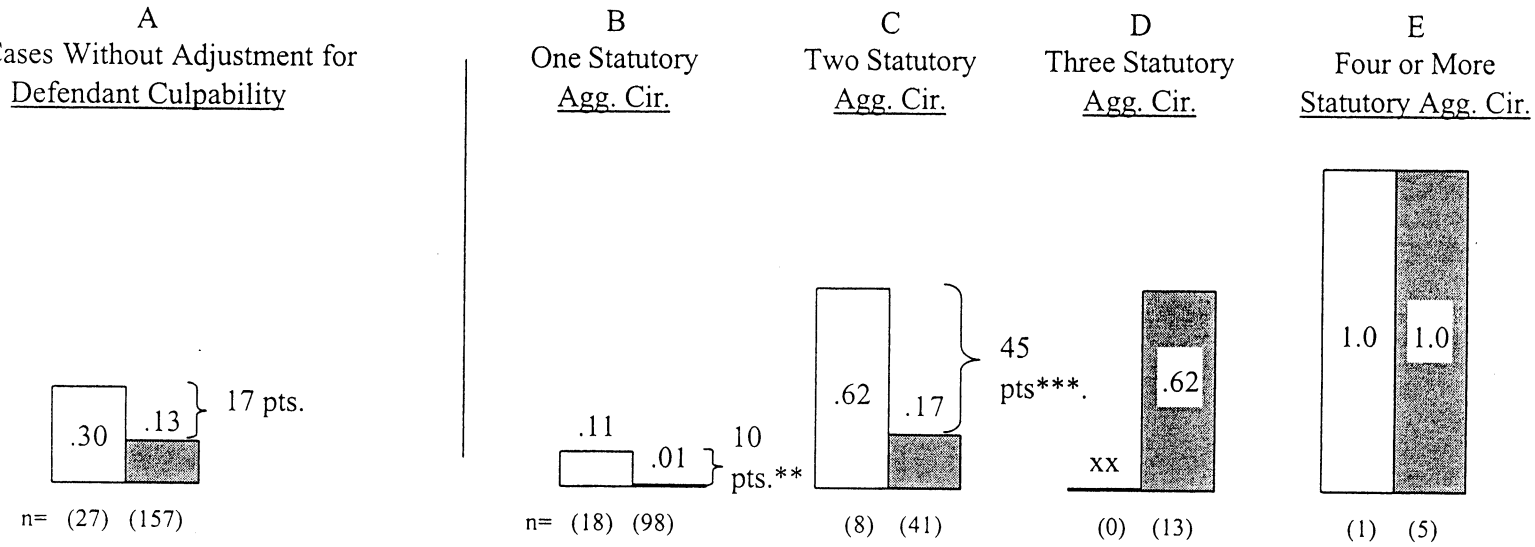
[2] The victim SES effects are significant at the .01 level after adjustment for defendant culpability.

[3] The victim SES effects are significant at the .001 level after adjustment for defendant culpability.

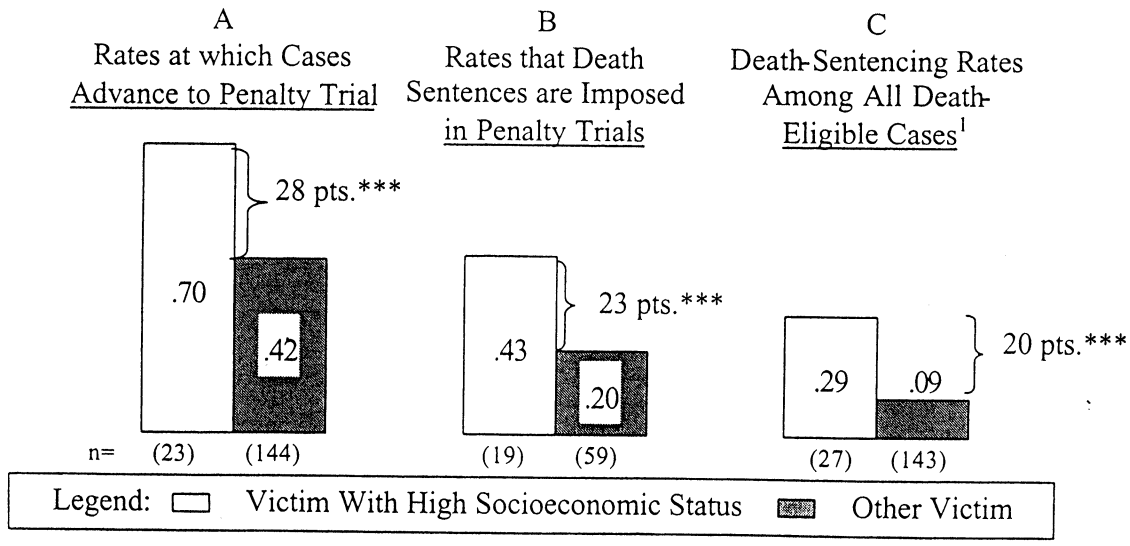
FIGURE 21

STATEWIDE HIGH VICTIM SOCIOECONOMIC STATUS (SES) DISPARITIES IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

Part I. High Victim SES Effects in Death-Sentencing Rates Among All Death-Eligible Cases, Controlling for the Number of Statutory Aggravating Circumstances (Col. B-E)



Part II. High Victim Disparities in Charging and Sentencing Outcome Adjusted for the Number of Aggravating Circumstances in the Cases



[1] The 14 case difference in the "other victim" category in Part A, Column A and Part II Column C is explained by the absence of both high SES cases and other victim cases in the three aggravator category (13 cases) and the six aggravator category (1 case).

