The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis

Amended Final Report

David C. Baldus*
George Woodworth**
Gary L. Young***
Aaron M. Christ****

October 10, 2001

* Joseph B. Tye Professor of Law, University of Iowa, College of Law
** Professor, Department of Statistics and Actuarial Science, University of Iowa
*** Shareholder, Keating, O'Gara, Davis & Nedved, P.C,, Lincoln, Nebraska
****Research Associate, College of Law, University of Iowa

The authors gratefully acknowledge the assistance of the following people during the completion of the project:

Research Staff
Joel Bacon, Troy Kirk, Tracy Uecker, Justin Walker, Timothy Kraft, Abel Sisco, Jisella Veath, Tiffini Yeates, Richard Newell, Barbara Broffitt, Jessica J. Kriebs, Michael T. Muilenburg, Nathan S. Russell

Members of the Nebraska Commission on Law Enforcement and Criminal Justice
Hon. Donald Stenberg, Nebraska Attorney General and Chairman, Hon. Mike Johanns, Governor, State of Nebraska, Harold Clarke, Director, Nebraska Department of Corrections, Col. Tom Nesbitt, Superintendent, Nebraska State Patrol, Phyllis Anstine, At Large Member, Scott B. Arnold, Hall County Board of Supervisors, Sheriff Ralph Black, Antelope County, Charles Brewster, At Large Member, Sheriff William Brueggemann, Cass County Sheriff, Chief Don Carey, Police Chief, Omaha Police Department, Stephen Exon, At Large Member, Gail Ferris, Merrick County Board of Supervisors, Chief Scot Ford, South Sioux City Police Chief, Prof. Susan Jacobs, University of Nebraska, Gary Lacey, Esq., County Attorney, Lancaster County, Kathy Moore, Voices for Children in Nebraska, Donald Overman, At Large Member, Vernon Pearson, At Large Member, James J. Riskowski, At Large Member, Major Brian Tuma, Nebraska State Patrol, Hon. Catherine A. Walters, Mayor, City of Cozad, William G. White, At Large Member

Nebraska Commission on Law Enforcement and Criminal Justice
Allen C. Curtis, Executive Director, Barbara McCreight, Administrative Staff

Criminal Homicide Study Advisory Panel Membership
Hon. John Colburn, Former Lancaster County Deputy Attorney, Sam Cooper, Esq., Former Douglas County Deputy Attorney, Dan Werner, Esq., Thayer County Attorney, J. Kirk Brown, Esq., Assistant Attorney General, Scott Helvie, Esq., Lancaster County Deputy Public Defender, Thomas C. Riley, Douglas County Public Defender, Alan Stoler, Esq., Emil Fabian, Esq., Gerald Soucie, Nebraska Commission on Public Advocacy, Dennis Keefe, Lancaster County Public Defender

Nebraska Department of Corrections
Ron Riethmuller, Records Administrator, Jeannene Douglass, Records Manager, Ginger Shurter, Records Officer, Nancy DeRyke, Records Officer, Lorraine Douglass, Office Clerk

Nebraska Parole Board Staff
Barb Wilken, Lisa Peery, Rachel Bauch, Trudy Clark, Tanya Forney, Christy Lyons

Others
Julia McQuillian, Ph.D., University of Nebraska Sociology Department, Cheryl Wiese, Ph.D., Associate Director, Bureau of Sociological Research, University of Nebraska, Joe Steele, State Court Administrator, State District Court Clerks and their staff, State Probation Office Directors, Officers and their staff, Numerous Nebraska prosecutors and defense counsel, DeMaris Johnson,

Executive Director, Nebraska County Attorneys Association, Helga Kirst, Executive Director, Nebraska Criminal Defense Attorneys Association

Table of Contents

Executive Summary

I. Introduction

This amended[1] report examines decision making in the disposition of 691 potentially death-eligible Nebraska homicide cases that resulted in a criminal conviction between 1973 and 1999. The principal focus of the report is on decision making in 175 of those homicides that we classified as death-eligible in a case-by-case screen of the 691 homicide convictions. In the initial prosecution of these death-eligible cases, judges imposed 24 death sentences, 9 of which were reversed and remanded on appeal in a state or federal court. On remand, 5 additional death sentences were imposed in those cases -- yielding a total of 29 death sentences among all death eligible cases for the period of this research -- 1973-1999. Overall, the original 175 death eligible cases resulted in a total of 185 prosecutions in which a death sentence was a possible outcome.

Three of the 24 death-sentenced defendants have been executed; 3 died by suicide or natural causes while on death row and 4 remain on death row.

We identified Nebraska's 175 death-eligible homicides by screening 691 homicides prosecuted during the period of this research that were potentially death-eligible. The test we used to identify death-eligible cases has two parts. The first part focuses on first-degree murder (M1) convictions. We classified an M1 case as death-eligible if (a) it 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

[1] This is an amended version of the July 25, 2001 Final Report released August 1, 2001. It 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 database that expand slightly the universe of death-eligible cases.

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.

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 death-sentenced defendants 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 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.

Several findings of this research are open to more than one interpretation in terms of what they tell us about how well the Nebraska death sentencing system operates. In our presentation of those findings, we present both sides of the interpretative issues.

II. Methodology, Research Design, and Measures

A. Methodological Overview

The first and principal part of this research focuses on all death-eligible defendants, regardless of how the prosecutor charged them and whether or not their cases advanced to a penalty trial. The Data Collection Instrument ("DCI") used to code these cases is a modified version of instruments developed in other similar studies. It includes for capital murder cases quantifiable measures of the strength of evidence for each of the statutory aggravating and mitigating circumstances. These measures allow us to examine the impact of statutory aggravating and mitigating circumstances on both prosecutorial and judicial decision-making. A second and subsidiary part of the research embraces non-capital homicides. We coded these cases with a smaller data collection instrument that was completed in the process of screening all the cases to identify those that were death-eligible.

Our analysis of the capital murder cases utilizes a series of measures of defendant culpability. The first set of measures has three parts: (1) a count of the number of statutory aggravating circumstances found or present in each case, (2) a count of the statutory mitigating circumstances found or present, and (3) a count of both aggravating *and* mitigating circumstances. The second "salient factors" measure classifies cases qualitatively in terms of the principal aggravating factor either found or present in the case and the presence of other relevant

statutory aggravating and mitigating circumstances. The third measure is based on the results of logistic regression analyses.

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") disparities in the system after controlling for defendant culpability.

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 characterize as "greater Nebraska." The distinction between the major urban centers of the state and greater Nebraska is not an "urban" v. "rural" distinction. We also recognize that there are important distinctions, some of which we describe below, between charging and sentencing practices in Nebraska's two largest counties, Douglas County and Lancaster County.

1. Case Screening Plan and Data Sources

We identified the potential universe of Nebraska criminal homicide cases from April 20, 1973 to December 31, 1999 with a statewide case list and other case identifying techniques. The primary source for identifying these cases is a list of Nebraska homicide cases generated by the Records Administrator for the Department of Corrections. According to the Department of Corrections, this list contains all criminal homicides for which a defendant was convicted and sentenced to serve any amount of prison time. In addition, we conducted a comprehensive electronic search of all reported Nebraska cases and 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, we requested each County Attorney to 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. For each of these cases we coded a 15 page data collection instrument, known as the Initial Screening Instrument ("ISI"). For each of the cases that we identified as death-eligible, we completed a detailed data collection instrument ("DCI").

A major challenge in this type of research is obtaining reliable data on the cases. A defendant's pre-sentence investigation report served as the first and best source of information regarding a particular defendant, the facts of a particular homicide, and witness information. A pre-sentence investigation report includes a detailed description of the defendant that is generated by a probation officer following a criminal conviction. In particular, the PSI will often contain descriptive information regarding the physical, mental, and emotional health of the defendant. It discusses the defendant's personal family history, ordinarily contains the defendant's personal criminal history, and sometimes contains a description of the victim. The PSI also often contains a description of the crime that is generated from the trial record, police reports, and interviews with the defendant.

At the outset of the study we attempted to collect a copy of the PSI and the Department of Corrections Classifications Study for each defendant in our universe of potentially death-eligible cases from the Department of Corrections Records. 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, as a result of the document retention policies of the State Probation Office, PSIs were sometimes unavailable. In those cases, 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.

We relied on the study files containing the information described above to screen cases for death-eligibility. As each case was reviewed, law student coders completed the Initial Screening Instrument (ISI).

Once it was determined that a case was death-eligible, we undertook an additional stage of case file information development. For all penalty trial cases, including death-sentenced cases, the most important additional data sources were the record of the trial and sentencing, if available, the opinion of the Nebraska Supreme Court if the case was appealed, and the briefs of the State and the defendant.

We obtained information on the racial and social background of the defendant from the PSI and the Department of Corrections Classification Study. Death certificates provided the primary data source for information regarding the demographic background of the victim.

2. Data Coding and Entry

The case files described above provided the basis for the case coding process conducted in Lincoln, Nebraska during the Summer and Fall of 2000. The data collection instrument for the non-capital cases – the "ISI" – contains 138 entries. In addition, the coders completed thumbnail sketches of each non-capital case. The data collection instrument used to code the capital murder cases – the DCI – contains over 500 entries for each case. Each coder also completed a detailed narrative summary and a five to ten line "thumbnail sketch" for each case.

The procedural coding for each statutory aggravating and mitigating circumstance and its strength of evidence measure were individually reviewed and verified. Project staff handled all data entry for the ISI, DCI, and the narrative summaries. A project staff member not involved with the data entry visually checked the data entered against each DCI to flag data entry errors.

3. Measures of Defendant Culpability

One's confidence in the inferences suggested by a study of this type depends on the validity of the measures of "defendant culpability" that provide a basis for comparing similarly situated defendants. For example, to what extent was the murder premeditated and planned? The second dimension of culpability is the defendant's personal responsibility for and role in the murder, or any contemporaneous crimes. The third dimension of culpability is the defendant's character, including a review of his or her prior criminal record.

The study's measures of defendant culpability are important because they provide an objective basis to define groups of similarly situated offenders. With such groups defined, comparisons can be made to determine if similarly situated offenders are treated differently because of their race or socio-economic status or the race or socio-economic status of their victims. These assessments provide the basis for assessing concerns about *disparate treatment* in the system. Disparate treatment exists when prosecutors or sentencing judges, in the exercise of their discretion, treat similarly situated offenders differently on the basis of illegitimate or suspect factors. In contrast to disparate treatment, *disparate impact* exists when the evenhanded application of a facially neutral policy disadvantages a particular group.

Our measures of defendant culpability also enable us to define groups of similarly situated offenders as a foundation for addressing concerns about consistency and comparative excessiveness in the system, without regard to the race and socio-economic status of defendants

and victims. In such analyses, the issues are (a) how frequently are similarly situated offenders sentenced to death and (b) to what extent does the system limit death sentences to the most culpable death-eligible offenders.[2]

Because of the crucial role of defendant culpability in this research, we used the following four independent measures of defendant culpability that have been utilized with success in other similar studies.

a. The Number of Statutory Aggravating and Mitigating Circumstances Found or Present in the Cases: Three Measures

The first measure of defendant culpability is the number of statutory aggravating circumstances found by the penalty trial court or present in each non-penalty trial case. The second measure under this heading is a count of the number of mitigating circumstances found or present in the cases. The third measure under this heading is the number of both aggravating *and* mitigating circumstances combined, e.g., two aggravators and one mitigator.

b. The Salient-Factors Measure

The second "salient factors" measure of culpability is used by some state courts in their proportionality reviews of death-sentenced defendants. This straightforward measure classifies each case initially in terms of its most prominent statutory aggravating circumstance and then subclassifies it on the basis of other statutory aggravating and mitigating circumstances in the case. The salient factors measure we rely on in this research (presented in Appendix A) is modeled on a measure developed in 1999 by Judge David Baime, Special Master to the New Jersey Supreme Court for Proportionality Review. This measure shares the strengths of the measures based on counts of aggravating and mitigating circumstances.

[2] In more popular parlance, the most culpable offenders are often referred to the "worst of the worst."

c. Logistic Regression-Based Measures

This set of measures is based on the results of logistic multiple regression analyses that estimate the impact of case characteristics (legitimate, illegitimate, and suspect) on charging and sentencing outcome decisions in capital cases. However, the culpability scales developed in this analysis reflect only the impact of the legitimate case characteristics.

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 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.[3]

The issue of race in Nebraska's capital charging and sentencing system is raised by straightforward demographics. Racial minorities constitute approximately 10% of the population of the state of Nebraska. Yet minorities represent 24% (7/29) of the defendants who were sentenced to death during the period of this study. In addition, minorities represent 33% (29/89)

[3] *See infra* Section VII for detailed findings.

of the defendants whose cases advanced to a penalty trial with the state seeking a death sentence.[4]

It is an important finding of this research, therefore, that there are no significant statewide race disparities in penalty trial death-sentencing decisions or in the rates that death sentences are imposed among all death-eligible cases. The only evidence of race-of-defendant disparities statewide is in prosecutorial decisions to waive the death penalty and to advance capital cases to penalty trial. However, on closer examination, these disparities appear to be largely a by-product of a greater willingness of prosecutors in the major urban counties (where 90% of the prosecutions against minorities statewide take place) to advance death-eligible cases to a penalty trial than is the case in 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 no significant race-of-defendant disparities. Indeed the death sentencing rates in those counties are slightly higher in the white defendant cases. In greater Nebraska, the race disparities are trivial, not significant, and based on very small samples. As a result, in both the major urban counties and greater Nebraska, the data do not support an inference that the cases of similarly situated defendants advance to penalty trial or are sentenced to death at different rates because of their race.[5] Rather, the data supports a finding that there is no differential treatment based on race.

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.[6] Among all death-eligible cases, the death-sentencing rate for white offenders is .16 (22/135) and for racial minorities it is

[4] Minorities represent 27% (50/185) of all of the defendants in death-eligible prosecutions.
[5] As noted *supra*, page 13, disparate treatment refers to the differential treatment of similarly situated offenders.

.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 introduced controls for defendant culpability, there are also no significant race-of-defendant effects in the death-sentencing data.

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), a 14 percentage point disparity that is statistically significant at the .10 level. When controls for defendant culpability are introduced, this statewide disparity persists and remains statistically significant when some measures of defendant culpability are applied but become insignificant when others are applied.[7]

However, when the analysis takes into account whether the cases are prosecuted in a major urban county or greater Nebraska, the statewide white-defendant disparity evaporates.[8] 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 nearly 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).[9] In the penalty trial death-sentencing decisions, the rate is .36 (26/72) for white-victim cases and .19 (3/16) for

---

[6] *See infra* Figure 13.1, Parts I & II, Rows 2 & 3.
[7] *See infra* Figure 13.1 Part II, Row I, Figures 14 and 16, Table 4, Columns B & C, Row 2a, and n. 170.
[8] *See infra* Figures 17 and 18.
[9] *See infra* Figure 13.1, Column C.

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 victims.[10] Among all death-eligible cases, the death-sentencing rate in minority defendant/white-victim cases was .20 (5/25) and .15 (24/159) for all other cases. In the penalty trial death-sentencing decisions, the rate was .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 advanced to penalty trial at a rate of .62 (16/26), while the rate was .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 major urban counties or greater Nebraska, the

[10] *See infra* Figure 13.1, Column D.

statewide minority defendant/white victim disparity evaporates for the same reason that the white defendant effect described above evaporates.

2. 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. The Data Do Not, However, Support a Conclusion that the System Consistently Limits Death Sentencing to the Most Culpable Death-Eligible Offenders.[11]

The level of consistency in the Nebraska system suggested by our data depends on the range of cases one considers in the analysis. In that regard, there are at least two possible perspectives. One is to limit the focus to the outcomes of penalty trials, which are strictly a product of judicial sentencing decisions. A second perspective is to expand the focus to embrace the imposition of death sentences among all death-eligible cases, outcomes that are the product of both judicial sentencing decisions *and* prosecutorial charging decisions.

When one's focus is limited to penalty trial outcomes, the system appears to work well when compared, for example, to New Jersey, a state in which penalty-trial death sentencing is almost exclusively a jury responsibility. (Our principal measure of consistency in each death-sentenced case is the percentage of defendants with comparable levels of criminal culpability (the death-sentenced defendant's "near neighbors,") who were sentenced to death.) In Nebraska penalty trials, 48% (14/29) of the death sentences were imposed in cases in which the death-sentenced defendant's near neighbors were sentenced to death more than 70% of the time. In New Jersey the comparable figure is 29% (10/34).[12] The discriminating nature (in terms of defendant culpability) of the Nebraska penalty trial death-sentencing system appears to be principally the product of greater selectivity on the part of the sentencing judges as compared to juries.

[11] *See infra* Section IX.
[12] *See infra* Figure 25, Part I and note 212 and accompanying text.

Also, since 1978, Nebraska's sentencing judges have been required by legislation to consider issues of comparative excessiveness in their sentencing considerations and they are no doubt aware of legislative concerns about arbitrariness and comparative excessiveness. These 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, a death sentence is almost certain, for cases with two aggravators, the outcome could go either way, depending on the facts of the case, and for cases with only a single aggravator, there is a very strong presumption in favor of a life sentence.

In spite of this penalty trial performance, the penalty trial data as a whole suggest that a number of death sentences may have been imposed in cases that are clearly not among the worst of the worst.[13] Specifically, the data suggest that 14% (4/29) of Nebraska's death sentences were imposed in cases in which the defendant's penalty trial near neighbors were sentenced to death less than half the time; in 38% (11/29) of the death-sentenced cases, the defendant's near neighbors were sentenced to death less than 60% of the time. However, in only one death sentenced case was the death-sentencing rate among penalty trial near neighbors below the average death-sentencing rate for all penalty trials, which is .33.