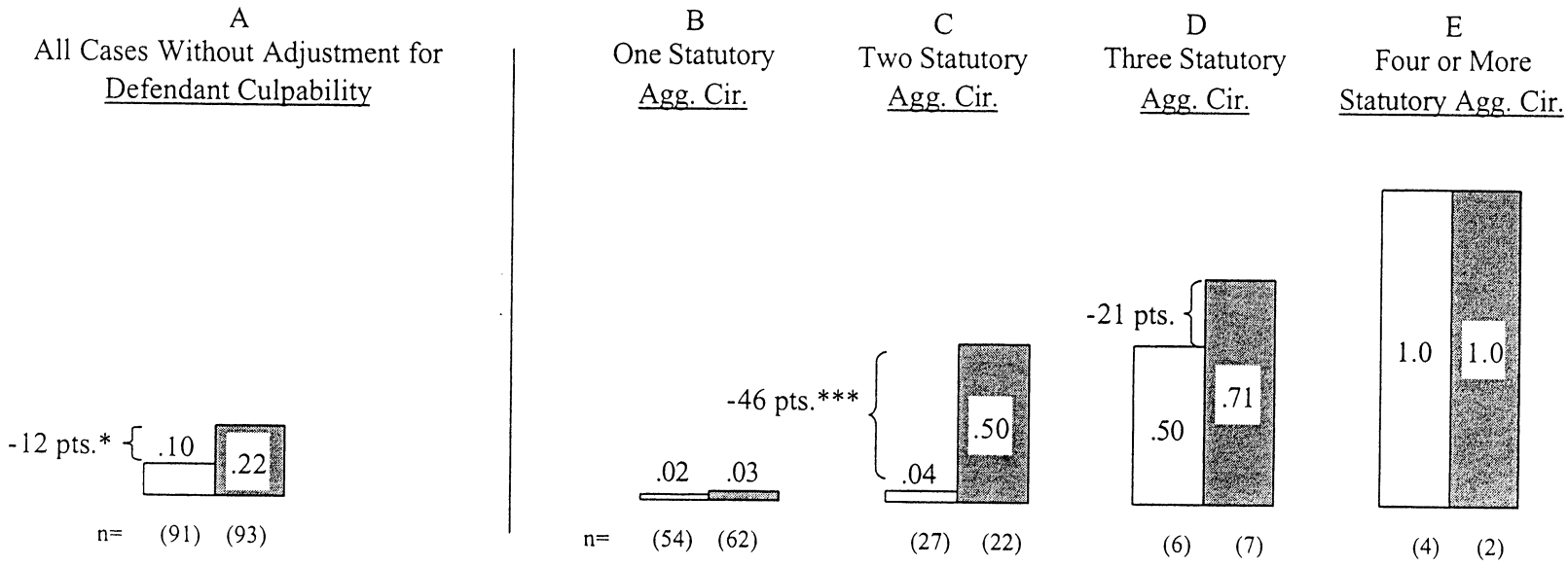
*=significant at the .10 level; **=significant at the .05 level; ***=significant at the .01 level; ****=significant at the .001 level.

xx Indicates no cases in the category.

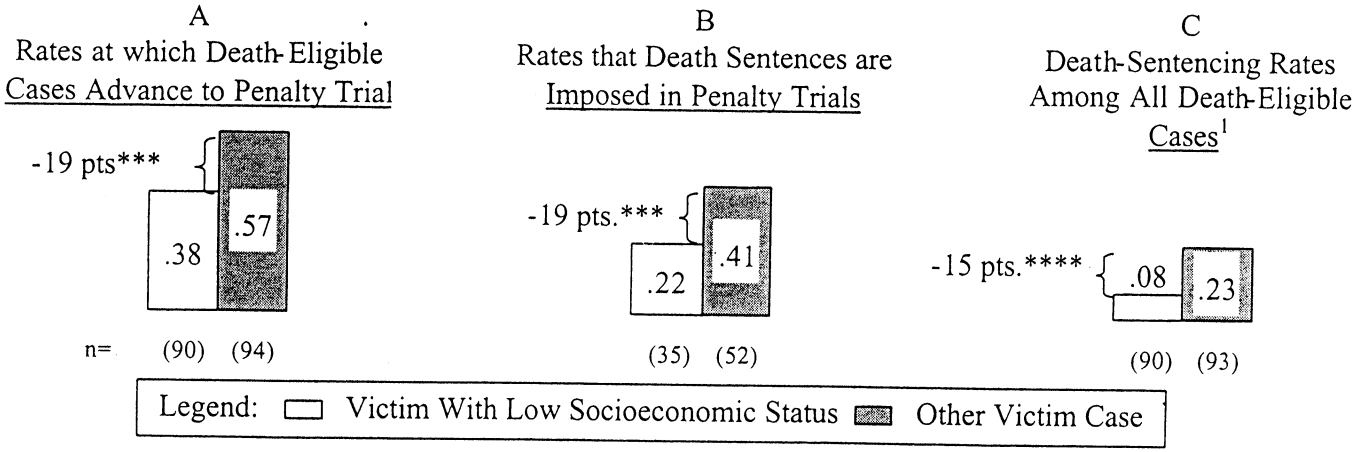
FIGURE 22

STATEWIDE LOW VICTIM SOCIOECONOMIC STATUS (SES) DISPARITIES IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

Part I. Low Victim SES Disparities in Death-Sentencing Rates Among All Death-Eligible Cases[1]



Part II. Overall Low Victim SES Disparities in Charging and Sentencing Outcomes After Adjustment for the Number of Aggravators in the Cases[2]



[1] The one case difference between the number of low victim SES cases in Part I, Column A and in Part II, Column C is explained by the fact that there is a single low victim SES case with six aggravators for which there is no comparison case in the "Other Victim Case" category.