When the comparative proportionality analysis is expanded to embrace death sentencing among all death-eligible cases, the results look less favorable than they do when the analysis is limited to penalty-trial near neighbors.[14] In that analysis, we find that in only 17% (5/29) of the Nebraska death-sentenced cases were death sentences imposed in cases in which the defendant's near neighbors were sentenced to death more than 70% of the time. And in 52% (15/29) of

[13] *See infra* Figure 25, Part I.
[14] *See infra* Figure 25, Part II.

death-sentenced cases, a death sentence was imposed among the defendant's near neighbors less that 50% of the time. However, only one death sentence was imposed in a case in which the death-sentencing rate among the death-sentenced defendant's near neighbors was less than the .16, which is the average death sentencing rate among all death eligible offenders.

3. The Nebraska 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.[15]

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 were 2.1 (.58/.28) times more likely to advance to a penalty trial with the state seeking a death sentence then were comparable cases in greater Nebraska.[16] These geographic disparities have existed since 1973 and have grown larger since 1982.[17]

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.[18]

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

[15] *See infra* Section VI for detailed findings.
[16] *See infra* Figure 9, Part II, Column A.
[17] *See infra* Figure 11, Part I.
[18] *See infra* Section VI C.

"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 penalt trials.[19] 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 at rates that are substantially higher than the rates that prosecutors in the counties of greater Nebraska advance cases to penalty trial.[20]

As a result, because 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 situated white defendants.

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. The adverse impact on minorities in the capital charging and sentencing system is analogous to the adverse impact on minorities that exists in states where local appropriations for the support of public education are lower in predominately minority communities than they are in predominately white communities. Our findings on this issue do not suggest or intimate that the Nebraska death sentencing system is racially biased. Our findings are quite to the contrary.

What then can one make of the adverse impact flowing from the sharp disparities in the rates that death eligible cases advance to penalty trial in the major urban counties as contrasted to greater Nebraska? Two characterizations are possible. One possible characterization is that the

[19] *See infra* Figure 13.1, Part II, Row 1, Column B.
[20] *See infra* Figure 9, Part II, Column A.

adverse disparate impact on minority capital defendants that we have documented *is not* a matter of concern; from this perspective, the impact is merely an anomaly resulting from the fact that minorities overwhelmingly reside in the state's major urban areas. A second possible characterization of the data is that the adverse impact *is* a matter of real concern; from this perspective, in spite of the its demographic origins, the adverse impact places on minority defendants a significant and disproportionate burden.

Given the adverse impact of prosecutorial charging decisions on minorities statewide, one could reasonably expect to see an adverse impact against minorities in the imposition of death sentences among all death-eligible cases. Indeed, if sentencing judges imposed death sentences at comparable rates in white and minority defendant cases, this is exactly what one would see. However, this does not occur. The reason it does not is that the penalty trial judges in the major urban counties, where all but one of the minority penalty trials were held, sentence white defendants to death at a higher rate than they do minority defendants.[21] The bottom line data for the state as a whole, therefore, reveal only small, non-significant and *inconsistent* disparities on the order of 2 and 3 percentage points. These disparities do not constitute a statewide adverse impact on racial minorities in the rates that death sentences are imposed among all death-eligible cases.[22]

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.[23]

In the first decade under the new death sentencing system (1973-1982), the judicial death-sentencing rates in the major urban counties and in the counties of greater Nebraska were

[21] *See infra* Figure 18, Part I, Column C, Row A.
[22] *See infra* Figure 13.1, Parts I & II, Row 3.
[23] See Section VI for detailed findings.

comparable (.37 v. .31).[24] 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 counties was 2.4 (.26/.11) times higher in the major urban counties than it was in greater Nebraska.[25]

Since the mid-1980s, changes in sentencing practices, primarily in the major urban counties, 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 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 greater Nebraska (.22 v. .29).[26]

Both of these effects -- 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 greater Nebraska -- may be attributable, in part, to the 1978 legislative amendments that address this issue. As noted above, those amendments require sentencing 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

[24] *See infra* Figure 13, Part II, Column B.
[25] Id., Part III, Column B.

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 nearly identical – .12 in the major urban counties v. .13 in greater Nebraska. In the earlier period (1973-82), in contrast, the death sentencing rate among all death-eligible cases was 2.4 (.26/.11) time higher in the major urban counties.

5. The Impact of Defendant and Victim Socio-Economic Status (SES) on Charging and Sentencing Outcomes.[27]

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

Our statewide universe of capital murder 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.

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

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 than have other defendants. Specifically, defendants with high SES victims were 1.7 (.70/.42) times more likely to advance to a penalty trial; 2.1 (.43/.20) times likely to be sentenced to death in a penalty trial; and 3.2 (.29/.09) times more likely to be sentenced to death among all death-eligible defendants.[28] Defendants with low SES victims faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death. They were .66 (.38/.57) less likely

[26] *See infra* Figure 13, Part II, column C.
[27] *See infra* Section VIII for detailed findings.
[28] *See infra* Figure 21, Part II,

to see their cases advance to a penalty trial, .54 (.22/.41) less likely to receive a death sentence in a penalty trial, and .35 (.08/.23) less likely to receive a death sentence among all death-eligible defendants.[29] All of these victim SES disparities are statistically significant.

When the focus shifts from the state as a whole to victim SES effects estimated separately within the major urban and other counties, both high and low victim SES disparities are apparent throughout the state.[30]

[29] *See infra* Figure 22, Part II.
[30] *See infra* Figure 24.

I. Introduction

This amended[31] report examines decision-making in the disposition of 691 potentially death-eligible Nebraska homicide cases that resulted in a criminal conviction between 1973 and 1999.[32] The principal focus of the report is on decision-making in 175 of those homicides that we classified as death-eligible in a case by case screen of the 691 homicide convictions.[33] In the initial prosecution of these death-eligible cases, judges imposed 24 death sentences, a number of which were reversed on appeal in a state or federal court. On remand, 5 additional death sentences were imposed in those cases -- yielding a total of 29 death sentences among all death eligible cases for the period of this research -- 1973-1999. Overall, the original 175 death eligible cases resulted in a total of 185 prosecutions in which a death sentence was a possible outcome.

Three of the original 24 death-sentenced defendants have been executed; 3 died by suicide or natural causes while on death row and 4 remain on death row.

In all of these death-eligible cases, we examine prosecutorial charging and plea bargaining decisions as well as prosecutorial decisions 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 death sentences.

---

[31] This is an amended version of the July 25, 2001 Final Report released August 1, 2001. It 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 database that expand slightly the universe of death-eligible homicides.

[32] 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.

[33] 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 the time of the offense are not death-eligible. Neb. Rev. Stat. § 28-105.01 (Cum. Supp. 1999).

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,[34] (b) disparities based on the race, gender, religious preference, and socio-economic status of the defendant and the victim,[35] and (c) the extent to which the defendants sentenced to death can be meaningfully distinguished from the death-eligible offenders who received a sentence less than death (death sentences that fail to meet this standard are known as "comparatively excessive").[36]

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

---

Accordingly, while we collected a large amount of information on these cases, they are not included in the main analysis contained in this report.

[34] The Nebraska Legislature has a long-term commitment to the principle that the death penalty be "applied uniformly throughout the state" and the 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.

[35] 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.

[36] This issues is sometimes put in terms of the extent to which death sentencing is limited to the "worst of the worst" death-eligible offenders. 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. § 29-2521.03 (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. Ann. § 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 other 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 of the cases in our universe of criminal homicides.

the case.[37] For these cases, we focus on prosecutorial charging decisions, the crime of conviction, and the sentencing decision.[38] In these analyses, we examine the trend of decision and the main determinants of the system based on legitimate case characteristics. (For these cases, however, we have substantially less information on legitimate case characteristics than we do for the death-eligible cases.)

Several findings of this research are open to more than one interpretation in terms of what they tell us about how well the Nebraska death sentencing system operates. In our presentation of those findings, we present both sides of the interpretative issues.

II. Review of the Literature

An extensive academic body of literature has developed over the last 15 years addressing whether, and to what extent, the consideration of non-legitimate factors influences the administration of the death penalty.[39] The debate over this matter includes a lively discussion on both theoretical and methodological dimensions. One significant concern raised by this literature is the degree to which decisions of prosecutors and juries are influenced by the race or socio-economic status ("SES") of the defendant or the victim. On the question of race, while they are mixed, most studies indicate that the race of the defendant does not generally effect the likelihood that the defendant will receive the death penalty.

---

[37] 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).

[38] 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 to 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.

[39] *See* David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1792 (1998)

However, a number of studies suggest that the odds of receiving the death penalty are enhanced if the victim is white as opposed to another race.[40] For example, the Baldus Study of capital punishment administration in Georgia from 1973-1980 found that – after adjusting for the presence or absence of hundreds of variables for legitimate case characteristics, such as the level of violence and the defendant's prior record – defendants whose victims were white faced odds of receiving a death sentence that were 4.3 times higher than similarly situated defendants whose victims were black.[41]

Studies that have addressed race disparities in sentencing do not consistently report racial disparities: the studies indicate race disparities in sentencing are highly sensitive to locality and vary significantly. For example, the study conducted by Professor Baldus of Colorado's capital punishment administration determined that there were no statistically significant race-of-defendant effects, and no statistically significant race-of-victim effects.[42] In a study of Philadelphia, however, there were findings of both race-of-victim and race-of-defendant effects in jury decision-making.[43]

Where race effects are present, these studies generally report that the principal source of these race effects is the prosecutorial decision to seek or waive the death penalty in death-eligible cases. The literature also suggests that the race effects are concentrated in the mid-range of cases where the facts permit the greatest room for the exercise of discretion. Finally, the literature

---

(summarizing studies); U.S. Gen. Acct. Off., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (GAO/GGO-90-57), 254-65 (1990) (summarizing studies through 1989).

[40] *See* U.S. Gen. Acct. Off., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (GAO/GGO-90-57) (1990).

[41] David C. Baldus, et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

[42] *See* Scott Anderson, *As Flies to Wanton Boys: Death-Eligible Defendants in Georgia and Colorado*, 40 TRIAL TALK 9-16 (1991) (no race-of-defendant effects, and no statistically significant race-of-victim effects).

[43] David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (no race-of-victim or defendant effects in prosecutorial decision-making, but finding race-of-defendant and victim effects in jury decision-making).

suggests that race effects are more likely to influence the death penalty administration in rural rather than urban areas.

Some scholars have argued that there are methodological flaws in these studies.[44] At least two Justices of the United States Supreme Court have suggested that discrimination in the administration of the death penalty is inevitable.[45] To the extent possible, the research design we use in this research attempts to address the concerns raised by critics of prior studies.

To date, there has been no systematic or comprehensive collection of information and analysis conducted in Nebraska on the scope provided in this study. Comprehensive studies have been conducted[46] in Georgia,[47] New Jersey,[48] Kentucky,[49] Mississippi,[50] North Carolina,[51] South Carolina,[52] California,[53] Colorado,[54] and Philadelphia, Pennsylvania.[55]

---

[44] John C. McAdams, *Racial Disparity and the Death Penalty,* 61 LAW AND CONTEMP. PROBS. 153 (1998).

[45] McCleskey v. Kemp, 481 U.S. at 311-12. *See also* Memorandum from Antonin Scalia, Justice, United States Supreme Court to the Conference of the Justices, United States Supreme Court 1 (Jan. 6, 1987) (stating that "[s]ince it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof"). David C. Baldus, et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection, and Correction*, 51 WASH. & LEE, REV. 359, 371 n. 46 (1994).

[46] *See* David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1792 (1998) (survey of studies through 1998); U.S. Gen. Acct. Off., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (GAO/GGO-90-57), 254-65 (1990) (summarizing studies through 1989).

[47] David C. Baldus, et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (no statewide findings of race-of-defendant effects, but race-of-victim effects found in prosecutor and jury decision-making).

[48] *See* State v. Marshall, 613 A.2d 1059 (N.J. 1992); Beinan, et al., *The Reimposition of Capital Punishment in New Jersey: the Role of Prosecutorial Discretion*, 41 RUTG. L. REV. 27 (1988) (finding race-of-victim effects and no race-of-defendant effects in prosecutorial decision-making, and race-of-defendant effects but no race-of-victim effects in jury decision-making).

[49] Thomas J. Keil & Gennardo F. Vito, *Race and the Death Penalty in Kentucky Murder Trials*: 1976-1991, 20 AM. J. CRIM. J. 17 (1995) (no race-of-defendant effects, but significant race-of-victim effects).

[50] Richard Berk & Joseph Lowery, FACTORS AFFECTING DEATH PENALTY DECISIONS IN MISSISSIPPI (June 1985) (no overall race-of-defendant effects, but race-of-victim effects).

[51] Barry Nakell & Kenneth A. Hardy, THE ARBITRARINESS OF THE DEATH PENALTY (1987) (statewide race-of-victim effects, no race-of-defendant effects).

[52] Raymond Pasternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245 (1988) (no race-of-defendant effects, but finding race-of-victim effects).

[53] Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33 (1991) (no race-of-defendant effects, but significant race-of-victim effects).

In this study, we have used the most advanced analytical methodology developed in the conduct of prior similar studies. The analysis builds on the insights of these studies and seeks to refine the measures of criminal culpability and other controls that have developed as these studies have become more sophisticated.

III. Charging, Adjudication, and Sentencing in Nebraska Homicide Cases

A. Capital Murder

1. The Statute

The first element of capital murder in Nebraska is liability for first-degree murder (M1). The key elements of M1 are (a) killing another person with a mens rea (mental state) defined as "purposely and with deliberate and premeditated malice" or (b) killing "in the perpetration of or attempt to" commit one of a series of violent felonies.[56] The second element of a capital murder is a presence in the case one or more statutory "aggravating circumstances."[57] These are listed in Table 1 along with the statutory mitigating circumstances that the court is required to consider in its final sentencing determination.[58]

When a death-eligible offender is found guilty of first-degree murder, the Nebraska statute requires the trial judge to set a date for a "hearing on determination of the sentence to be imposed."[59] This proceeding is usually conducted within three months of the guilt trial

---

[54] *See* Scott Anderson, *As Flies to Wanton Boys: Death Eligible Defendants in Georgia and Colorado*, 40 TRIAL TALK 9-16 (1991) (no race-of-defendant effects, and no statistically significant race-of-victim effects).

[55] David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (no race-of-victim or defendant effects in prosecutorial decision-making, but finding race-of-defendant and victim effects in jury decision-making).

[56] Neb. Rev. Stat. § 28-303 (Reissue 1995). Deliberation and premeditation also embrace the statutory elements of "administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same, he puposely procures the conviction and execution of any innocent person." Id.

[57] Neb. Rev. Stat. § 29-2523 (Reissue 1995). All of the aggravators in Table 1 with small technical changes were in the original statute with the exception of 29-2523 (1) (i) which became effective July 15, 1998.

[58] Id.

[59] Neb. Rev. Stat. § 29-2520 (Reissue 1995).

determination.[60] The statute states that any evidence deemed relevant by the court "may be presented … and shall include matters relating to any of the relevant aggravating and mitigating circumstances." It also provides that the "state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."[61]

Some prosecutors appear to believe that the statute requires them to present evidence of aggravation in all cases that result in an M1 conviction even though the statute does not state that the prosecution "shall" present evidence of statutory aggravating circumstances in every sentencing hearing.[62] This narrow discretion approach is exemplified by Office of the Douglas County Attorney. During the period covered by this study, 96% (54/56) of that county's M1 convictions advanced to a penalty trial.[63] 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 34% (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 held.[64] 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

[60] In most states, the penalty trial commences directly upon the conclusion of the guilt trial.
[61] Neb. Rev. Stat. § 29-2520 (Reissue 1995).
[62] However, the language that the evidence, which "may" be presented, "shall" include aggravating circumstances can be construed to impose such a requirement.
[63] However, in 11% (6/54) of those cases our data indicated that the prosecutor did not present evidence of aggravation to the court.

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% (13/32) of the county's death-eligible cases advanced to a penalty trial.

Some prosecutors also appear to believe that, in the ambit of a statutorily defined sentencing hearing, they additionally have the authority to abstain from presenting evidence of aggravation, in which event the court, on its own motion, may consider and evaluate the aggravation and mitigation in the case.[65] In such cases to date, our research indicates that the outcome has always been a life sentence. It is for this reason that for the purposes of this project we define a "penalty trial with the state seeking a death sentence" as a proceeding in which the state presents evidence of aggravation,[66] which is generally accompanied with a request that the court impose a death sentence.[67]

A distinctive feature of Nebraska's death penalty system is that penalty trial sentencing is performed exclusively by trial court judges.[68] Also, the statute gives the guilt trial judge the

---

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

[65] In such cases, the prosecution usually abstains from presenting an argument in favor of a death sentence.

[66] Evidence of statutory aggravation presented in the sentencing hearing may take the form of evidence beyond the guilt trial record, such as detail on the defendant's criminal history, or it may be limited to the submission of the guilt trial record, which may contain a basis for finding that one or more statutory aggravators are present in the case, e.g., multiple victims.

[67] We identified one death-eligible case in which the state presented evidence of aggravation but abstained from requesting the court to impose a death sentence. There may be additional examples of these that we are not aware of, however, because in some cases, we typically did not have notes of testimony from the penalty trial and could not discern the state's argument concerning the death penalty.

We also identified 14 M1 convictions, in which the facts did not support the presence of a single aggravating factor in the case and a classification of death eligibility, but in the sentencing hearing, which is required for all M1 convictions, whether the case is death-eligible or not, the court referred to statutory aggravating and mitigating circumstances. We classified these cases as not death eligible despite the court's reference to the aggravation and/or mitigation.

[68] Among states with exclusively judge death sentencing, Arizona, Montana, and Idaho assign the sentencing responsibility to the guilt trial judge. Colorado assigns it to a panel of three judges. Ariz. Rev. Stat. Ann. §13-703 (West 2000); Colo. Rev. Stat. Ann. § 16-11-103 (West 2000); Idaho Code § 19-2515 (Michie 2000); Mont. Code

authority to conduct the penalty trial before himself or herself or to request the Supreme Court to appoint two other judges to share the duty with him or her.[69]

The statute establishes a multi-stage decision process for the penalty trial. First, the court must determine whether "sufficient aggravating circumstances exist to justify" a sentence of death. Second, it must determine "whether sufficient mitigating circumstances exist which approach or exceed the weight" of the aggravators.[70] Third, the court must determine whether "the aggravating circumstances …outweigh the mitigating circumstances."[71]

Also, since 1978, the sentencing judges have been required to determine that the imposition of a death sentence in the case would not be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[72] A review of the sentencing orders since 1978 suggests that the sentencing judges are aware of and consider the comparative excessiveness issue. However, ordinarily the issue is explicitly addressed in the

---

Ann. § 46-18-301 (2000). Nebraska is the only judge sentencing state where the guilt trial judge may impose the sentence or he or she may request the appointment of two additional judges to participate in the decision. Neb. Rev. Stat. § 29-2520 (Reissue 1995). *See generally* Roxane J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189 (1997).

[69] Neb. Rev. Stat. § 29-2520 (Reissue 1995). A recent decision of the Nebraska Supreme Court ruled that a death sentence imposed by a three judge panel must be unanimous to stand. State v. Anderson, 262 Neb.311, 328 632 N.W. 2d. 273 (2001).

[70] Neb. Rev. Stat. § 29-2550 (Reissue 1995).

[71] Neb. Rev. Stat. § 29-2519 (Reissue 1995).

[72] Neb. Rev. Stat. § 29-2522 (Reissue 1995). This language, which is drawn from the Georgia statute approved by the United States Supreme Court in *Gregg. v. Georgia*, 428 U.S. 153 (1976), requires the sentencing court in Nebraska to conduct what is known as a "comparative proportionality" review of death as a possible sentence in the case. This form of proportionality review exists in about 15 other states, including Georgia, but only at the "appellate" level and not at the trial court level since death sentences in these states are imposed by juries.

Trial courts elsewhere have been resistant to the presentation of comparative excessiveness evidence and arguments to sentencing juries. Also, defense counsel have been concerned that any arguments to juries that death sentences are infrequently imposed in a given category of cases, which includes their client's case, may motivate the jury to impose a death sentence in the instant case to compensate for the other comparable cases in which a death sentence was not imposed. Nebraska is the only judicial sentencing statute of which we are aware that imposes a proportionality review obligation on the sentencing judge. As we note below, the state Supreme Court also has the obligation to conduct a comparative proportionality review.

sentencing order only in cases that result in a death sentence,[73] often with extensive citation to "generally comparable" cases. These opinions are generally not characterized by close comparative analysis of life sentenced cases presented to the court by defense counsel as "comparable" to the defendant's case.

When a death sentence is imposed, the Nebraska statute mandates an appeal to the Nebraska Supreme Court to review the case for possible legal error in either the guilt or penalty trial.[74] Since 1978, the Court has also been directed to conduct a comparative proportionality review in each death sentence case to "determine the propriety of the sentence of each case… 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."[75]

The 1978 legislation requiring the proportionality review of death sentences by the Supreme Court also instructed the Supreme Court to collect information on all cases involving criminal homicides committed after the effective date of the Nebraska death penalty statute in 1973.[76] The implication of this legislation was that the Court's comparative proportionality reviews should be based on a close factual analysis of all death-eligible cases and not simply those that advanced to a penalty trial or resulted in a death sentence.[77] However in 1982, the

[73] In the typical life-sentenced case, the decision rests on a finding of "no aggravation" or a finding that the aggravation fails to outweigh the mitigation, thereby eliminating any need to conduct a comparative sentence review.
[74] Neb. Rev. Stat. § 29-2524 (Reissue 1995).
[75] Neb. Rev. Stat. § 29-2521.03 (Reissue 1995). The statute actually extends the requirement of proportionality review to all criminal homicide convictions.
[76] Neb. Rev. Stat. § 29-2521.02 (Reissue 1995).
[77] Among the state supreme courts that conduct proportionality reviews, most limit the universe of cases considered in such reviews to these two pools of cases. The New Jersey court is the only one of which we are aware that routinely conducts a close factual analysis of all death-eligible cases. State v. Marshall, 613 A.2d 1059 (N.J. 1992).

Nebraska Supreme Court ruled that the Legislature exceeded its authority in purporting to prescribe how the Court should conduct its proportionality reviews.[78]

Nebraska's death penalty legislation summarized above is typical of many American statutes, with two important exceptions. The first exception is its novel features concerning judicial sentencing.[79] Another feature of the Nebraska legislation that distinguishes it from any other death penalty statute of which we are aware is a series of "legislative findings" enacted in 1978, that articulate the Legislature's concerns and goals concerning the administration of the death penalty.[80]

The 1978 amendments contain: (a) a finding that "charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results"; (b) an admonition that the law "should be applied uniformly throughout the state and since the death penalty is a statewide law 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"; (c) a finding of the importance of life and an admonition that the "state apply and follow the most scrupulous standards of fairness and uniformity" in the administration of the death penalty; (d) an endorsement of the principle that the death penalty "should never be imposed arbitrarily nor as a result of local prejudice or public hysteria"; and (e) a finding that "it is necessary for the Supreme Court to review and analyze all criminal homicides…to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances."[81]

---

[78] State v. Moore, 316 N.W. 2d 33, 42-45 (1982). Since that time the Nebraska Court has followed the more common practices of other courts in the conduct of proportionality review by limiting its universe of comparison cases to death sentenced cases.

[79] *See supra* note 72 and accompanying text.

[80] These findings were passed on April 19, 1978 over the Governor's veto. Act of April 19, 1978, LB 711, 1978 Neb. Laws 621. In the same legislation, the Legislature imposed on the trial court and the Supreme Court the duty to conduct comparative proportionality reviews.

[81] Neb. Rev. Stat. § 29-21.01 (Reissue 1995). This latter finding is evident in the requirement that the Supreme Court conduct a comparative proportionality review of each death sentence imposed.

These findings represent a commitment to geographic uniformity in capital charging and sentencing outcomes, a concern about arbitrariness in the administration of the death penalty, and a belief in the necessity for both sentencing judges and the Supreme Court to conduct their comparative proportionality reviews in a systematic factually-based manner that embraces all death-eligible cases. These findings provide us a helpful guide in our evaluation of Nebraska's capital charging and sentencing system.

The Legislature's 1978 findings also provide a basis for (a) identifying and measuring the "radically differing results" in charging and sentencing outcomes that the Legislature perceived to exist in that year,[82] (b) assessing whether those geographic disparities materially changed after 1978, and (c) assessing the plausibility that any such changes were the product of the 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 175 death-eligible cases by screening 691 homicides prosecuted during the period of this research that were potentially death-eligible.[83] The test we used to identify death-eligible cases has two parts. The first part focuses on the first-degree murder (M1) convictions. We classified an M1 case as death-eligible if it (a) advanced to a sentencing hearing under Neb. Rev. Stat. Section 29-2520, (b) there was some evidence of

[82] The "differing results" perceived by the Legislature in 1978 refer to the charging and sentencing outcomes in Nebraska's death penalty system from April 1973 to April 1978.

[83] 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 were unable to collect sufficient information to support an informed judgment of death-

statutory aggravation in the case, and (c) the court addressed the issue of whether the sentence should be life or death.[84] 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 were 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.[85]

Figure 1 presents an overview of the disposition of Nebraska's death-eligible cases. Box A includes 185 prosecutions against 175 death-eligible defendants over the period 1973-99.[86] 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

---

eligibility. The large majority of these cases were homicides in which the defendant was found guilty of manslaughter and sentenced to probation, with no time served in a Department of Corrections (DOC) facility.

[84] If there was no evidence of statutory aggravation in the case, we did not classify it as death-eligible even if the court made reference to statutory aggravation and/or mitigation.

[85] 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 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.

[86] There are 175 death-eligible defendants with 185 prosecutions. We exclude subsequent prosecutions in which the state lacked the authority to seek death because the original prosecution resulted in a sentence less than death.

penalty trial.[87] 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.[88] 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.[89]

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 47% (36/77) were heard by the trial judge alone and the remainder were heard by a three judge panel.[90]

Box D depicts the M1 convictions that terminated 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).

---

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

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

[89] 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 prosecutors and defense attorneys in over 100 cases to describe over the telephone and/or via a questionnaire the process of negotiation and agreement when the records in the case were unclear about what had transpired in this regard.

[90] The detail on the number of sentencing judges is not shown in Figure 1. The death-sentencing rate in the single judge cases is .18 (7/39) versus .51 (22/43) in the cases involving three-judge panels.

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 of 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),[91] and the death sentencing rate among all death-eligible cases was .16 (29/185).[92]

Of the 29 death sentences imposed during the study period, approximately 50% have been reversed and/or the sentence vacated by the Nebraska Supreme Court or a federal court. [93]

B. Non-Capital Homicide

1. The Statutes

The most serious form of *non-capital* homicide in Nebraska is first-degree murder in cases that do not include a statutory aggravating circumstance that would qualify the case as capital murder. Non-capital M1 carries a mandatory sentence of life imprisonment.[94]

The next most serious category of non-capital homicide is murder in the second-degree (M2). The principal distinction between first and second-degree murder is the defendant's mens rea (mental state).[95] While M1 requires a mens rea of purpose, deliberation, and premeditation, the M2 statute requires only that the defendant caused the victim's death "intentionally, but

[91] The overall penalty trial 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 penalty trials, the court did not exercise discretion, see Figure 1, n.2. Accordingly, our subsequent analyses of penalty trial decision making are limited to the 88 cases in which such discretion was exercised.

[92] We omit from subsequent analyses of death-sentencing rates one case 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.

[93] The Nebraska Supreme Court has not reversed any cases on the ground of comparative excessiveness. *See supra* text accompanying note 31 for the current status of the 24 defendants sentenced to death during the period of this study.

[94] Neb. Rev. Stat. §§ 28-105 (1), 28-303, 29-2522 (Reissue 1995).

without premeditation."[96] In spite of the facial clarity of this distinction, there was an ongoing dispute in the Nebraska Supreme Court during the last decade about whether proof of "malice" is also required to establish a second-degree murder conviction.[97]

Upon a M2 conviction, the sentencing judge has discretion to sentence the offender to life imprisonment or to a term of years that can range from 20 years to life imprisonment.[98]

The third major category of non-capital murder in Nebraska is manslaughter, which follows the classic pattern. Manslaughter may involve what would be murder but for the presence of a "sudden quarrel."[99] Manslaughter may also exist when the killing is caused "unintentionally while in the commission of an unlawful act."[100] The punishment for 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.[101]

2. The Disposition of Non-Capital Cases

Figure 2 presents the disposition of the 548 non-capital homicide cases 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.

---

[95] However, first-degree murder convictions based on the felony murder doctrine do not require a heightened mens rea (mental state).
[96] Neb. Rev. Stat. § 28-304 (Reissue 1995).
[97] The issue is lucidly considered in Richard E. Shugrue, *The Second Degree Murder Doctrine in Nebraska*, 30 CREIGHTON L. REV. 29, 29-66 (1996). The issue has been resolved. State v. Burlison, 583 N.W.2d 31 (Neb. 1998).
[98] Neb. Rev. Stat. § 28-105, 28-304 (Reissue 1995). In 1973, the statutory minimum for M2 was 10 years. In 1995, it was increased to 20 years. Act of June 13, 1995, LB 371, Vol. 1, 1995 Neb. Laws 563.
[99] This is commonly known as "voluntary manslaughter."
[100] Neb. Rev. Stat. § 28-305 (Reissue 1995).
[101] Neb. Rev. Stat. §§ 28-105 (1), 28-305 (Reissue 1995).

Figure 3 presents the duration of the sentences imposed in the M2 cases sentenced to a term of years and in the manslaughter or less cases. For the 144 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 first divides the cases by decade and then sorts on an annual basis the number of capital and non-capital homicide convictions.[102] 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 the number of homicide convictions has been stable over time, about 27 a year. The number of death-eligible offenses has been about 7 a year, ranging from 3 to 15. The proportion of death-eligible cases has declined from .27 and .30 in the 1970s and 1980s respectively, to .20 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 rates at which death-eligible cases advance to a penalty trial with the state seeking a death sentence. The Column B analysis embraces all of the death-eligible cases in the study; we sometimes also refer to that 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 excludes 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 case." This analysis

[102] As explained *supra* note 84 and accompanying text, this table excludes 203 homicide convictions that were not potentially death eligible.

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 within 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 have advanced to a penalty trial, and in these hearings the death-sentencing rate has declined.[103] Specifically, Column B documents that since 1987 the rate at which cases advance to a penalty trial with the state seeking a death sentence declined 14% (7/51).[104] There has also beem a 25% (9/36) decline from .29 to .27 in the penalty trial death-sentencing rate. The combined effect of these two trends has been a 29% (5/17) decline in the rate that death sentences were imposed among all death-eligible cases from .17 to .12.

IV. Methodology, Research Design, and Measures

A. Methodological Overview

The first and principal part of this research focuses on all death-eligible defendants, regardless of how the prosecutor charged them and whether or not their cases advanced to a penalty trial. The Data Collection Instrument ("DCI") used to code these cases is a modified version of instruments developed in New Jersey and Pennsylvania research.[105] It includes for capital murder cases quantifiable measures of the strength of evidence for each of the statutory aggravating and mitigating circumstances. These measures allow us to examine the impact of statutory aggravating and mitigating circumstances on both prosecutorial and judicial decision-making. A second and subsidiary part of the research embraces non-capital homicides. We coded these cases with a smaller data collection instrument that was completed in the process of

[103] These results do not adjust for the culpability of the offender.
[104] The numerator is the difference in the two rates (.51 and .44); the denominator is the earlier .51 rate.

screening all the cases to identify those that were death-eligible. It, like the DCI, contains measures for the presence of statutory aggravating circumstances.

Our analysis of the capital murder cases utilizes a series of measures of defendant culpability. The first set of measures has three parts: (1) a count of the number of statutory aggravating circumstances found or present in each case, (2) a count of the statutory mitigating circumstances, and (3) a count of both aggravating and mitigating circumstances. The second "salient factors" measure classifies cases qualitatively in terms of the principal aggravating factors either found or present in the cases as well as according to other relevant statutory aggravating and mitigating circumstances. The third measure is based on the results of logistic regression analyses. These models estimate the impact on charging and sentencing outcomes of 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") 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

[105] Prior to initiating coding of the DCI, we presented it to an Advisory Panel of Nebraska prosecutors and defense counsel for review and comment, and the response to the DCI from those who replied was favorable.

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.[106] In addition, we conducted a 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.

[106] 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. This 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 that 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* Shugrue *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 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, pre-sentence 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 that 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.

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 over 700 homicides committed in Nebraska between April 20, 1973 and December 31, 1999 that resulted in the criminal conviction of a defendant.[107] 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), the availability of a Department of Corrections Classification Study, the level of judicial procedure that the courts devote to a defendant's case, and the quality of the record of those proceedings and other information.

A defendant's pre-sentence investigation report served as the first and best source of information regarding a particular defendant, the facts of a particular homicide, and witness information. A pre-sentence investigation report includes a detailed description of the defendant that is generated by a probation officer following a criminal conviction. One purpose of the PSI is to provide the sentencing court with a comprehensive review of a defendant. In particular, the PSI will often contain descriptive information regarding the physical, mental, and emotional health of the defendant. It discusses the defendant's personal family history, ordinarily contains the defendant's personal criminal history, sometimes contain a description of the victim, and will often compile statements of the victim's family regarding the impact of the crime upon them.

[107] 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.

The PSI often contains a description of the crime that is generated from the trial record, police reports, and interviews with the defendant. Ordinarily, the prosecutor will be given the opportunity to provide the state's version of the crime, which is described as the "Official Version" of the crime. The Defendant is also permitted to provide his or her version of the crime, ordinarily entitled "Defendant's version" or similar nomenclature.

At the outset of the study we attempted to collect a copy of the PSI and a Department of Corrections Classifications Study for each defendant in our universe of potentially death-eligible cases. The initial primary source of this information was the Department of Corrections Records Department, which provided us with complete and very accommodating access to its records. Although there was some variation in the records of the Department, it generally had a record of each PSI generated for each defendant that is currently an inmate of a Department of Corrections 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 more than 700 homicides identified in our universe of criminal homicides. As each case was reviewed, law student coders completed the Initial Screening Instrument (ISI). And, as noted above, for each death-eligible case, we developed an expanded file of information in the DCI.

Once it was determined that a case was death-eligible, we undertook an additional stage of case file information development. For all penalty trial cases, including death-sentenced cases, the most important additional data sources were the record of the trial and sentencing, if available (especially the bill of exceptions of the penalty trial and the trial court's sentencing order), the opinion of the Nebraska Supreme Court if the case was appealed, and the briefs of the State and the defendant. Other helpful sources, when available, included affidavits of probable cause (which may include witness accounts and confessions) and newspaper accounts. Again, we examined and copied all of this information, when it was feasible.