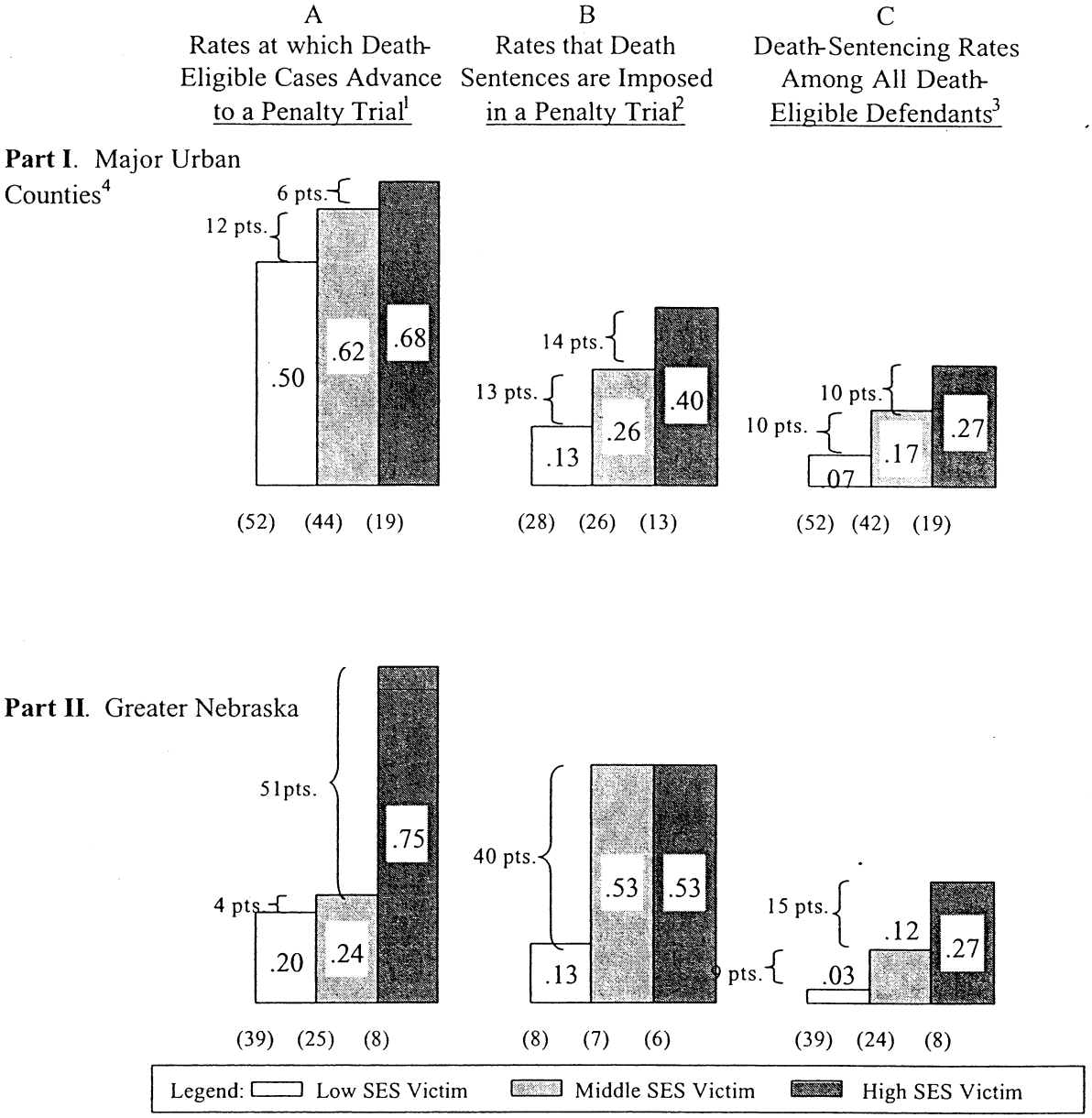
[2] The overall low victim SES disparity in the death-sentencing rate among all death-eligible defendants is –15 percentage points (.08 - .23), significant at the .002 level.

*= significant at the .10 level; **=significant at the .05 level; ***=significant at the .01 level; ****=significant at the .001 level.

FIGURE 23

VICTIM SOCIOECONOMIC STATUS (SES) EFFECTS IN CHARGING AND SENTENCING OUTCOMES IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES

(the bars indicate penalty trial rates (Col. A) and death-sentencing rates (Col. B &C))



[1] The victim SES effects in Part I for this outcome are not significant (p=.15), while the effects in Part II are significant at the .01 level.

[2] The victim SES effects in Part I for this outcome are significant at the .01 level and the effects in Part II are significant at the .08 level.

[3] The victim SES effects in Parts I and II for this outcome are significant at the .01 level.

[4] In Lancaster County, there are no statically significant victim SES effects in either charging or sentencing outcomes. In Douglas and Sarpy Counties, there are significant victim SES effects in the rates that cases advance to a penalty trial (low .50; medium .76; high .80) (p=.02) and in penalty trial death sentencing rates (low .00; medium .20; high .37) (p=.01). In death sentencing among all death-eligible cases in Douglas and Sarpy Counties, the victim SES effects are significant at the .001 level (low .00; medium .18; high .31).

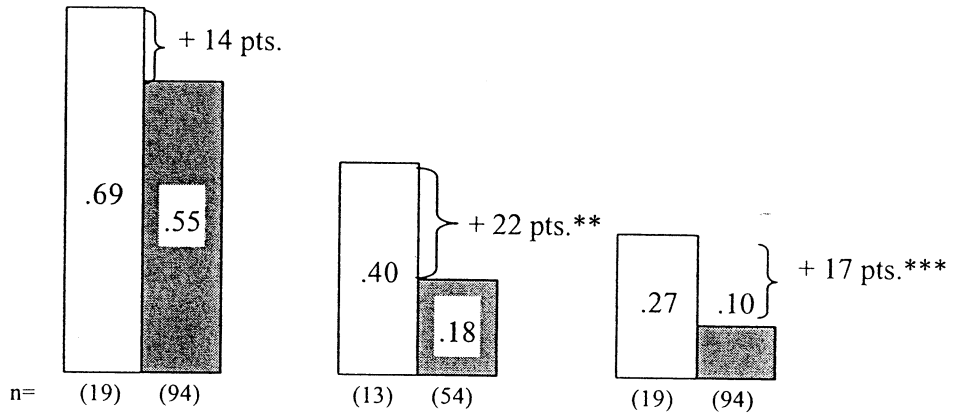
FIGURE 24

HIGH (PART I) AND LOW (PART II) VICTIM SOCIOECONOMIC STATUS (SES) DISPARITIES IN CHARGING AND SENTENCING OUTCOMES IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA ADJUSTED FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: 1973-1999

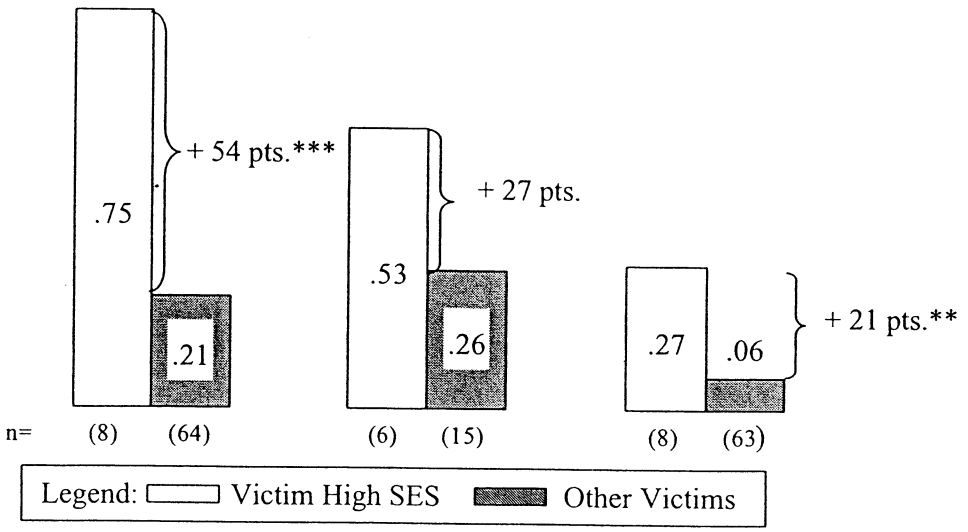
(the bars indicate the penalty trial (Column B) and death-sentencing rates (Column C & D) after adjustment for the number of statutory aggravating circumstances in the cases)[1]

Part I.

A. Major Urban Counties[1]



B. Greater Nebraska[2]



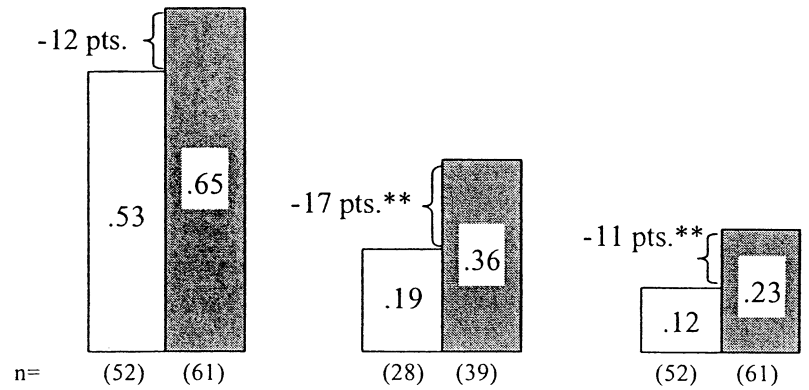
[1] The source of the high victim SES disparities shown in this panel are Douglas and Sarpy Counties where there is a 20 point disparity (.80 v .60) (p = .18) in the adjusted rates that cases advance to a penalty trial; a 26 point disparity (.37 v .11) (p = .02) in penalty trial death-sentencing rates; and a 25 point disparity (.31 v .06) (p = .01) in the rates death sentences are imposed among all death-eligible cases. In Lancaster County, the charging and sentencing rates are *lower* in the high victim SES cases than in the other cases.

[2] The discrepancies in case counts between Part II, Columns A and C reflect the fact that in one case the sentencing court believed it had no discretion to impose a death sentence under the law. Accordingly, that case is omitted from Columns C and D.

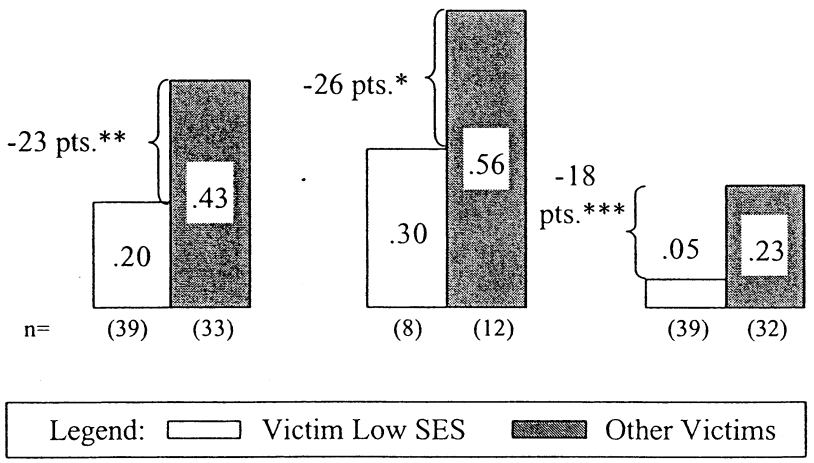
*=significant at .10 level; **=significant at .05 level; ***=significant at the .01 level; ****=significant at the .0001 level.