We obtained information on the race and social background of the defendant from the PSI, and the Department of Corrections Classification Study. Death certificates provided the primary data source for information regarding the demographic background of the victim. Although the information in death certificates has varied throughout the years of the study, a victim's death certificate usually includes information on both the race and occupation of the victim.

2. Data Coding and Entry

The case files described above provided the basis for the case coding process conducted in Lincoln, Nebraska by five law students during the Summer and Fall of 2000. We trained the students and supervised them on a daily basis.[108]

The ISI for the non-capital cases contains 138 entries and requires an experienced law school coder about 1 and ½ hours to complete. In addition, the coders completed thumbnail sketches of each non-capital case.

The DCI used to code the capital murder cases contains over 500 entries for each case and takes an experienced law student coder an average of four hours to complete. Each student also completed a detailed narrative summary and a five to ten line "thumbnail sketch" for each case.

Co-author Gary L. Young, Esq. individually reviewed and verified the procedural coding for each statutory aggravating and mitigating circumstance and its strength of evidence measure. Project staff handled all data entry for the ISI, DCI, and the narrative summaries. A project staff

[108] Prior to coding, the coders were thoroughly instructed on each aggravator, and the history of the Nebraska Supreme Court treatment of each aggravator. The coders were provided with all case law reflecting the Nebraska Supreme Court's treatment of each aggravator, as well as a thorough description of the manner in which each sentencing court applied the aggravator in cases where the aggravator was found or considered and not found.

member not involved with the data entry visually checked the data entered against each DCI to flag data entry errors.

Upon completion of data entry, we recoded the variables in both the ISI & DCI data sets to a form suitable for data analysis.

3. Measures of Defendant Culpability

One's confidence in the inferences suggested by a study of this type depends on the validity of the measures of "defendant culpability" that define categories of similarly situated defendants. For example, to what extent was the murder premeditated and planned? The second dimension is the defendant's personal responsibility for the murder or any contemporaneous felonies or injures to victims who were not killed in the assault. For example, was the defendant the prime mover or merely an underling in the planning and commission of the crime? The third dimension of culpability is the defendant's character. For example, does the offender have a prior criminal record and did he or she accept responsibility for his or her role in the murder? These considerations are reflected in the statutory aggravating and mitigating circumstances listed in Table 1.

We view the concept of defendant culpability as synonymous with "deathworthiness" and use the terms interchangeably in this research.[109]

As we noted above, our measures of defendant culpability are important because we use them to define groups of similarly situated offenders. With such groups defined, one is in a position to determine if similarly situated offenders are treated differently because of their race or socio-economic status or the race or socio-economic status of their victims. These assessments provide the basis for assessing concerns about *disparate treatment* in the system. Disparate treatment exists only when prosecutors or sentencing judges, in the exercise of their

discretion, treat similarly situated offenders differently on the basis of illegitimate or suspect factors. Our analysis that focuses on the issue of disparate treatment is presented in Section VII.

In contrast to disparate treatment, *disparate impact* exists when the evenhanded application of a facially neutral policy disadvantages a protected group of individuals. For example, in the employment context, if employers apply height and weight requirements evenhandedly, they may adversely affect women who tend to be smaller in stature and weigh less. The impact of such a policy is known in anti-discrimination law as an *adverse disparate impact.* Our analysis that focuses on adverse disparate impacts in the Nebraska capital charging and sentencing system is presented in Section VII.

Because measures of defendant culpability define groups of similarly situated offenders, they also provide a foundation for addressing concerns about consistency and comparative excessiveness in the system without regard to the race and socio-economic status of defendants and victims. In such analyses, the issue is how frequently are similarly situated offenders sentenced to death. High death-sentencing rates among similarly situated offenders alleviate concerns about comparative excessiveness while low death-sentencing rates among similarly situated offenders enhance such concerns. Our analysis that focuses on inconsistency and comparative excessiveness in death sentencing is presented in Section IX.

Because of the crucial role of defendant culpability in this research, we developed the following four independent measures of defendant culpability.

a. The Number of Statutory Aggravating and Mitigating Circumstances Found or Present in the Cases: Three Measures

Our first measure of defendant culpability is the number of statutory aggravating circumstances found by the penalty trial court, or present in each non-penalty trial case (a

[109] See Appendix D for a glossary of social science and statistical concepts and technology used in this report.

counter variable).[110] Our second measure under this heading is a count of the number of mitigating circumstances found or present in the cases (a continuous variable). The third measure under this heading is the number of both aggravating *and* mitigating circumstances (a categorical variable).

This classification system is easily understood, is firmly grounded in the substantive law, and rests on none of the technical assumptions of multiple regression analyses that have attracted criticism in the past. These measures can also be applied with confidence to small samples of cases such as we have in our capital murder database.

b. The Salient-Factors Measure

Our second "salient factors" measure of culpability is used by some state courts in their proportionality reviews of death-sentenced defendants. This straightforward measure classifies each case initially in terms of its most prominent statutory aggravating circumstance and then subclassifies it on the basis of other statutory aggravating and mitigating circumstances in the case. The salient factors measure we rely on in this research (presented in Appendix A) is modeled on a measure developed in 1999 by Judge David Baime, Special Master to the New Jersey Supreme Court for Proportionality Review. This measure shares the strengths of the measures based on counts of aggravating and mitigating circumstances.

[110] We created two versions of this variable. The first is based on whether there is strong evidence of the presence of the aggravating factor in the case. We applied this version in the analysis of prosecutorial decisions on the ground that prosecutors will normally be guided by the facts of the cases and are often uncertain what the sentencing authority will find. It also recognizes that the court's finding of whether a factor is present in an individual case may be driven as much by considerations of the deathworthiness of the defendant as it is by the strength of the evidence on a particular aggravating circumstance. The second form of the variable treats it as present only if it was found to be present by the sentencing court in a penalty trial. We use this variable in the analysis of penalty trial death sentencing outcomes. For example in Table 4, the variable used for the number of aggravating circumstances in the case follows this protocol. In the analysis of the impact of race and the socio-economic status of the defendant and victim, the results were virtually identical, regardless of which form of the variable was used.

c. Logistic Regression-Based Measures

This set of measures is based on the results of logistic multiple regression analyses that estimate the impact of case characteristics (legitimate, illegitimate, and suspect) on outcome decisions in capital cases.[111] 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 developed "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 a penalty trial? The core 2RS models that we developed are presented in Table 4.[112]

In each of these models, we first examined the impact of the number of statutory aggravating and mitigating circumstances (Model 1). Next, we conducted systematic screening procedures to determine what other legitimate aggravating and mitigating case characteristics included in the DCI improved the predictive power of the analyses (Model 2). We then added variables for geography, race, and socio-economic status of both the defendant and victim

[111] Logistic regression is the regression procedure best suited for the analysis of binary outcomes, such as whether a death sentence is imposed in a case. Throughout this report, all references to regression and multiple regression analyses are to logistic regression procedures.

[112] With one exception, the logistic regression procedures that we used in this research to develop statistically based culpability indices and scales are identical to those used in earlier studies. See, e.g., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 47 at 52-56. Because of the relatively small number of cases and large numbers of explanatory variables, standard logistic regression was numerically unstable and it impaired the capacity of the models to converge properly. To minimize, these effects, we used a hierarchical Bayesian logistic model with diffuse priors to fit the models. See, Bradley P. Carlin, and Thomas A Louis, Bayes and Empirical Bayes Methods for Data Analysis, Monographs on Statistics and Applied Probability #69, Chapman & Hall, London. pp. 176-180 (1996). In our Nebraska analyses, we established likelihood equations and exploited properties of Markov chains to get samples from the posterior parameter distributions through the Gibbs sampling algorithm. This approach, although more time consuming to implement, produced more stable estimates. The results are reported in Table 4. Even though the number of variables that entered these models is small in contrast to earlier work we have done (in part because of the small number of death-eligible cases in general and death sentences in particular and in part

(Model 2RS). The regression coefficients estimated for the geographic, race, and SES variables (after controlling for all of the other variables included in the analysis) provide a useful measure of their average impact on outcomes.

Because of the small number of capital cases and death sentences in our database, there were substantial limitations on the number of variables that we could introduce into these regression analyses. For this reason, we rely more heavily on the measures described in subsections a and b above than we have in studies with larger numbers of cases and death sentences, although the disparities estimated with each set of measures are quite comparable.

Logistic regression analyses also produce for each explanatory variable a coefficient and an "odds multiplier," which estimates the extent to which, on average, the presence of a case characteristic increases or decreases the odds that an outcome will occur. For example, in Georgia research presented to the U.S. Supreme Court in *McCleskey v. Kemp*, the data suggested that a defendants odds of receiving a death sentence were enhanced, on average, by a factor of 4.3 if the victim were white. (These statistics for the four most important models are presented 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

---

because of the overwhelming 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.

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 .43 (56/131) in white defendant cases and .54 (25/46) in minority defendant cases. The 11 percentage point difference (.43-.54) 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 for defendant culpability are an example of an adjusted disparity.[113] For example, an odd-multiplier of 1.5 for the white defendant variable might tell you that after controlling for defendant culpability, on average the *odds* that a white defendant will receive a death sentence in a penalty trial are 1.5 times higher than the odds faced by similarly situated minority defendants.

Experience has taught us, however, that odds multipliers are subject to frequent misinterpretation.[114] For that reason, we more commonly report adjusted disparities that control for defendant culpability on a *culpability scale*, such as the number of aggravating circumstances in the cases or a regression based culpability scale. Of course, adjustments of this type would be

[113] Odds-multipliers are also known as odds ratios.
[114] The most common error is to interpret the statistic as a multiplier of "probabilities" rather than "odds."

unnecessary if *all of the* members of two groups being compared, say white and minority defendants, had the same culpability levels or the same distribution of culpability scores when we apply our culpability measures; in that situation, the average outcome say of/for death-sentencing rates, for the members of the two groups would give a valid picture of how similarly situated offenders are being treated.

However, we know that the distribution of culpability scores among different groups of offenders can vary substantially, a condition that will create a risk of faulty inference concerning the treatment of similarly situated offenders if adjustments for defendant culpability are not introduced into the analysis. For example, if all of the white defendants in an analysis had cases with high culpability levels and all of the minority defendants had cases of low culpability levels, a comparison of the average death-sentencing rates for the two groups would be quite misleading. The adjustment procedure that we use throughout this report estimates disparities after it reconfigures that data so that the members of the two groups being compared have similar distributions on the culpability scale being applied. An example of such adjusted disparities would be a 10 percentage point (.40 - .30) difference in the *adjusted* rates that death-eligible cases advance to a penalty trial or a 1.3 (.40/.30) ratio of those rates.[115] In Appendix C, we describe the adjustment procedure in more detail.

V. The Impact of Defendant Culpability on Prosecutorial and Judicial Decision-Making in Death-Eligible Cases

In this section we apply measures of defendant culpability to evaluate the extent to which culpability explains the key outcomes, i.e., the rates at which cases advance to a penalty trial and result in the imposition of a death sentence. The association between defendant culpability as measured by our core measures of defendant culpability and the key charging and sentencing

outcomes suggest the degree to which the system operates in a principled manner, given the statutory and non-statutory aggravating and mitigating circumstances in the cases.

Our measures of defendant culpability also lay the foundation for the analyses presented in Sections VI-IX, in which we evaluate evidence of: (a) geographic disparities in charging and sentencing outcomes (Section VI), (b) disparities in these outcomes based on the race (Section VII) and socio-economic status (SES) of the defendant and victim (Section VIII), and (c) inconsistency and comparative excessiveness in death sentencing outcomes (Section IX). Each of these inquiries requires the identification of sub-groups of death-eligible offenders with comparable levels of culpability as measured by our principal measures of defendant culpability.

A. The Impact of Individual Statutory Aggravating and Mitigating Circumstances

Figure 4 presents data on the individual impact on each aggravating and mitigating circumstance on death sentences imposed among all death-eligible cases. Part I focuses on the impact of the individual statutory aggravating circumstances, while Part II focuses on the impact of the individual mitigating circumstances. Each column presents the data for a single 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 "1(a)" factor (Defendant record of murder, terror, or serious assault) is present in the case, the death sentencing rate among all

[115] *See* Figure 20 for an example of charging and sentencing outcomes adjusted for defendant culpability.

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.[116]

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 outcomes among all death-eligible defendants. The results of a multiple regression analysis show comparable results.[117]

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 mitigating factors has a statistically significant effect.[118] This result is also confirmed in a multiple regression analysis.[119]

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

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

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

[118] 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.

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 for these three outcomes 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).

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).

The striking impact of the number of aggravating circumstances sentencing outcomes is also apparent in the logistic regression models presented in Table 4 (Row 1a). 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

[119] 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

"penalty imposed in similar cases, considering both the crime and the defendant."[120] The judges have access to all of the reported death 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 cases, there is a substantial presumption against a death 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 has 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.[121]

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 slight impact on outcomes. The regression results shown in Table 4 (Row 1b, Columns B through I) document a weak non-significant association.

---

significant at the .001 level.

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

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 (Parts 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 since the three death sentences imposed 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 Parts 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 Part 2 that we can perceive a meaningful effect of mitigation (a result consistent with the expectation that individual case characteristics have their greatest impact in the mid-range of cases where the room for the exercise of discretion is greatest).[122] In the single aggravator cases (Part 1), there is little to mitigate in the first place, while in the most aggravated cases (Parts 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 Cases

We next applied the salient factors of the cases measure of culpability, which is presented in Appendix A. This measure assigns each case to a single category identified by its most

[121] 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 .51 coefficient for that variable in the model for the prosecutorial decisions (.52: Row 1a , Column D).

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

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, Part I-IV of Figure 7 documents a 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 "1(e)" multiple victim cases with low mitigation and an additional aggravating circumstance, the death sentencing rate was .43 (6/14). However, Column A, Parts 5 and 6, indicate that two of the aggravators most commonly charged and found (1(b) and 1(d)) have average death-sentencing rates that are lower than the overall average (.16) and only a marginal impact on charging and sentencing outcomes, 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 and identifying the most death worthy offender, the salient 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 number of variables in the models is quite small.[123] The models are presented in Table 4. With them we

[123] 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

created culpability scales that reflect the impact of the legitimate factors only in explaining charging and sentencing outcomes. We used the regression results for three outcomes to create the scales shown in Figure 8. Each level of the scale groups together cases that are similar in terms of the predicted probability that the case will result in a death sentence or advance to a penalty trial, as the case may be.

Figure 8 presents judicial death-sentencing rates (Parts I and II) and the prosecutorial charging rates (Part III), 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. These outcomes reflect the charging decisions of prosecutors and the judicial sentencing decisions. Part II shows similar results on a 4 level scale limited to outcomes in the penalty trials in which the state sought a death sentence. These decisions reflect only the decisions of the sentencing judges. Part III shows a comparable analysis for the rates that death-eligible cases advance to a penalty trial strictly as a result of prosecutorial charging decsions, controlling for defendant culpability on a 7 level culpability scale.

The culpability scales in Parts I and II of Figure 8 distinguish quite well between the cases in which death sentences are routinely imposed from those in which they are not. In the most aggravated case category in Part I (Column E), we find 69% (20/29) of the death sentences imposed. Moreover, in the most aggravated category of cases in Part II, we find 48% (14/29) of the death sentences imposed. However, Part III indicates that the penalty trial scale is much less predictive. Indeed, for the first four levels of the culpability scale, there is no association at all between the defendant's culpability level and the rates that cases advance to a penalty trial.

---

endeavor than we have enjoyed in research in other states. But *see infra* note 125 on the explanatory power of the death sentencing 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."[124] We think the same can be said of Nebraska's penalty trial death-sentencing process depicted in Parts I and II of Figure 8. Indeed, the levels of defendant culpability measured by those regression based measures appear to explain the death sentencing outcomes of the Nebraska system even better than they did in the Georgia data.[125] This result is most likely attributable to the fact that the crucial penalty trial death-sentencing decisions are made by experienced 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.

The pattern of consistency in Nebraska's death sentencing outcomes appears, however, to be much less attributable to selectivity in prosecutorial charging decisions, a matter we discuss in more detail in the Section IX below on consistency and comparative excessiveness in capital sentencing.[126] Also, as we point out in that section, in spite of impressive evidence of consistency in the outcomes of Nebraska's penalty trials, the data indicate that the system falls well short of limiting death sentences to the most culpable death-eligible offenders.

---

[124] 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 case where the imposition of the death penalty in any particular case is less predictable").

[125] 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 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 207 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.

VI. Geographic Disparities in Charging and Sentencing Outcomes

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 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.[127] They also account for 67% (366/548) of the state's non-capital homicides, 61% (113/185) of the state's death-eligible murders, 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.[128] 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 urban areas, Douglas and Sarpy counties on the

---

[126] A comparison of the consistency of prosecutorial decision making in Georgia and Nebraska speaks to this issue. An analysis of prosecutorial decisions to advance death-eligible cases to penalty trial in Georgia produced an R^2 of .45. Id. at 643. The R^2 in the comparable Nebraska model of prosecutorial decision-making is .15.

[127] 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. U.S. Bureau of the Census—Census 1990, unadjusted, PL94-171 Released. Processed by Nebraska Department of Natural Resources, FSCPE, March 16, 2001.

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

one hand and and Lancaster county on the other hand.[129] When our substantive analysis reveals important differences between these two metropolitan areas, we note them.

Figure 9, Part I presents unadjusted geographic disparities in charging and sentencing outcomes between the major urban counties and 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 it was in greater Nebraska. In contrast, the penalty trial death-sentencing rate, shown in Part I, Column B, was 13 percentage points (.43 - .30) higher in greater Nebraska than it was in the major urban counties. The combined effect of these two decision points is shown in Part I, Column C – a 5 percentage point higher death-sentencing rate in the major urban counties than in greater Nebraska.