Part II.	A Low Victim SES Effects	B Rates at Which Cases Advance to a Penalty Trial	C Rates that Death Sentences are Imposed in Penalty Trials	D Death-Sentencing Rates Among All Death-Eligible Cases

A. Major Urban Counties[3]



B. Greater Nebraska[4]



[3] Douglas and Sarpy Counties are the source of the low victim SES adjusted disparities shown in this panel. For those two counties, the overall disparity in the adjusted rates at which cases advance to penalty trial is –26 points (.52 v .78), (p = .02); the penalty trial death sentencing disparity is –25 points (.06 v 31) (p = .02); the overall adjusted disparity in death sentences imposed among all death-eligible cases is –22 points (.04 - .26) (p = .001). In Lancaster County, the adjusted charging and sentencing rates are *higher* in the cases with low SES victims.

[4] The discrepancies in case counts between Part II, Columns A and D reflect the fact that in one case the sentencing court believed it had no discretion to impose a death sentence under the law. Accordingly, this case is omitted from Columns C and D.

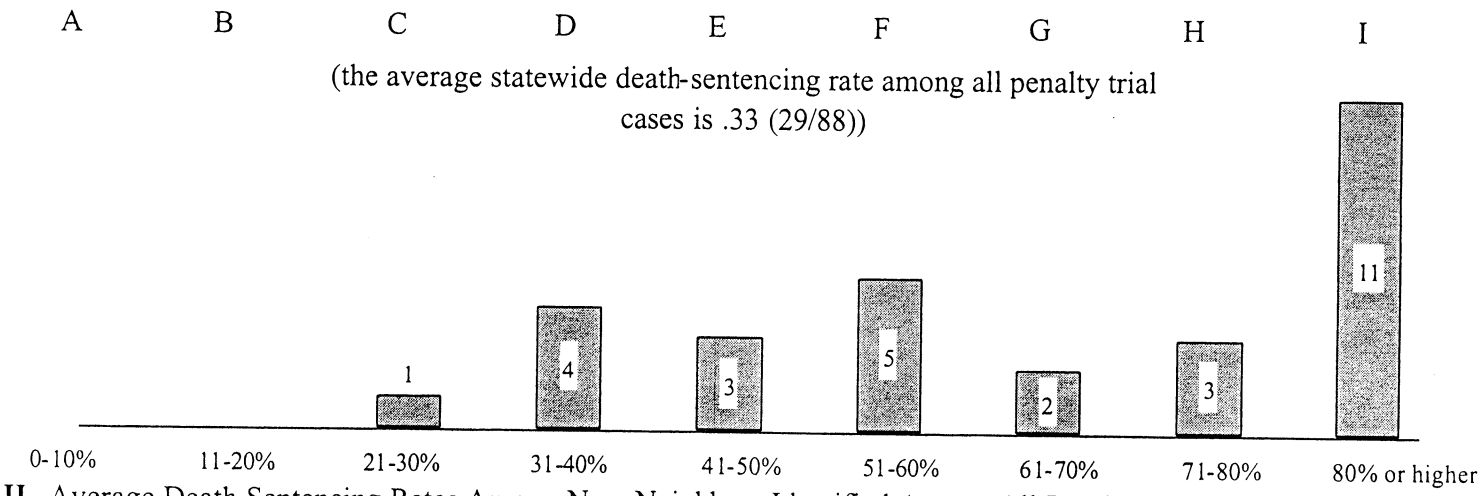
*=significant at .10 level; **=significant at .05 level; ***=significant at the .01 level; ****=significant at the .001 level.

FIGURE 25

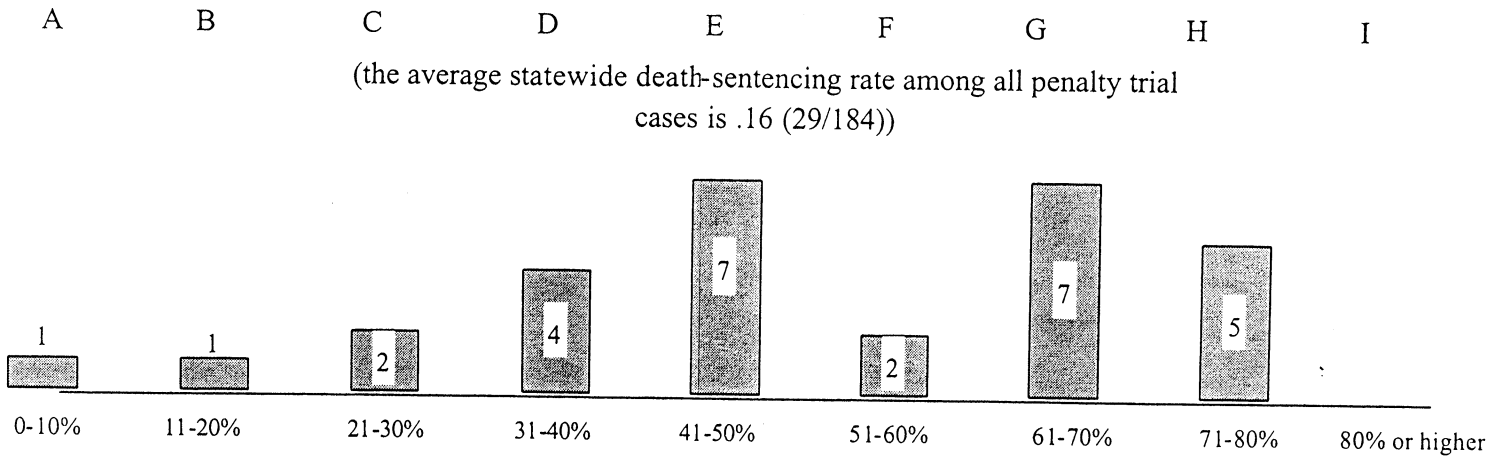
EVIDENCE OF INCONSISTENCY AND COMPARATIVE EXCESSIVENESS IN NEBRASKA DEATH SENTENCED CASES, 1973-1999: A CLASSIFICATION OF DEATH SENTENCED OFFENDERS ACCORDING TO THE DEATH-SENTENCING RATE AMONG CASES WITH COMPARABLE LEVELS OF CULPABILITY ("NEAR NEIGHBORS"), MEASURED WITH AN AVERAGE OF FOUR DIFFERENT MEASURES OF DEFENDANT CULPABILITY[1]

(the bars indicate the number of death sentenced offenders with the death-sentencing rates among near neighbors that is indicated at the foot of each bar).[2]

Part I. Average Death-Sentencing Rates Among Near Neighbors Whose Cases Advanced to a Penalty Trial



Part II. Average Death-Sentencing Rates Among Near Neighbors Identified Among All Death-Eligible Offenders



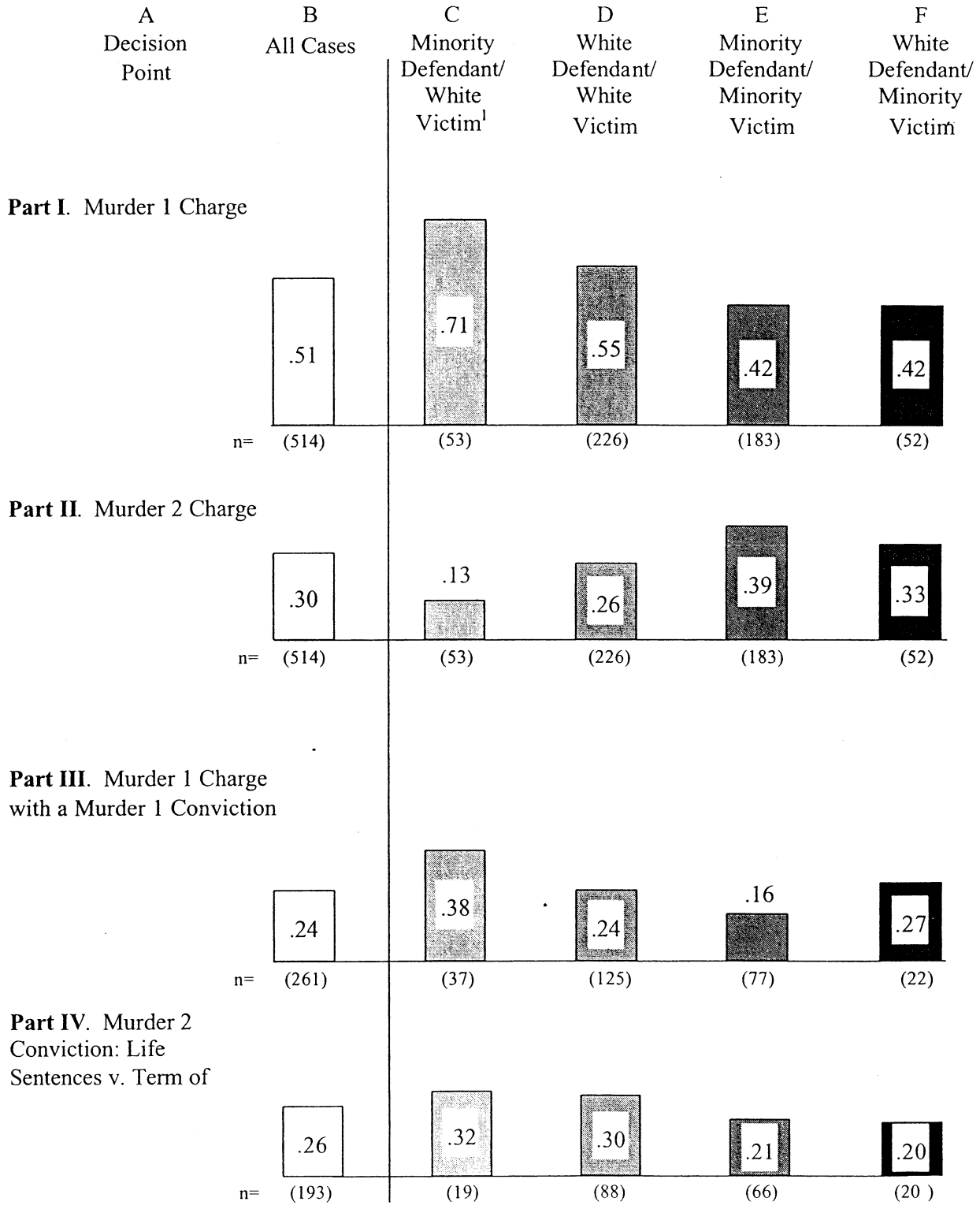
[1] The measures of culpability are the number of aggravating circumstances, the number of aggravating and mitigating circumstances, the salient factors of the case measure, and regression based scales measures. See supra Section IV.A.3 for a description of the measures. Detail on the death-sentencing rates among each death sentenced offender's near neighbors is presented in Appendix B.

[2] For example, Part I, Column F indicates that for 5 death sentenced offenders our data indicate that the death-sentencing rate among near neighbors was between 51% and 60%.