Part II of Figure 9 presents the statewide results after adjustment for defendant culpability measured by the number of aggravating circumstances in the cases. Column A shows a slightly larger geographic disparity in the rates that cases advance to a penalty trial, but Column B documents penalty trial death sentencing rates that are quite comparable -- .27 and .29. The bottom line is shown in Column C of Part II -- a 5 percentage point higher death sentencing-rate among all death-eligible cases in the major urban counties. Although this disparity is not statistically significant, in practical terms it means that over the 27 year period covered by this research, the risk of a death sentence for death-eligible offenders has been 50% (5/10) [130] higher in the major urban counties than it has been in greater Nebraska.

[129] *See supra* note 64 and accompanying text for a description of differential approaches in the two groups of counties to plea bargaining in capital murder cases.

[130] The denominator is the death sentencing rate in greater Nebraska and the numerator is the difference in the rates between the two parts of the state.

B. Geographic Disparities Over Time

Figure 10 depicts Nebraska charging and sentencing practices in the major urban counties and greater Nebraska counties in five-year intervals since 1973. The vertical bars for each time period from left to right present the (a) the rates at which cases advance to a penalty trial (the 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 (middle bars) are uniformly lower than the rates at which prosecutors advance cases to a penalty trial (left bars). However, in greater Nebraska, with the single exception of the first five years (Column B), the penalty trial death-sentencing rate has approximated (Column C) or exceeded (Columns D-F) 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 cases to penalty trials.[131]

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 greater Nebraska the average rate has declined only slightly. The third pattern of interest in Figure 10 is a sharp decline in greater Nebraska, in the rate that cases have advanced to a penalty trial since 1987, while the penalty trial rate has remained stable and much higher in the major urban counties during this same period.

Figure 10 sheds light on another issue: the Legislature's perception in early 1978 of "radically differing results" in different parts of the state.[132] A comparison of Column B in Part I

[131] 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.

[132] *See supra* note 82 and accompanying text.

and Part II suggests what the Legislature may have had in mind.[133] 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 greater Nebraska (.44 v. .20). The disparity in the unadjusted rates that cases advanced to a penalty trial was substantially higher in the major urban centers (.56 v. .42). Moreover, the death sentencing rate among all death-eligible offenders was 3.1 (.25/.08) times higher in the major urban counties.

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 in both geographic areas a smaller proportion of cases advanced to a penalty trial after 1982, but the geographic disparity is essentially the same in each time period: 28 and 31 percentage points, both statistically significant.

Part II shows disparities in penalty trial death-sentencing rates for both periods. Note that, 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 while in the later period (Column C) it was more than 3 times (.60 v. .17) higher in greater Nebraska.[134]

The data in Part III depicting death-sentencing rates among all death-eligible cases show the effects of the changes in penalty trial death-sentencing rates in the major urban counties documented in Part II. In the earlier period, the death sentencing rate among all death-eligible

[133] Because the Legislature was unlikely to have had any substantial information on the culpability of the individual death penalty defendants, it is likely that the disparities unadjusted for defendant culpability present the best picture of the Legislative perceptions.

cases was 3.7 (.37/.10) times higher in *the major urban counties* while in the later period it was 1.4 times (.14/.07) higher in *greater Nebraska.*

These data raise some obvious questions about the reasons both for geographic disparities in general and the changes that occurred 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.

C. Geographic Disparities after Additional 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 Part II of Figure 9 address this issue over the entire 1973-1999 period while the data in Figure 12 test this hypothesis over time. Specifically, Figure 12 compares charging and sentencing practices in the major urban areas and greater Nebraska 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 counties and greater Nebraska 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.[135]

Note first that the penalty trial rate for both the major urban counties and greater Nebraska 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).[136]

Figure 12 sheds less light on penalty trial sentencing decisions since only in the subgroups with two or three aggravators (the middle bars of Columns C and D) are the sample sizes large enough to make a meaningful comparison. 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 greater Nebraska. The overall 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 greater Nebraska.

The adjusted disparity for death-sentencing rates among all death-eligible cases, (shown in note 1 of Table 12) which reflects the combined impact of both the prosecutorial charging and judicial sentencing decisions was a non-significant 5 percentage points – .15 for the major urban counties v. .10 for greater Nebraska.

We conducted a variety of supplemental analyses in which we estimated geographic disparities controlling for other measures of offender culpability. The results were comparable to

[135] Although, the "Four or More" aggravators 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.

[136] This adjusted disparity reported in Figure 12, note 1, is significant at the .0003 level.

those presented in Figure 12 – substantial and statistically significant disparities in the rates at which cases advanced to penalty trial. Also, for the penalty-trial death-sentencing decisions, the rates were slightly higher in the counties of greater Nebraska but the disparities were not statistically significant.

Finally, we explored separately the unadjusted disparities in death-sentencing rates that we documented before and after 1982 in Figure 11. That analysis indicated a dramatic shift in the direction of the unadjusted geographic disparities in penalty trial sentencing practices after 1982. These results suggested that the analysis in Figure 12 covering the entire 1973-1999 period may mask significant, but different, geographic disparities in death-sentencing rates in each period. Accordingly, in Figure 13, we disaggregate the data into pre- and post-1983, and estimate geographic disparities after adjustment for defendant culpability.

The measure of defendant culpability in Figure 13 is the number of statutory aggravating circumstances in the cases. A comparison of Columns B and C of Part I indicate that after controlling for defendant culpability, the geographic disparities in the rates at which cases advance to a penalty trial are in the same direction and somewhat more pronounced and statistically significant in the post-1982 period.

Part II confirms that the direction of the geographic disparity in judicial death sentencing is different in the two periods. But after adjustment for defendant culpability, the disparities are dramatically reduced and no longer statistically significant. We have rarely seen the introduction of controls for defendant culpability have such a substantial effect on an unadjusted disparity of the magnitude shown in Figure 11, Part II.

Part III presents the adjusted geographic disparities in the rates that death sentences were imposed among all death-eligible cases. Row B indicates that in the earlier period, the death-

sentencing rate in the major urban counties was substantially higher (15 percentage points) than it was in greater Nebraska. 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 both before and after 1982 judges in the major urban counties and greater Nebraska shared a comparable 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 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[137] 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 (Part III, Column C).

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, the higher rates that death-eligible cases advance to a penalty trial in the major urban counties appear to have been offset somewhat by sentencing rates of the judges in the major urban

counties that are below the statewide norm. Similarly, the practices of prosecutors in greater Nebraska in advancing death-eligible cases to a penalty trial at rates below the statewide norm are offset in part by the sentencing practices of the judges in those counties that are above the statewide norm.

The changes we have documented since the early 1980s suggests that the 1978 amendments to the death sentencing statute (requiring comparative proportionality review at the trial court level) and the Legislature's expressions of concern about geographic disparities and arbitrariness in general may have had an effect. Specifically they may have influenced the decline of death-sentencing rates in the major urban counties and the apparent statewide adoption of a "two aggravator" rule as the general threshold for the imposition of a death sentence. Changes of this magnitude do not normally occur by chance.

D. Alternative Explanations for Geographic Disparities in the Rates that Cases Advance to a Penalty Trial

One plausible theory to explain the geographic disparities in the rates that cases advance to a penalty trial is that prosecutors outside the major urban areas are more conservative than their counterparts in the major urban areas in their assessment of the level of deathworthiness in a death-eligible case that is required to justify the state's seeking a death sentence. Another possibility is that prosecutors in the two areas may differ in terms of the discretion they believe they have under the law to waive the death penalty in first-degree capital murder cases unilaterally or in a plea bargain.[138]

---

[137] What we mean by "explain" is that when the analysis takes into account different levels of criminal culpability of the defendants in the two different parts of the state, what initially appeared to be large differences in sentencing practices, turn out to be only a modest non-significant difference or no difference at all.

[138] Interviews with prosecutors in the Douglas County Attorney's office suggest that such a perception may exist in that office.

Knowledgeable Nebraska prosecutors, defense counsel, and others have suggested several other possible explanations:[139]

1. the disparities may be explained by the greater level of resources that are available to prosecutors in large urban areas to prosecute capital cases.
2. prosecutors in the major urban counties have more experience with capital prosecutions and therefore are more inclined on the basis of this experience to advance a case to penalty trial than are their counterparts in greater Nebraska counties.
3. judicial attitudes about the death worthiness of an individual case may have a significant effect on the willingness of a prosecutor to advance a capital case to a penalty trial.
4. prosecutors may be influenced in their decisions to advance a capital case to a penalty trial by the imminence of their re-election.

We have developed measures that permit us to test the plausibility each of these alternative explanations for the geographic disparities in the rates at which cases advance to penalty trial.

1. Disparities in Prosecutorial Resources

It is commonly believed throughout the country that small counties can be adversely affected if they are required to finance themselves complex long-term criminal trials, which aptly describes many capital prosecutions.[140] Accordingly, one might reasonably expect to see fewer capital cases advance to a penalty trial in counties with fewer prosecutorial resources.[141]

---

[139] We appreciate the helpful comments and suggestions of County Attorneys at the 2001 Annual Meeting of the Nebraska County Attorneys Association.

[140] In Nebraska, for example, of the 93 counties in the state, many are currently staffed by a part-time County Attorney.

[141] There is also an issue of caseload. In a number of major urban counties in this country that have substantial prosecutorial resources, the case load is so high that there are few resources available to finance capital trials and plea bargains are a common means for disposing of capital cases.

We tested in two ways the hypothesis that disparities in prosecutorial resources explain geographic disparities in the rates that cases advance to penalty trials in Nebraska. We first developed a series of quantitative measures of prosecutorial resources[142] and correlated them with the rates that cases advance to a penalty trial. The only measure that showed a significant relationship to the penalty trial outcome was the variable for the county attorney's overall budget, which is substantially higher in the major urban counties.[143]

Next, we introduced that variable into a logistic regression analysis designed to explain which cases advanced to a penalty trial. The model also included variables for defendant culpability, the race and socio-economic status of the defendant and victim, and whether the case was prosecuted in a large urban or other county (the "geography" variable). In this analysis, the variable for the magnitude of the prosecutorial budget was statistically significant, but it suggested that after controlling for geography and defendant culpability, the larger the prosecutorial budget on average, the *less* likely the cases were to advance to a penalty trial.[144] In addition, the "geography" variable, which distinguishes between the rates at which cases advance to a penalty trial in large urban and other counties remained substantial and significant.[145]

Our second approach was to consider the availability of resources from the Attorney General's Office to assist small counties in the conduct of complex criminal cases. In a number of states, including Nebraska, the office of the Attorney General offers prosecutorial services to assist smaller counties in the conduct of complex criminal cases. The Nebraska experience has been that smaller counties request such assistance in criminal prosecutions approximately 5-8

[142] The measures are: (a) the County Attorney budget for 1997-98, (b) the salary of the County Attorney, and (c) the salaries of the Deputy County Attorneys in the county. *County Budget Reports to the Nebraska State Auditor:1997-98* (1999).
[143] The Pearson correlation coefficient was .21, significant at the .01 level.
[144] The regression coefficient was -.01, significant at the .05 level.
[145] The regression coefficient for prosecution in a major urban county was 3.8, significant at the .01 level, which is larger than the 1.1 coefficient estimates in our core models reported in Table 4.

times a year.[146] Requests are routinely made for such assistance in homicide cases, although the exact number is unknown. According to Assistant Attorney General William Howland, no such request for assistance in the prosecution of a complex case, capital or non-capital, has ever been denied by the office of the Nebraska Attorney General.[147]

These two inquiries, one quantitative and one qualitative, suggest that differences in prosecutorial resources do not explain the differences in the rates that capital cases advance to penalty trial in Nebraska's major urban and greater Nebraska.

2. The Experience of Prosecutors in Capital Litigation

The hypothesis that the experience of prosecutors in handling capital cases could explain the differences in the rates that cases advance to penalty trial is entirely plausible. Capital trials with the state seeking a death sentence are a significant test for lawyers on both sides. It would be understandable if prosecutors with less experience were more inclined to waive the death penalty unilaterally or by way of a plea agreement, than their counterparts with fewer years of experience in capital litigation.

To test this hypothesis, we developed a series of measures of the experience of prosecutors in handling homicide cases in general and capital cases in particular during the time period covered by this project. The measures distinguish between simply handling a homicide prosecution and trying the case.[148]

---

[146] Gary L. Young interview with William Howland, Nebraska Attorney General's office.
[147] Id.
[148] The measures are based on counts of prosecutor and defense attorney names among the 700 plus cases in our larger universe of homicide cases from which we culled the death-eligible cases. The record of each of those cases indicates the names of the lawyers on each side and whether the case was tried or resulted in a guilty plea. With this information, we created a measure of how many homicide and capital cases each prosecutor and defense counsel handled from 1973 to 1999 and how many of those cases were tried. One limitation of these measures is that they cover the entire period of the study and are not tailored to the prior experience of each prosecutor and defense attorney at the time of each prosecution.

The measure of prosecutorial experience revealing the strongest correlation with whether a death-eligible case advanced to a penalty trial was the number of capital trials the prosecutor conducted.[149] It indicates that on average the higher the number of capital trials, the higher the likelihood that a prosecutor's cases will advance to a penalty trial. This result is consistent with expectations since the larger number of penalty trials in the major urban counties would naturally result in more experience in such litigation for the prosecutors in those counties.

The next step of the analysis was to include the variable for prosecutor experience in trying capital cases in the regression analysis designed to explain which capital cases advanced to a penalty trial. In that analysis, the variable for prosecutorial experience did not emerge as a significant predictor in explaining which cases advanced to a penalty trial, and its inclusion in the analysis did not weaken the strong effect of the geography variable which distinguishes between the large urban counties and the counties of greater Nebraska.[150]

It is interesting to note that prosecutorial experience in trying capital cases is also strongly correlated with the imposition of a death sentence in a penalty trial. The data suggest that the more capital trials the prosecutor has conducted the greater likelihood the court will return a death sentence.[151] One might expect to see this on the assumption that the more experienced prosecutors would be assigned to the most serious cases with the greater likelihood of a death sentence of the basis of the facts of the case. However, after adjustment for defendant culpability in a regression analysis, the association between prosecutorial experience and the death sentencing outcome continues to hold.[152]

---

[149] The correlation coefficient was .22, significant at the .001 level.

[150] The regression coefficient for the prosecutorial experience in trying capital cases variable was .31, significant at the .26 level. The regression coefficient for the major urban v. greater Nebraska counties variable was 1.3, significant at the .01 level.

[151] The simple correlation coefficient is .26, significant at the .02 level.

[152] In this analysis, the coefficient for the number of capital trials conducted is 3.4, significant at the .02 level, a very large effect.

Also of interest is the apparent impact of defense counsel's experience on the likelihood of a penalty trial and a death sentence in a penalty trial. Contrary to expectations, the more experienced the defense counsel, the higher the risk of a penalty trial,[153] even after controlling for defendant culpability and the place of the trial. The experience of defense counsel showed no unadjusted association with the death sentencing outcome, and there was no effect apparent in the regression analysis, which controlled for defendant culpability.[154]

This analysis suggests that the experience of the prosecution in conducting capital litigation, especially trying capital cases, may have some effect on the frequency with which capital cases advance to a penalty trial. However, it does not significantly explain the documented disparity in the rates that cases advance to a penalty trial in the major urban counties and the counties of greater Nebraska.

3. Judicial Sentencing Practices as a Proxy for Judicial Attitudes.

Some have suggested that in the exercise of discretion concerning the advancement of cases to penalty trial, prosecutors are constrained by the prosecutor's perception of the trial judge's attitude about the propriety of the death penalty in the case. On the one hand, if the prospects are high that the judge will impose a life sentence, economy may suggest that a faster way to get there is simply to waive the death penalty and avoid the risk of irritating the court with an unnecessary sentencing hearing. On the other hand, there are cases in which the prosecutor wants to waive the penalty trial in a plea bargain but the court expressly refuses to countenance the agreement and insists on a sentencing hearing.[155]

---

[153] r = .32, p = .0001.

[154] r = .11, p = .36. In the regression analysis, the coefficient for the experience of defense counsel in trying capital cases was .66 (p = .24).

[155] Our records document two such cases in which the court records clearly indicate that the court insisted on conducting a penalty trial when the prosecutor sought to waive the death penalty as part of a plea bargain. There may be other occurrences of this that were not apparent on the records in our files.

To test this hypothesis we ideally need a measure of the trial judge's attitude about the appropriateness of the death penalty in each case. However, we have no factual basis for creating that measure. What we have instead is the basis for creating a measure of judicial penalty trial voting practices that likely reflects the culpability levels of the cases heard by each judge (i.e., the more aggravated the case, the more likely it is that death is the result).

Our principal measure of judicial attitudes was the proportion of penalty trial cases (for judges with participation in three or more sentencing hearings) in which each judge had been involved that resulted in a death sentence. Because of the small number of judges who had heard three or more cases, we developed alternative measures that count the number of cases in which each judge participated and the result was a death sentence.[156] The measures also distinguished between cases in which the judge had presided alone or had empanelled a three-judge court. We developed these measures on the basis of the information in the DCI indicating the name(s) of the judges who participated in each sentencing hearing.[157]

None of the measures of judicial attitudes showed a significant relationship with the rate that prosecutors advanced cases to a penalty trial, either with or without controls for defendant culpability.[158] In fact, the data are consistent with a greater likelihood of a penalty trial when the

[156] We prepared a similar measure of the number of times a judge's case resulted in a life sentence.

[157] These measures have limitations, i.e., we have small samples for many judges and there is a distinct correlation between the number of cases heard with either sentencing outcome and the number of years the judge has been on the bench, although it is unclear the bias this may introduce. Another possible concern is that we have no controls for the relative culpability levels of the defendants in cases that each judge hears. For example, the judges associated with many life sentenced cases may have participated in a disproportionate number of cases with low levels of culpability. However, we consider it reasonable to assume that there is a random distribution among the judges in terms of the culpability levels of the cases that they hear.

[158] The simple correlation of our principal measure, the death sentencing rate among all cases heard by each judge was negative .07, $p = .39$. There is a weak non-significant positive correlation between the number of solo penalty trials of the judges that resulted in a death sentence and the advancement of cases to a penalty trial ($r = .12$) ($p = .16$). However, there is also a similar weak positive correlation between the number of solo penalty trials and the advancement of cases to a penalty trial ($r = .12$, $p = .16$).

judge has participated in more cases that resulted in a life rather than a death sentence.[159] We are inclined to discount, therefore, that the geographic disparities in the rates that capital cases advance to a penalty trial are the product of judicial influence over prosecutorial decisions.

4. The Imminence of Prosecutorial Election

Because of the political salience of the death penalty in many jurisdictions, the record of an elected prosecutor or elected judge in prosecuting and sentencing in capital cases is sometimes a salient factor in their re-election campaigns. It is commonly believed, therefore, that in some jurisdictions elected prosecutors and judges may be influenced in their decision-making by the imminence of their re-election.

We tested this hypothesis by first creating a measure of the time between the date of conviction of each capital case and the prosecutor's next election. (We did not apply this analysis to the sentencing judges because they are appointed.) We then correlated this measure with the rate that prosecutors advance cases to penalty trial. We also created a scale that classified the cases in one-to-four year periods between the prosecutor's next election and the date of conviction. Statewide and at the local level these measures showed no effect in bivariate analyses and in logistic regression analyses.

Finally, we conducted a logistic regression analysis that (in addition to measures for defendant culpability, the race of the defendant and the victim, and the socio-economic status of the defendant and victim) included variables for (a) judicial propensity, (b) county attorney budgets, (c) the experience of the prosecutor and defense counsel, and (d) the imminence of prosecutorial elections. In terms of explaining the rates at which cases advance to a penalty trial,

[159] In the regression analysis, the coefficient for the number of life sentences outcome cases in which the judge has participated was .21, $p = .03$. This may reflect the fact that the judicial death-sentencing rates are lower in the major urban counties where the cases are most likely to advance to a penalty trial, although the place of prosecution was

only the experience of defense counsel variable had a significant coefficient.[160] The coefficient for the geography variable remained substantial and significant beyond the .10 level.[161]

5. A Note on Omitted Variables Concerning "Compelled" Plea Bargains

The data in this study concerning prosecutorial charging and plea bargaining practices are limited to the information available to us in court records and the pre-sentence investigation report (PSI).[162] Also, for 100 cases where it was unclear if a plea-bargain offer had been made by the prosecution, we inquired of both the prosecutor and defense counsel if such an offer had been made. However, neither of these sources identify proof problems that may have "compelled" a waiver of the death sentence and the offer of a plea bargain as the exclusive means of obtaining a conviction.[163] In such cases, the decision to waive the death penalty would not necessarily reflect a discretionary decision concerning the deathworthiness of the defendant, but rather may reflect a practical judgment informed by the need to obtain a guilt trial conviction.

We do not believe it plausible that our inability to distinguish between "compelled" and "non-compelled" plea bargain agreements has biased our documented geographic disparities

---

controlled for in the regression. In addition, the probability of a penalty trial is lower for judges with higher levels of participation in cases that is result in a death sentence (the logistic coefficient is – 1.4 (p = .17)).

[160] (b = 1.0), (p = .02).

[161] (b = 2.7), (p = .07).

[162] At the proposal stage of the study, we intended to request that individual prosecutors who handled pleas provide us with their comments on their motivations for entering the pleas, if collecting that information was feasible. However, subsequent discussions with members of the Crime Commission Subcommittee that supervised the Study indicated that it was probably unreasonable to expect that much fruitful information would be provided to us on this issue. These discussions raised the concerns that County Attorneys would be uncomfortable providing us their mental impressions regarding the strength of their cases, the quality of evidence used to convict defendants or as the factual bases for pleas, and similar information. Such mental impressions would ordinarily not be discoverable by defendants because they would be subject to a work product privilege. The concern was raised that if these matters were disclosed for this study, the disclosure would constitute a waiver of the attorney's work product privilege over those mental impressions, and defendants may be able to seek discovery of that information to support litigation in their cases. We also raised the possibility of collecting this type of information at the annual meeting of the Nebraska County Attorneys Association held in March of 2001, and requested that County Attorneys advise us if in their judgment County Attorneys would be willing to disclose this information. Discussions with County Attorneys at that meeting did not allay the concerns raised earlier regarding discovery of that information. None of the County Attorneys with whom we spoke at that time indicated that they would be willing to provide that information.

[163] A classic example is when the testimony of a coperpetrator is the only source of information available in a case and a condition for the coperpetrator's cooperation is a plea bargain including the waiver of a death sentence.

concerning the rates that cases result in plea bargains and advance to penalty trials. Such bias would occur only if the compelled plea bargains were a much more common phenomena in greater Nebraska (where plea bargains are more common and penalty trials are less common) than they are in the major urban counties, particularly Douglas county, which advances death-eligible cases to penalty trial at a higher rate than any other county in the state. We consider it more likely that the incidence of compelled plea bargains is randomly distributed throughout the state. In this regard, recall that the geographic disparity in the rates that cases advance to penalty trial is very large. Accordingly, bias in our finding as a result of this omitted variable would require a very much higher incidence of compelled plea bargains outside Nebraska's major urban counties than occurs in the major urban centers. We consider this unlikely.

The upshot of our analyses is that none of the rival hypotheses offered to explain the geographic disparities in the rates at which cases advance to penalty trial appear plausible. Our conclusion, therefore, is that those geographic disparities are more likely explained in the two ways suggested above. The first possibility is different perceptions of the breadth of prosecutorial discretion under the law to waive the death penalty in capital prosecutions.[164] The second possibility is differential perceptions of the degree of culpability and deathworthiness of similarly situated death-eligible offenders that needs to exist before a case is advanced to a penalty trial with the state seeking a death sentence. What might explain these different perceptions in the major urban counties and greater Nebraska?

The disparities in prosecutors' policies may reflect differences in community attitudes and concerns about crime and the necessity of prosecuting capital murder cases to the full extent of the law. Certainly Nebraska's major urban counties have higher crime and homicide rates

[164] *See supra* note 64 and accompanying text for a description of the different legal interpretations.

than do the other counties.[165] Prosecutors in the major urban counties may well be reacting to those community attitudes and concerns.

VII. Race of the Defendant and Victim Disparities in Charging and Sentencing Outcomes.

The issue of race in Nebraska's capital charging and sentencing system is raised by straightforward demographics. Racial minorities constitute approximately 10% of the population of the state of Nebraska.[166] Yet they represent 24% (7/29) of the defendants who were sentenced to death during the period of this study. In addition, minorities represent 33% (29/89) of the defendants whose cases advanced to a penalty trial with the state seeking a death sentence.[167]

It is an important finding of this research, therefore, that there are no significant statewide race disparities in penalty trial death-sentencing decisions or in the rates that death sentences are imposed among all death-eligible cases. The only evidence of race-of-defendant disparities statewide is in prosecutorial decisions to waive the death penalty and to advance capital cases to penalty trial. However, on closer examination, these disparities appear to be largely an artifact of a greater willingness of prosecutors in the major urban counties (where 90% of the prosecutions against minorities statewide take place) to advance death-eligible cases to a penalty trial than is the case in the counties of greater Nebraska. Once one controls for the location of the prosecutions, the race disparities disappear.

---

[165] In the Nebraska "metropolitan" statistical areas where 864,156 persons reside, the FBI "Crime Index Total" was 46,775 in 1999. (The crime index total is "composed of selected offenses used to gauge fluctuations in the overall volume and rate of crime reported to law enforcement. The offenses included are the violent crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson.") In the cities outside metropolitan areas where 392,151 persons reside, the crime index total was 15,923. In rural areas where 409,693 persons reside, the crime index total was 5,746 in 1999. FBI, UNIFORM CRIME REP., INDEX OF CRIME BY STATE (1999).

[166] The 2000 census reports 90.8% white, 4.4% African American, 1.3% Native American, 1.6% Asian, .1% Native Islander, and 3.3% "some other race." US Census Bureau, Census 2000 Table DP-1- Profile of General Demographic Characteristics: Nebraska 2000 (2001) (one race or a combination of races reported) (2001).

[167] Minorities constitute 27% (50/185) of the defendants in all death-eligible prosecutions and 45% (249/548) of the defendants in all Nebraska non-capital homicide prosecutions between 1973 and 1999.

As we explain in more detail below, the data within the major urban counties document no significant race-of-defendant disparities. Indeed the death sentencing rates in those counties are slightly higher in the white defendant cases. In greater Nebraska, the race disparities are trivial, not significant, and based on very small samples. 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 or are sentenced to death at different rates because of their race.[168] Rather, the data supports a finding that there is no differential treatment based on race.

A. An Overview of Charging and Sentencing Disparities Based on the Race-of-Defendant and the Victim

Figure 13.1 presents an overview of unadjusted (Part I) and adjusted (Part II) race-of-defendant and race-of-victim disparities in statewide charging and sentencing decisions. Column B focuses on the race-of-defendant effects, Column C focuses on the race-of-victim effects, and Column D focuses on the minority defendant/white victim effects. The three rows in Parts I and II, document the disparities in (1) the rates that cases advance to a penalty trial, (2) penalty trial death-sentencing rates, and (3) the death-sentencing rates among all death-eligible cases.

Focus first on the unadjusted race of defendant effects in Column B. Row 1 of Part I shows a 14 percentage point (.58 - .44) unadjusted white-defendant effect, significant at the .10 level. These effects are substantially offset, however, by the race effects in judicial decision-making shown in Row 2 indicating that statewide white defendants are sentenced to death at a 12 percentage point higher rate than minority defendants, although this disparity is not statistically significant. The combined effect of these two decision points is reflected in the disparity shown in Row 3, Column B among all death-eligible cases -- a 2 point higher death-sentencing rate for white defendants.

---

[168] As noted *supra*, page 13, disparate treatment refers to the differential treatment of similarly situated offenders.

The adjusted disparities in Part II of Figure 13.1 show comparable white defendant effects for the prosecutorial decisions (-16 points), weaker effects in the judicial sentencing decisions (4 points), and a 3 point *higher* death sentencing rate for minorities among all death-eligible cases. These data fail to support any inference of differential treatment in the judicial sentencing decisions. The results in Row 1 for the prosecutorial charging decisions are less clear, however, and we give them closer scrutiny below.

Focus next on the race-of-victim effects documented in Column C of Parts I and II. Research in a number of other jurisdictions has documented more punitive treatment of white-victim cases. Contrary to the expectations suggested by this prior research, Part I, Row 1 shows slightly *lower* penalty trial rates in the white-victim cases, although the death-sentencing rate (Row 2) is 17 percentage points higher in those cases. However, none of these effects is significant and they are based on a very small sample of non-white victim cases.

The adjusted disparities in Part II are even weaker, especially in the sentencing decisions (Row 2), and the 4 percentage point overall disparity in Row 3 shows a *lower* average death sentencing rate among all death-eligible cases for the white victim cases. These data, therefore, fail to support an inference of disparate treatment in either charging or sentencing decisions on the basis of the victim's race.

Prior research in a number of other jurisdictions suggests that minority defendants with white victims may be at particular risk of differential treatment in capital charging and sentencing decisions. The data in Column D test this hypothesis for Nebraska. The unadjusted disparities in Part I, Row 1 support this expectation with respect to the prosecutorial charging decisions, i.e., 16 percentage point higher penalty-trial rate for minority defendants with white victims. However, Row 2 shows no race effects in the sentencing decisions, which results in the

5 percentage point disparity among all death-eligible cases shown in Row 3. The adjusted effects shown in Part II are comparable except for the 13 point effect shown in Row 2 Column D. However, the bottom line in Row 3 shows no effect at all. These data therefore fail to support an inference of disparate treatment in judicial sentencing decisions. However, because the results of the prosecutorial charging decisions (Row 1, Column D) appear to track the race of defendant data presented in Column B, we give them closer scrutiny below.

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

Additional statewide data on prosecutorial charging decisions are presented in Figures 14, 15, and 16. Figure 14 presents 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 disparities in both parts of Figure 14 suggest that white defendants enjoy a distinct advantage. The results reported in notes 1 and 2 of Figure 14 indicate that after adjustment for defendant culpability, white defendants are substantially 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.[169] 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

[169] 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 II). 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 a 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 on 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 also analyzed these race effects using our other measures of defendant culpability. The results are generally to the same effect.[170]

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

Without more, 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 level range of defendant culpability where there is the greatest room for the exercise of discretion.[171] An alternative possibility is that these disparities are explained by something other than differential treatment of similarly situated white and minority defendants.

[170] 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 shown in Table 4, Row 2a, Column D, 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, Table 4, Row 2a, Column B, the coefficient for the white-defendant variable is -.67 and not statistically significant.

Because defendants do not always accept plea bargain offers tendered 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.

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

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

The results of that analysis are presented in Figure 17, which estimates white defendant disparities separately in the major urban counties and greater Nebraska for 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 of Figure 17 indicates that without adjustment for defendant culpability, in 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 three subgroups of cases (Columns B, C, and D). However, the effects are small, and in Columns C and D, the sample sizes are small. 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 greater Nebraska, Part II, Column A shows unadjusted disparities that are consistent with disparate treatment favoring white defendants. However, when controls for defendant culpability are introduced, the results are mixed, 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 counties v. greater Nebraska 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 Figure 18, Row A shows no effects in charging and plea bargaining (Column B), a higher penalty trial death sentencing rate for whites (Column C), and a comparable disparity among all death-eligible cases (Column D).[172] In greater Nebraska (Row B), white-defendants fared better in penalty trials (Column C), but there was only one 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).[173] However, Column D indicates that after adjustment for defendant culpability in a scale based on an analysis of death sentences imposed among all death-eligible cases, the death sentencing rate is lower for minority defendants with white victims.

The data for greater Nebraska (Row B) show minority defendant/white victim effects that are consistent with a theory of disparate treatment (Column D), but because of the small disparities based on very 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 greater Nebraska suggests that the statewide race effects in prosecutorial decision-making are primarily a by-product of the greater rate that cases advance to a penalty trial in the

[172] When the data for the major counties are disaggregated and we compare Lancaster County with Douglas and Sarpy counties combined, the sample sizes are small in Lancaster County. 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.

[173] 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 ($p = .86$).

major urban counties. 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, Column B reveals 26 minority defendants with white victims statewide, 85% (22/26) of whom are prosecuted in the major urban counties.[174]

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 association 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.[175] 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.[176]

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

1. The Concept of Disparate Impact

The preceding analysis does not support a theory of disparate treatment in capital charging and sentencing decision making. However, the impact of differential prosecutorial

---

[174] Specifically, Part I, Panels A and B (dark bars) indicate a statewide total of 46 (41 + 5) minority defendants with 41 prosecuted in the major urban counties. Part II, Panels A and B (dark bars) indicate a statewide total of 24 minority defendants with white victims, 20 of whom were prosecuted in major urban counties.

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

[176] 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 & Frederick Mosteller eds., 1977).

charging policies in the major urban counties and greater Nebraska statewide presents an example of an "adverse disparate impact" on racial minorities.

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.[177] 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 its application 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 weight less than men, a higher proportion of women than men are excluded by the evenhanded application of this otherwise facially-neutral job qualification.[178] 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, and funding levels per student vary widely across many states. If minorities largely reside in the communities with per student appropriation for public education that are

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

[178] 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 term of "business necessity." If such a justification is forthcoming, such as minimum height and weight requirements are necessary in hiring fire fighters, the policy may stand. If it cannot be justified under this standard, it may not be used.

below the statewide average, they experience an adverse disparate impact by virtue of where they reside and the state law that delegate discretion for school financing to local officials.

2. Evidence of an Adverse Disparate Impact on the Rates that Cases Advance to Penalty Trial.

In Nebraska's capital charging and sentencing system, the adverse disparate impact on minority defendants statewide flows from differential charging and plea bargaining practices in the major urban counties and greater Nebraska. Specifically, the rates that cases advance to penalty trial are highest in the communities in which the vast bulk (90%) of minority defendants are prosecuted for capital murder. 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 at rates that are substantially higher than the rates that prosecutors in the counties of greater Nebraska advance cases to penalty trial.

Because 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 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 white defendants. Figure 13.1, Part I, Row 1, Column B documents a statistically significant 14 percentage point unadjusted effect, while Part II, Row 1, Column B of that Figure documents a significant 16 percentage point adjusted disparity.

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, noted above, 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 suggest quite the contrary.