FIGURE 26

CHARGING, CONVICTION, AND SENTENCING OUTCOMES AMONG NON-CAPITAL CASES, CONTROLLING FOR THE DEFENDANT/VICTIM RACIAL COMBINATION

(the bars represent the selection rates (charge, conviction, or sentence) for each subgroup of cases, e.g. Row 1, Col. D indicates that of the 226 white defendant/white victim cases, 55% were charged with M1)



[1] 30 cases with race of the victim unknown are omitted from the chart.

TABLE 1
NEBRASKA STATUTORY AND MITIGATING CIRCUMSTANCES

R.R.S. Neb. § 29-2523 (2001). Aggravating and mitigating circumstances, as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties;

(h) The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; or

(i) The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

The facts upon which the applicability of an aggravating circumstance depends must be proved beyond a reasonable doubt.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme

mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

TABLE 2

NEBRASKA CRIMINAL HOMICIDE CONVICTIONS AND THE PROPORTION AND NUMBER OF CAPITAL MURDER CASES, BY YEAR: 4/20/73 TO 12/31/99

1970's			1980's			1990's		
A	B	C	D	E	F	G	H	I
Year	Number of Convictions	Proportion & # Death-Eligible Cases	Year	Number of Convictions	Proportion & # Death-Eligible Cases	Year	Number of Convictions	Proportion & # Death-Eligible Cases
1973-74	19	.21 (4)	1980	32	.31 (10)	1990	19	.32 (6)
1975	21	.43 (9)	1981	30	.17 (5)	1991	19	.16 (3)
1976	27	.15 (4)	1982	23	.17 (4)	1992	36	.17 (6)
1977	31	.35 (11)	1983	23	.43 (10)	1993	36	.17 (6)
1978	26	.27 (7)	1984	26	.58 (15)	1994	28	.21 (6)
1979	21	.19 (4)	1985	22	.27 (6)	1995	28	.39 (11)
			1986	37	.24 (9)	1996	27	.22 (6)
			1987	23	.26 (6)	1997	25	.12 (3)
			1988	27	.22 (6)	1998	24	.17 (4)
			1989	27	.33 (9)	1999	34	.15 (5)
Sub-Totals	145	.27 (39/145)		270	.30 (80/270)		276	.20 (56/276)
Grand Total		.25 (175/691)						

TABLE 3
DISPOSITION OF NEBRASKA CAPITAL MURDERS, IN 5-YEAR PERIODS:
1973 TO 1999

A	B	C	D
Year of Sentence[1]	Rates at which Death-Eligible Cases Advance to a Penalty Trial with the State Seeking a Death Sentence[1]	Rates that Death Sentences are Imposed in Penalty Trials[2]	Death-Sentencing Rates Among All Death-Eligible Cases[2]
A. 1973-1977	.50 (14/28)	.36 (5/14)	.18 (5/28)
B. 1978-1982	.55 (18/33)	.56 (10/18)	.30 (10/33)
	.51 (56/110)	.36 (20/55)	.17 (20/109)
C. 1983-1987	.49 (24/49)	.22 (5/23)	.10 (5/48)
D. 1988-1992	.38 (11/29)	.18 (2/11)	.07 (2/29)
E. 1993-1999	.48 (22/46)	.32 (7/22)	.15 (7/46)
	.44 (33/75)	.27 (9/33)	.12 (9/75)
Total 1973-1999[a]	.48 (89/185)	.33 (29/88)[a]	.16 (29/184)[a]

[1] The Table includes 10 subsequent prosecutions for 9 defendants whose death sentences were vacated or murder 1 convictions reversed on appeal. One defendant had two such subsequent prosecutions.

[2] Column C excludes cases that did not advance to a penalty trial, while Columns B and D include all death-eligible cases.

[a] Column B includes one case in which the prosecutor perceived the defendant to be death-eligible and advanced the case to a penalty trial but the sentencing judge believed it was not death-eligible. Accordingly, that case is excluded from Columns C and D and all other analyses of judicial sentencing decisions presented in this report.

TABLE 4

LOGISTIC REGRESSION MODELS OF FOUR CHARGING AND SENTENCING OUTCOMES

(the number in the Columns are logistic odds-multipliers and regression coefficients (in parenthesis) estimated for the applicable explanatory variables in Column A; there are two models for each outcome-the first with the geography variable (2.e) omitted and the second with it included)

A	B	C	D	E	F	G	H	I
Explanatory Variables	Death Sentence Waived by Plea/Unilateral Decision		Death-Eligible Cases Advanced to Penalty Trial w/ State Seeking a Death Sentence		Death Sentences are Imposed in a Penalty Trial		Death Sentence Imposed Among All Death-Eligible Cases	
1. Legitimate Case Characteristics								
a. Number of Statutory Aggravating Circumstances	.53 (-.64)*	.48 (-.72)*	1.67 (.51)*	1.75 (.56)*	18.1 (2.9)*	18.1 (2.9)*	12.2 (2.5)*	12.2 (2.5)*
b. Number of Statutory Mitigating Circumstances	1.26 (.23)	1.23 (.21)	.83 (-.19)	.83 (-.19)	.72 (-.13)	.72 (-.13)	.58 (-.16)	.54 (-.17)
c. Victim Bound and Gagged	--	--	1.31 (.27)	1.72 (.54)	--	--	--	--
d. Def. Killed Two or More Victims [1]	.41 (-.90)	.35 (-1.05)*	1.97 (.68)	2.46 (.90)	--	--	--	--
e. Guilty Plea	--	--	--	--	.11 (-2.2)*	.12 (-2.1)	.04 (-3.3)*	.05 (-3.1)*
f. Def. Committed an Additional Crime	--	--	--	--	--	--	4.48 (1.5)	4.95 (1.4)*
g. Defendant Confession	3.2 (1.14)*	3.7 (1.3)*	--	--	--	--	--	--
2. Illegitimate/Suspect Variables								
a. White Def.	1.95 (.67)	1.46 (.38)	.63 (-.45)	.73 (-.31)	1.61 (.48)	1.55 (.44)	1.40 (.33)	1.40 (.33)
b. White Victim	.97 (-.03)	.76 (-.27)	.92 (-09)	.97 (-.03)	1.03 (.03)	1.03 (.03)	.86 (-.15)	.88 (-.12)
c. Def. SES Scale (High, Middle, Low)	1.21 (.20)	1.08 (.08)	.72 (-.33)	.72 (-.33)	.86 (-.15)	.87 (-14)	.55 (-.58)	.86 (-.14)
d. Victim SES Scale (High, Middle, Low)	1.82 (.72)*	2.03 (.71)*	.55 (-.59)*	.54 (-.61)*	.30 (-1.2)*	.30 (-1.2)*	.27 (-1.3)*	.30 (-1.2)*
e. Geography Variable 1=Major Urban County 0=Other County	--	.27 (-1.3)*	--	2.8 (1.03)*	--	.95 (-.05)	--	.93 (.08)