What then can one make of the adverse impact flowing from the sharp disparities in the rates that death eligible cases advance to penalty trial in the major urban counties as contrasted to greater Nebraska? At least two characterizations come to mind. One is that the adverse disparate impact on minority capital defendants that we have documented *is not* a matter of concern; from this perspective the impact is merely an anomaly resulting from the fact that minorities primarily reside in the state's major urban areas. A second possible characterization of the data is that the adverse impact *is* a matter of concern; this perspective reflects the view that in spite of the its demographic origins, this adverse impact places on minority defendants is a significant and disproportionate burden.[179]

Given the adverse impact of prosecutorial charging decisions on minorities statewide, one could reasonably expect to see an adverse impact against minorities in the imposition of death sentences among all death-eligible cases. Indeed, if sentencing judges imposed death sentences at comparable rates in white and minority defendant cases, this is exactly what one would see. However, this does not occur. The reason it does not is that the penalty trial judges in the major urban counties (where all but one of the minority penalty trials were held) sentence white defendants to death at a higher rate than they do minority defendants. (See Figure 18, Part I, Column C, Row A.) The bottom line for the state as a whole is presented in Figure 13.1, Parts I and II, Row 3. These data reveal only small, non-significant and *inconsistent* disparities on the order of 2 and 3 percentage points. These results clearly indicate that the race of defendant

[179] In employment and housing discrimination law, a substantial adverse disparate impact against a protected group will not stand unless it can be justified by a compelling business interest.

disparities in the rates that cases advance to penalty trial statewide do not produce a statewide adverse impact in the rates that death sentences are imposed among all death-eligible cases.

VIII. The Impact of Defendant and Victim Socio-Economic Status (SES) on Charging and Sentencing Outcomes.

We measure the socio-economic status of defendants and victims in terms of their occupations. There is a substantial literature on the importance of different occupations and the prestige associated with each.[180] For this analysis, we drew on the results of a nationwide 1989 opinion poll that asked a "representative sample of non-institutionalized adults to evaluate the prestige of occupational titles."[181] We used these scores to rank-order the occupations reported in our case records for defendants and victims and created a three level scale of high, middle, and low SES for each.[182]

[180] The literature is summarized well in Keiko Nakao and Judith Treas, *Updating Occupational Prestige and Socioeconimic Scores: How the New Measures Measure Up* in SOCIOLOGICAL METHODOLOGY, (Volume 24) 1-72 (Peter V. Marsden ed. 1994).

[181] Id. at 5. The scores are reported at id. pp. 42-69. Sociologists also use prestige scores to estimate a "socio-economic index" (SEI) by regressing the prestige scores on the education and income levels of the people who are employed in the different occupations. These scores appear to be the preferred measures in sociological studies of "occupational mobility and related process of status allocation" because they are better predictors of these outcomes than are the unadjusted prestige scores. David L. Featherman and Robert M Hauser, *Prestige or Socioeconomic Scales in the Study of Occupational Achievment*, 4 SOCIOLOGICAL METHODS & RESEARCH 403,405 (1976). However, we believe that the unadjusted prestige scores are more relevant to our research because they reflect the perceived "standard of living, power and influence over other people, level of qualifications, and the value to society" of people in different occupations. Id. at 404.

[182] Although we obtained a prestige score for each victim, we were guided in our three level classification by the codes for Questions 50 (defendants) and 82 (victims) in the DCI, which were as follows: High SES: Professional and Managerial (professional [doctor, lawyer, etc], executive or business person, small business person or farmer [other than farm worker], judge, legislator, government official, and military officer); Law Enforcement and Military (police officer and military officer), and government officer; Middle SES: White-Collar (office worker, apartment/hotel manager, store manager, secretary, government employee), Misc. (juvenile, student, retired persons, homemaker supported by family, disabled), enlisted military personnel; and Low SES: Blue-collar and unskilled laborers including farm workers; Service Workers (including security guard, store clerk, service station attendant, waiter, waitress, domestic, custodian, etc.); Unstable or Extralegal (including drifter, professional criminal (organized crime), prostitute or pimp, individual criminal (e.g., thief), drug dealer, sporadic odd jobs, no particular skill, chronically unemployed (including recipient of pubic assistance)).

A. Defendant Socio-Economic Status (SES)

The statewide data document no significant disparities in charging and sentencing outcomes on the basis of the socio-economic status (SES) of the defendant. That is, there is no evidence that defendants are treated differently because of their SES. Nor are such effects apparent when we focus separately on the major urban and greater Nebraska.[183]

B. Victim Socio-Economic Status (SES)

1. Statewide Disparities

A "high victim SES effect" results in a greater risk of a penalty trial and death sentence for the defendant when his or her victim has high SES. A "low victim SES effect" results in a reduced risk of a penalty trial and death sentence when the victim has low SES.

The statewide data document disparities in charging and sentencing outcomes based on the socio-economic status (SES) of the victim both before and after adjustment for defendant culpability. The evidence of both high and 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

[183] There were 5 high SES defendants. One of them advanced to a penalty trial and received a life sentence, for an overall death-sentencing rate among high SES death-eligible offenders of .00 (0/5). The comparable rate for the mid-range SES defendants was .32 (7/22). However, the rate for low SES defendants was .14 (20/145). The comparison of low SES defendants v. all others showed no significant effects before or after adjustment for defendant culpability. The number of high SES defendants was too small to support a meaningful analysis of high SES offenders v. others.

III data indicate that the death sentencing rate among all death-eligible defendants is 3.0 (.30/.10) times higher when victim SES is high than when it is low.

Columns 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 (Columnes C and D).

Figure 20 presents data on the statewide impact of victim SES controlling for the number of aggravating circumstances in the cases.[184] Column A indicates the impact on the rates that cases advance to a 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 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 each model, the victim SES variable is statistically significant. In terms of practical importance, it is useful to compare in Table 4 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

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

sign of the coefficient) range from .59 to .72, while the coefficients for the number of aggravating circumstances in Row 1a 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 circumstances 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. Part I, Column A reports an unadjusted disparity of 17 percentage points. The effects are almost exclusively concentrated in the two aggravator 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 decisions (Column A – 28 percentage points) and sentencing decisions (Column B – 23 percentage-points). 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.[185]

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

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-eligible 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 high[186] and low[187] victim SES effects that is

---

[186] 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 25 points (p = .01); controlling for the regression based scale, the disparity is 25 points (p = .01); in the logistic regression analysis in Table 4, Row 2d, Column D, the coefficient for the victim SES scale is -.59, 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 23 points (p = .01); controlling for the regression based scale, the disparity is 21 points (p = .01); in the logistic regression analysis in Table 4, Row 2d, Column F, 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 18 points (p = .0001); controlling for the regression based scale, the disparity is 15 points (p = .04). In the logistic regression analysis in Table 4, Row 2d, Column H, the coefficient for the victim SES scale is -1.3 and statistically significant.

For each outcome in the high SES victim analysis above, the salient factors analysis contained too many cases omitted for want of comparable cases on the salient factors scale to support reliable estimates. The reason this occurred in the relatively small number of high victim SES cases and the large number of salient factors categories

[187] 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 -22 points (p = .01); controlling for the salient factors measure, the disparity is -19 points (p = .02); controlling for the regression based scale, the disparity is -18 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 -22 points (p = .03); controlling for the salient factors measure, the disparity is -14 points (p = .19); 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 -15 points (p = .01); controlling for the salient factors measure, the disparity is -9 points (p = .07). Controlling for the regression based scale, the disparity is -10 points (p = .04).

consistent with the data in Figures 21 and 22. The victim high SES effects are consistently stronger than the victim low SES effects.

2. Disparities in the Major Urban Counties and Greater Nebraska

We explored next the relationship between these statewide victim SES effects and decision-making in the major urban counties and greater Nebraska. Recall that the race-of-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 counties and greater Nebraska, 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 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.

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

To the extent that they are real, the victim SES effects that we have documented 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, based on victim occuparion, 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 have documented 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.[188] Such an association is a less plausible explanation of the low victim SES effects documented statewide.

Ideally, we would control for the presence of victim impact evidence in the cases and our DCI can accommodate that information. Unfortunately, the pre-sentence investigation reports (PSI) on which we relied for this information contained too little useable data to support an analysis. The high SES victim disparity raises the possibility that high victim SES may have been a factor in one or more decisions to advance a case to a penalty trial or to impose a death sentence. The low victim SES disparities raise the possibility that a death sentence that might

[188] Also, several of the 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* Table 1 *supra*. However, none of the three police victim death-eligible cases resulted in a death sentence.

have been imposed in an evenhanded system may not have been imposed because of the victim's low SES.

The victim SES effects documented in the Nebraska death sentencing system are consistent with findings of other studies.[189] The literature suggests that such effects in prosecutorial decision-making may be explained by the perceived impact that victim SES may have on prospects for either a jury guilt trial conviction and/or the court's imposition of a death sentence. In addition, press coverage and manifestations of community concern about a homicide are often correlated with the victim's socio-economic status. The impact of victim SES on both prosecutors and judges may also reflect differential identification, generally non-conscious, with high and low status victims.

IX. Inconsistency and Comparative Excessiveness in Capital Sentencing

A. The Concepts of Inconsistency and Comparative Excessiveness

In this research, we define a death sentence in an individual case as "inconsistent" and "comparatively excessive" if there exist many other cases involving defendants with comparable levels of criminal culpability that result in life sentences or less. We refer to the other defendants with comparable levels of criminal culpability as the defendant's "near neighbors." For example, if it can be demonstrated that a death-sentenced defendant has a large number of near neighbors in terms of their criminal culpability and none of those offenders has been sentenced to death, the logic of *Furman v. Georgia* (1972) suggests that this defendant's death sentence is inconsistent and comparatively excessive. *Furman* characterized such death sentences as

[189] See, e.g., EQUAL JUSTICE AND THE DEATH PENALTY, *supra* note 47 at 588 (research from Georgia, 1973-1978 presents a logistic regression coefficient of –2.63 and an odds multiplier ($p = .001$) for a low SES victim effect in an analysis of death-sentencing rates among death-eligible defendants convicted of murder.)

"wantonly and freakishly imposed" and representing an unacceptable level of inconsistency.[190] In the words of Justice Stewart, the death sentences before the court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[191]

Inconsistency and comparative excessiveness are relative matters and one's perception of the risk of such sentences depends on two things. First is the level of frequency with which death sentences are imposed among a death-sentenced defendant's near neighbors. For example, if the death-sentencing rate among a defendant's near neighbors is above 80%, the system is operating quite consistently and there is no risk of comparative excessiveness in that death sentence. However, if the death-sentencing rate among a defendant's near neighbors is 2%, the level of consistency is very low and the risk is very high that his death sentence is comparatively excessive.

The second consideration is one's normative judgment concerning the degree of inconsistency that is acceptable from a moral and legal perspective. Some might consider unacceptable any death sentence imposed in a case in which the death-sentencing rate among that defendant's near neighbors is not well above 50%.[192] Another quite different view might

---

[190] Furman v. Georgia, 92 S. Ct. 2726, 2763 (1972) ("there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.") (White, J., concurring).

[191] Id. at 2762. Beyond the infrequency of death sentencing perceived by the Furman court, the crucial flaw in the death sentencing systems declared unconstitutional in Furman was the absence of any standards to guide the discretion of sentencing authorities. The death sentencing amendments adopted in every death sentencing state after Furman, including Nebraska, provide these standards in the form of statutory aggravating circumstances. As a result, a claim of comparative excessiveness no longer implicates the Eighth Amendment under current law. Gregg v. Georgia, 428 U.S 153 (1976). However, many state legislatures, including the Nebraska legislature, have expressed concern about inconsistency in death sentencing in general and comparatively excessive death sentences in individual cases.

[192] Few state courts have given extended consideration of the minimal level of death sentencing required among a death sentenced defendant's near neighbors to rule out concerns about comparative excessiveness. One state Justice who has addressed the issue under a frequency system of proportionality review believes that the law requires a death sentencing frequency among near neighbors that is well above 50% to negate concerns about comparative excessiveness. State v. Jeffries, 717 P. 2d 722, 744 (Wash. 1986) (the death-sentencing rate among similar cases should be "significantly greater than 50 percent") (Utter, J., dissenting). To the same effect one could argue that a 50% chance of a death sentence among similar cases is equivalent to the toss of a coin and that a much higher level of consistency is required. Coley v. State, 204 S.E. 2d 612 (Ga. 1974), a capital rape case, suggests that a death sentencing frequency below 25% among similar cases raises serious concerns about comparative excessiveness.

consider death sentences unacceptable only if the death-sentencing rate among each defendant's near neighbors is less than 10%. With these two considerations in mind, it is possible to classify death-sentenced cases on a continuum that reflects the level of death sentencing among each death-sentenced offender's near neighbors. The degree of one's concern about the overall consistency of the system produced by such evidence will reflect his or her judgment of the degree of inconsistency that is morally and legally acceptable.

Inconsistency and comparative excessiveness in capital sentencing implicates two policy concerns that were articulated by the United States Supreme Court in *Furman v. Georgia*. First, inconsistent death sentences are unprincipled and arbitrary. Second, inconsistent death sentencing in a capital sentencing system as a whole threatens any potential for deterrence that the death penalty may produce. It can also be argued that comparatively excessive death sentences reflect an insufficient consensus on the level of culpability that is required to justify the imposition of a death sentence.

B. Comparative Proportionality Review in Nebraska

In the years following the *Furman* decision, a number of state legislatures created judicial systems of comparative "proportionality review" to ensure that comparatively excessive death sentences were not executed. In 1978, the Nebraska legislature adopted such a provision, which requires the Nebraska Supreme Court to conduct a comparative proportionality review in each death sentenced case it reviews.[193] However, since 1986, the Nebraska Supreme Court has applied a restrictive methodology in the conduct of these reviews by limiting its pool of

---

This case can also be read to imply that a death-sentencing rate above .25 among a defendant's near neighbors is sufficient to satisfy concerns about comparative excessiveness.

[193] *Supra* note 72 and accompanying text.

comparison cases to other death sentenced cases.[194] This approach, a narrow version of what is known as a "precedent seeking" approach to the issue, asks whether each new death sentence is at least as aggravated as the least aggravated death sentence that the court has previously affirmed. The approach reduces the potential effectiveness of proportionality reviews as a vehicle for identifying death sentences that are comparatively excessive. This is the case because the approach does not permit the court to compare the imposition of a death sentence in a particular case to the sentences imposed in life sentenced cases that have levels of culpability that are comparable to the death sentenced offender before the court.[195] The Nebraska court has vacated no death sentences on the grounds of comparative excessiveness.[196]

In its 1978 amendment to the Nebraska statute, the Legislature also assigns to the sentencing court a responsibility for the conduct of a comparative proportionality review of each penalty trial case. Specifically, the law requires the sentencing court to assure that no death sentence is imposed that would be "excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." [197] The case files indicate that in Nebraska penalty trials defense counsel do present to the court examples of other "comparable"

[194] State v. Palmer, 399 N.W. 2d 706, 722, 733-39 (1986). Prior to 1986, there is evidence that in some cases the court did use life sentenced first-degree murder cases as comparison cases. State v. Reeves, 344 N.W.2d 433, 448-450 (Neb. 1984); State v. Williams, 287 N.W.2d 18, 29-31 (Neb. 1979).
[195] David Baldus et al, *supra* note 47 at 284-90 (1980).
[196] The experience in other states is similar. Id. at 290-92. The states that limit their comparative reviews to death-sentenced cases rarely vacate a death sentence on the basis of comparative excessiveness. Even states that take a more expansive review that embraces all penalty-trial cases (both life and death-sentenced) or all death-eligible cases, such as the New Jersey court, are very reluctant to vacate death-sentences on the basis of comparative excessiveness. This experience strongly suggests that if concerns about comparative excessiveness are to have any meaning in the administration of the death penalty, those concerns will have to be reflected in prosecutorial charging and plea bargaining decisions and the decisions of sentencing judges in the few states that delegate death sentencing exclusively to judges. In this regard, Nebraska is the only judicial sentencing state in which the statute charges the sentencing judges with a duty to consider this issue.
[197] *Supra* note 72 and accompanying text.

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.[198]

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, since such decisions normally are based on finding that the aggravation in the case fails to outweigh the mitigation. 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 or her 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 the frequency with which death sentences are imposed among his or her near neighbors.[199] The estimates produced for each case in this manner provide a basis for assessing

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

[199] David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death-sentences*, 26 SETON HALL L. REV. 1528, 1595-1606 (1996) (discussing the distinction between the

how consistently the system as a whole imposes death sentences. These data also lay the foundation for assessments of whether individual death sentences are comparatively excessive.

Second, we compare the Nebraska record with comparable evidence from New Jersey – a state with jury sentencing and a system of proportionality review administered by the state supreme court. To date, the New Jersey court has vacated no death sentences on the ground of comparative excessiveness.

1. The Nebraska Data

The data we have developed on the consistency of Nebraska's death sentencing system are presented in Figure 25, Table 5, and Appendix B. Figure 25 provides an overview of the death-sentencing rates among the cases that we define as near neighbors to each of Nebraska's death-sentenced offenders. Part I presents near neighbor death-sentencing rates among the other defendants *whose cases advanced to a penalty trial* with the state seeking a death sentence. This part reflects only the degree of consistency of judicial penalty trial sentencing decisions. Part II broadens the inquiry and focuses on the death-sentencing rates among near neighbors who were selected from the universe of *all death-eligible offenders* in this study. This part reflects the impact on the consistency of outcomes of both prosecutorial charging and judicial sentencing decisions. It also documents the fact that a number of offenders whose cases did not advance to a penalty trial have levels of criminal culpability that are comparable to the defendants who were sentenced to death.

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)

---

frequency approach and the "precedent seeking approach" that is applied by most appellate courts that conduct proportionality reviews, including the Nebraska Supreme Court).

the number of aggravating and mitigating circumstances in the case, (c) the salient factors of the case measure, and (d) regression based culpability scale.[200] For each death sentence imposed, these measures identify eight overlapping but different groups of near neighbors. The first four groups of cases consist of near neighbors whose cases advanced to a penalty trial, while the second four groups of cases consist of near neighbors identified among all death-eligible cases regardless of whether they advanced to a penalty trial. Each of these frequencies presents a different estimate of the death-sentencing rate among a group of offenders with levels of culpability comparable to each death-sentenced offender. We then averaged those groups of four estimates for each death-sentenced case – one group based on the penalty trial near neighbors and one group based on the near neighbors among all of the death-eligible defendants.[201] Those two averages determine where each death sentenced case is classified in Part I (penalty trial near neighbors) and Part II (near neighbors identified among all death eligible cases) in Figure 25.

Part I, Column I indicates that when the analysis is limited to penalty-trial near neighbors, for 38% (11/29) of the death-sentenced defendants, the average death-sentencing rate among the cases we classified as comparable in terms of culpability was above .80.[202] 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

[200] *Supra* note 110 and accompanying text.

[201] The estimate for each offender under each measure in presented in Appendix B. Column L of the Appendix presents the average of the four estimates based on the penalty trial near neighbors, while Column M presents the average of the four estimates based on the near neighbors drawn from all death-eligible cases.

[202] 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.

have identified as near neighbors to assure that they are properly classified as comparable in terms of defendant culpability.[203]

Part I, Column A and Appendix B, Column L also identifies three death sentenced cases in which the average death-sentencing rate estimated among his near neighbors was less than the .33 average death-sentencing rate among all penalty trial cases. We classify these three death sentences as presumptively or *prima facie* comparatively excessive because .33 is in the range of death sentencing that one would expect to see if the death sentences were randomly assigned among all of the penalty trial cases. Again, close analysis of the records of the cases that we have identified as their near neighbors (with our four measures of defendant culpability) may indicate that, in fact, the cases of those offenders were actually much less culpable than these death-sentenced defendants, which would explain the low death-sentencing rate among their near neighbor cases. If that were the case, good practice would call for the identification of the near neighbors who were in fact most comparable to these defendants in terms of their criminal culpability.

The data in Part II of Figure 25 reflect the impact of both judicial sentencing decisions and prosecutorial charging. Because the data suggest that prosecutorial decision making statewide is considerably less discriminating in terms of defendant culpability than is judicial decision making,[204] we would expect to see considerably less consistency in the results that reflect the influence of prosecutorial decision making. That is exactly what we see in the results presented in Part II, i.e., the system appears considerably less discriminating in terms of limiting

[203] This is exactly what counsel for the defendant and the state do when this approach is used in a judicial proportionality review. The cases are distinguished on their facts to persuade the court to select what each side considers the appropriate group of near neighbor comparison cases. If such an analysis reveals a misclassification, the death-sentencing rates among the properly defined category of near neighbors would provide the basis of assessing the level of death sentencing among the defendant's similarly situated near neighbors.

death sentences to the most aggravated cases. None of the death sentences in Part II is classified in Column I where the death-sentencing rate among near neighbors is 80% or higher. In addition, 52% (15/29) of the death cases are in categories in which fewer than 50% of the defendant's near neighbors receive a death sentence (Columns A to E). However, in only one case is the death-sentencing rate among near neighbors less than the average rate (.16).

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 is highly selective and limits death sentences to the "worst of the worst"? In such a 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, i.e., they would be classified in Column I in Part I of Figure 25. This would mean that all of the sentencing judges applied a common conception of which offenders were truly death worthy. Similarly, in Part II nearly all of the cases would be classified in Column I, which would mean that statewide both the sentencing judges *and* the prosecutors shared a conception of which offenders were the worst of the worst.[205] The Nebraska system falls short of that model of consistency since only 48% of death sentences in Part I fall into such a highly selective category and none of the death sentences in Part II fall into that category.

What about the other extreme -- a substantially random system in which the culpability and deathworthiness of the offenders had little or nothing to do with who received a death

---

[204] As noted above, *supra* notes 125 and 126, the results of multiple regression analyses are much more predictable in the analysis of judicial decision making than they are in the analysis of prosecutorial decision making. This should not be surprising given the very great disparities

[205] 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 decision making 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.

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-trial death-sentencing rate.[206] In Part II, the cases would be distributed among the bars 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.

However, even in Part I the data suggest that penalty trial death sentences are not limited to the most culpable death-eligible offenders 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. Moreover, in both Parts I and II there are a number of death sentenced cases classified in and around (Column C) the category in which 50% of the defendant's near neighbors are sentenced to death. In assessing consistency, a 50% probability of receiving a death sentence is important because it approximates the outcome of a coin toss. Death sentences are imposed with this level of frequency or less among near neighbors (Columns A to F) in 45% (13/29) of the cases in Part I and 59% (17/29) of the cases in Part II.

Even though we base 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 terms of the number of

[206] 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.

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 near neighbors; and Column C presents the estimates based on near neighbors among 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 penalty trial near neighbors. (The parenthetical below the 54% estimate indicates that the range of estimates for the 12 cases in this category was from 40% to 62%.)

The differences between the estimates in Columns B and C parallel the differences between the estimates shown in Parts I and II of Figure 25, i.e., the Column B estimates reflect the impact of judicial penalty trial decision making alone, while the Column C estimates reflect the impact of both judicial and prosecutorial decisions among all death eligible cases.

The data in Table 5 clearly indicate that the greatest risk of inconsistency and comparative excessiveness exists in cases involving one or two aggravating circumstances. For cases with 3 or more aggravating circumstances, there is a very high level of consistency when the point of comparison is the treatment of other penalty trial defendants (Column B) and a consistent level of sentencing above .50 when the point of comparison is all death-eligible cases.

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).[207] The two states have similar lists of statutory aggravating and mitigating circumstances. The principal distinction between them is that New Jersey has nearly exclusively jury death sentencing while Nebraska has exclusively

[207] David C. Baldus, Special Master, Proportionality Review Project, FINAL REPORT TO THE NEW JERSEY SUPREME COURT (September 24, 1991).

judicial death sentencing conducted by appointed judges. In addition, as noted above, the Nebraska 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 in the penalty trial decisions and we could also expect this effect to result in a level of consistency among all death-eligible cases that is higher in Nebraska than it is New Jersey. As we explain below, the data are consistent with these expectations.

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. The analysis below documents that when the focus is exclusively on penalty-trial decisions, the Nebraska system is distinctly superior, but when the analysis reflects the impact of judicial sentencing decisions *and* prosecutorial charging decisions, the systems are quite comparable.

a. Death Sentenced Cases in which 70% or More of the Defendant's Near Neighbors Receive 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).[208]

[208] *Id*. at Table 19.

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 and New Jersey systems are comparable. In Nebraska, 17% (5/29) of the death sentences meet the 70% standard while in New Jersey 15% (5/34) meet it.[209]

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 only 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 the 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

[209] *Id*. at Table 20.

defendants, the death-sentencing rate among near neighbors is less than the overall average 3% (1/29) of the time in Nebraska and 9% (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 comparative data suggest that New Jersey and Nebraska are quite effective in avoiding clearly excessive death sentences, i.e., those with death-sentencing rates among near neighbors that are well below the overall average for all cases in the analysis (see Paragraph 1c above). In terms of limiting death sentences to the most aggravated cases, the penalty trial outcomes in Nebraska are clearly superior, but when the analysis embraces the impact of judicial sentencing decisions *and* prosecutorial charging decisions, the results are only slightly better in Nebraska (see Paragraphs 1a and 1b above).

As suggested above, the greater consistency of the Nebraska penalty trial decisions *vis a vis* New Jersey 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. The New Jersey penalty trial decisions in contrast are almost entirely jury decisions. However, when the impact of prosecutorial charging decisions is added to the mix, the risk of comparative excessiveness in the two systems appears to be quite comparable in terms of the imposition of death sentences among all death-eligible cases.

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 determine 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 statistically significant in none of the analyses.

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 the defendant or the race of the victim in either the major urban counties or the counties of greater Nebraska on the part of either prosecutors or judges.[210] 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 the 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. However, the data do not support a conclusion that the system consistently limits death sentencing to the most culpable death-eligible offenders, the group often referred to in popular parlance as the "worst of the worst."[211]

[210] *See supra* Section VII.
[211] *See supra* Section IX.

The level of consistency in the Nebraska system suggested by our data depends on the range of cases one considers in the analysis. In that regard, there are at least two possible perspectives. One is to limit the focus to the outcomes of penalty trials, which are strictly a product of judicial sentencing decisions. A second perspective is to expand the focus to embrace the imposition of death sentences among all death-eligible cases, outcomes that are the product of both judicial sentencing decisions *and* prosecutorial charging decisions.

When one's focus is limited to penalty trial outcomes, the system appears to work well when compared, for example, to New Jersey, a state in which penalty-trial death sentencing is almost exclusively a jury responsibility. (Our principal measure of consistency in each death-sentenced case is the percentage of defendants with comparable levels of criminal culpability, the death-sentenced defendant's "near neighbors" who were sentenced to death.) In Nebraska penalty trials, 48% (14/29) of the death sentences were imposed in cases in which the death-sentenced defendant's near neighbors were sentenced to death more than 70% of the time. In New Jersey, the comparable figure is 29% (10/34).[212] The discriminating nature (in terms of defendant culpability) of the Nebraska penalty trial death sentencing system appears to be principally the product of greater selectivity on the part of the sentencing judges as compared to juries.

Also, since 1978, Nebraska's sentencing judges have been required by legislation to consider issues of comparative excessiveness in their sentencing considerations, and they are no doubt aware of legislative concerns about arbitrariness and comparative excessiveness. These 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, a death sentence is

almost certain; for cases with two aggravators, the outcome could go either way, depending on the facts of the case; and for cases with only a single aggravator, there is a very strong presumption in favor of a life sentence.

In spite of this penalty trial performance, the data on those cases suggest that a number of death sentences may have been imposed in cases that are clearly not among the worst of the worst.[213] Specifically, the data suggest that 14% (4/29) of the death sentences were imposed in cases in which the defendant's penalty trial near neighbors were sentenced to death less than half the time, and in 38% (11/29) of the death sentenced cases, the defendant's near neighbors were sentenced to death less than 60% of the time. However, in only one death sentenced case was the death-sentencing rate among penalty trial near neighbors below the average death-sentencing rate for all penalty trials, which is .33.

When the comparative proportionality analysis is expanded to embrace death sentencing among all death-eligible cases, the results look less favorable than they do when the analysis is limited to penalty-trial near neighbors.[214] In that analysis, we find that in only 17% (5/29) of the Nebraska death sentenced cases were death sentences imposed in cases in which the defendant's near neighbors were sentenced to death more than 70% of the time. And in 52% (15/29) of death sentenced cases, a death sentence was imposed among the defendant's near neighbors less that 50 percent of the time. However, only one death sentence was imposed in a case in which the death-sentencing rate among the death-sentenced defendant's near neighbors was less than .16, which is the average death-sentencing rate among all death-eligible offenders.

3. Our third finding is that the Nebraska system is characterized by sharp disparities in charging and plea bargaining practices in the major urban counties *vis a vis* the counties of

---

[212] *See supra* Figure 25, Part I and note 190 and accompanying text.
[213] *See supra* Figure 25, Part I.

greater Nebraska.[215] The data also document less prominent but important geographic disparities in judicial death-sentencing rates.

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 twice (.58/.28) as likely as comparable cases in greater Nebraska to advance to a penalty trial with the state seeking a death sentence.[216] The different rates are not explained by differing levels of defendant culpability. Nor are these rates 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.[217] The geographic disparities in prosecutorial charging decisions has existed since 1973 and has grown larger since 1982.[218]

As suggested above, geographic disparities in the rates that penalty trial judges impose death sentences are less pronounced. During the entire period of this study, the adjusted difference in judicial death sentencing rates is only 2 percentage points -- .27 in the major urban counties v. .29 in greater Nebraska.[219] However, this overall disparity masks significant differences before and after 1983. Before 1983, in the major urban counties, the unadjusted death-sentencing rate was twice as high (.57 v. .27) as it was in greater Nebraska.[220] But, since 1982, there has been a reversal in the geographic disparities in penalty trial death-sentencing

---

[214] *See supra* Figure 25, Part II.
[215] *See supra* Section VI.
[216] *See infra* Figure 9, Part II, Column A.
[217] *See supra* Section VI C.
[218] *See supra*, Part I.
[219] *See supra* Figure 8, Part II, Column B.
[220] See Figure 11, Part II, Column B.

rates. Since then the unadjusted death-sentencing rate in the counties of greater Nebraska has been 3.5 (.60/.17) times higher than the rate in the major urban counties.[221]

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 v. .31) than it was in greater Nebraska; since 1982 it has been only 7 points lower (.22 v. .29).[222]

What impact have these changes in judicial death sentencing practices had on geographic disparities in the rates that death sentences are imposed among all death-eligible cases? Over the entire period of this study, in the major urban counties there has been a 5 percentage point (.15-.10) higher rate in the rates that death sentences are imposed among all death-eligible cases.[223] However, the system has been far from stable. Pre-1983, both penalty trial and death-sentencing rates were higher in the major urban counties than they were in greater Nebraska. This produced a death-sentencing rate among all death-eligible cases that was 2.4 times (.26 v. .11) higher in the major urban counties than it was in greater Nebraska.[224]

But, since 1982, there has been a shift in judicial sentencing practices – a substantial (15 percentage point) decline in the rate in the major urban counties and a slight (2 point) decline in greater Nebraska. A significant consequence of these changes is that since 1982 they have tended to minimize the effects of the geographic disparities in prosecutorial decisions that have continued since 1973. Specifically, the penalty trial death-sentencing rates in the major urban

[221] Id at Part II, Column C.
[222] *See supra* Figure 13, Part II.
[223] *See supra* Figure 9, Part II, Column B. This disparity represents a 50% (5/10) higher rate in the major urban areas (the denominator is the rate in greater Nebraska and the numerator is the difference in the rates for the two areas over the course of this study).
[224] *See supra* Figure 13, Column B.

counties 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 since 1982 is that among all death-eligible cases, the death-sentencing rates in the two areas of the state have been quite comparable -- .12 for the major urban counties v. .13 for greater Nebraska.[225]

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 since 1982. 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.

This "canceling out" effect of the judicial sentencing decisions does not change the fact, however, that since 1982 similarly situated offenders in major urban centers face a 33 percentage point (.57-.24) and 2.4 (.57/.24) times higher risk of advancing to a penalty trial strictly by virtue of where they are prosecuted than do similarly situated offenders in greater Nebraska.[226] Also, of the death-eligible cases that have advanced to a penalty trial since 1982, those tried in greater Nebraska have faced a 7 percentage point (.29-.22) and 1.3 (.29/.22) higher risk of receiving a death sentence than have similarly situated offenders prosecuted in the major urban counties.[227]

[225] *See infra* Figure 13, Part III, Column C.
[226] *See supra* Figure 13, Part I, Column C.
[227] *See supra* Figure 13, Part II, Column C.

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 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 after adjustment for defendant culpability, those prosecutors advance death-eligible cases to a penalty trial at a substantially higher rate than do their counterparts in greater Nebraska. Because 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.[228]

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 predominately minority communities 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.

[228] 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.

What then can one make of this adverse disparate impact? Two possible characterizations are possible. One is that the adverse disparate impact on minority capital defendants that we have documented *is not* a matter of concern; from this perspective the impact is merely an anomaly resulting from the fact that minorities primarily reside in the state's major urban counties. A second possible characterization of the data is that the adverse impact *is* a matter of real concern; from this perspective in spite of the its demographic origins, the adverse impact places on minority defendants a significant and disproportionate burden.[229]

Given the adverse impact of prosecutorial charging decisions on minorities statewide, one would reasonably expect to see a statewide 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 penalty trial judges in the major urban counties, where all but one of the minority penalty trials were held, sentence white defendants to death at a higher rate than they do minority defendants.[230] As a consequence, the statewide data document only small, non-significant, and *inconsistent* disparities on the order of 2 and 3 percentage points in the rates that death sentences are imposed among all death-eligible cases.[231] These disparities do not constitute a significant adverse impact against minorities in the rates that death sentences are imposed among death-eligible cases.

5. The statewide data document substantial disparities in charging and sentencing outcomes based on the socio-economic status of the victim. Since 1973, defendants whose

[229] In employment and housing discrimination law, a substantial adverse disparate impact against a protected group will not stand unless it can be justified by a compelling business interest.
[230] *See supra* Figure 18, Part I, Column C, Row A.
[231] *See supra* Figure 13.1, Parts I & II, Row 3.

victims have high socio-economic (SES) status have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence than have other defendants. Specifically, defendants with high SES victims were 1.7 (.70/.42) times more likely to advance to a penalty trial, 2.1 (.43/.20) times likely to be sentenced to death in a penalty trial, and 3.2 (.29/.09) times more likely to be sentenced to death among all death-eligible defendants.[232] Defendants with low SES victims faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death. These defendants were .57 (.24/41) less likely to see their cases advance to a penalty trial, .53 (.08/.23) less likely to receive a death sentence in a penalty trial, and .35 (.08/.23) less likely to receive a death sentence among all death-eligible defendants.[233] All of these victim SES disparities are statistically significant.

When the focus shifts from the state as a whole to SES effects estimated separately within the major urban and other counties, both high and low SES victim effects are apparent throughout the state.[234]

6. Our analysis of Nebraska's non-capital homicide was much less well controlled than the analysis of death-eligible cases. As a result the findings are only suggestive. The unadjusted analyses suggested the possibility of race-of-defendant and race-of-victim effects in charging, conviction, and sentencing outcomes.[235] The results of a multivariate analysis indicate, however, that the defendant's mens rea is the controlling factor and that neither the race nor the socio-economic status of the defendant and victim are significant factors in explaining these outcomes.[236]

---

[232] *See supra* Figure 21, Part II.
[233] *See supra* Figure 22, Part II.
[234] *See supra* Figure 24.
[235] *See supra* Figure 26.
[236] *See supra* Table 6.