[1] In multiple victim cases, in terms of aggravation in the case, the model reflects the more or most aggravated murder, as the case may be.

* = indicates a level of confidence in the estimate that, in Bayesian terms, is the analogue to statistical significance at the .05 level or beyond in frequenist terms.

TABLE 5

ESTIMATED DEATH SENTENCING RATES FOR DEFENDANTS WITH COMPARABLE LEVELS OF DEFENDANT CULPABILITY IN 29 NEBRASKA DEATH SENTENCED CASES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: 1973-1999[1]

A	B	C
Number of Aggravating Circumstances and Number of Death Sentenced Cases	Comparable Penalty Trial Cases	Comparable Cases Among All Death-Eligible Defendants
1 (n=3)	29 % (.22-.33)	9 % (.09-.28)
2 (n=12)	54 % (.40-.62)	39 % (.80-.51)
3 (n=8)	82 % (.79-.87)	61 % (.42-.66)
4-6 (n=6)	87 % (.79-.90)	75 % (.70-.79)

[1] The second line of data in each box indicates the range of estimates for death sentences imposed among near neighbors for the cases classified in that box.

TABLE 6

NON-CAPITAL HOMICIDE: LOGISTIC REGRESSION MODELS OF FOUR DECISION OUTCOMES, NEBRASKA: 1973-1999

(the numbers in each Column are the odds multipliers[1] for the variables in Column A)

A Explanatory Variables	B M1 charge Among All Cases (n=514)	C M2 Charge Among All Cases (n=514)	D M1 Conviction in Cases Charged with M1 (n=261)	E M2 Conviction: Life Sentence Imposed v. a Term of Years (n=193)
1. Murder 1 Mens Rea Clearly Present	5.8 (1.76)[d]	.24 (-1.43)[d]	87.6 (4.7)[d]	.74 (-.31)
2. Murder 1 Mens Rea Clearly Absent	.39 (-.93)[d]	.86 (-.15)	<.001 (-16.3)	.84 (-.18)
3. White Defendant	.74 (-.30)	1.3 (.27)	.71 (-.34)	.73 (-.31)
4. White Victim	1.4 (.36)	.63 (-.46)	1.3 (.30)	.90 (.61)
5. Victim Socio-Economic Status (SES) Scale (high, medium, low)	1.4 (.35)	1.3 (.27)	1.1 (.06)	.55 (-.59)
6. Defendant Socio Economic Status (SES) Scale (high, medium, low)	.83 (-.18)	1.1 (.10)	.65 (-.43)	1.1 (.12)
7. Female Victim	1.44 (.37)	.58 (-.54)[b]	.97 (-.03)	1.1 (-.07)
8. Male Defendant	2.25 (.85)[c]	1.1 (.08)	2.0 (.71)	3.9 (1.4)[c]
9. Defendant Prior Homicide	2.5 (.93)	.97 (-.03)	>50 (8.8)	2.7 (.98)
10. Victim Age	1.02 (.02)[b]	.99 (-.01)	1.02 (.02)	.99 (-.008)

[a]=significant at the .10 level; [b]=significant at the .05 level; [c]=significant at the .01 level; [d]=significant at the .001 level.

[1] For example, the 5.8 odds multiplier in Row 1 Column B indicates that on average, after controlling for the other variables in the analysis, the odds of a murder 1 charge are enhanced by a factor of 5.8 when the evidence clearly establishes a mens rea for first degree murder.

TABLE 6
NON-CAPITAL HOMICIDE: LOGISTIC REGRESSION MODELS OF FOUR DECISION OUTCOMES, NEBRASKA: 1973-1999
(the numbers in each Column are the odds multipliers[1] for the variables in Column A)

11. Defendant Age	1.01 (.01)	1.01 (.01)	1.002 (.002)	1.00 (.001)
12. Number of Coperpetrators	1.27 (.23)	.61 (-.49)[b]	.87 (-.14)	.92 (-.08)
13. Hispanic Defendant	.84 (-.17)	.86 (-.16)	2.4 (.86)	<.001 (-13.4)
14. Number of Statutory Aggravating Circumstances	1.05 (.05)	1.26 (.23)	3.1 (1.1)	.84 (-.18)

[a]=significant at the .10 level; [b]=significant at the .05 level; [c]=significant at the .01 level; [d]=significant at the .001 level.

[1] For example, the 5.8 odds multiplier in Row 1 Column B indicates that on average, after controlling for the other variables in the analysis, the odds of a murder 1 charge are enhanced by a factor of 5.8 when the evidence clearly establishes a mens rea for first degree murder.