

***Wayne Morse Center for Law and Politics Symposium:
The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?***

***39 Race, Region, and Death Sentencing in Illinois, 1988-1997**

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I.

Introduction and Statement of Research Questions

Along the long and complicated path to an execution in Illinois, many are called, but few are chosen. Before an execution *40 can occur, law enforcement officials must first devote ample resources to collecting the type of high-quality evidence that prosecutors and jurors would usually like to see before agreeing on a capital sentence. Prosecutors must decide both to seek a death sentence and to steadfastly stand by that decision, even if the defendant seeks some sort of plea bargain. Resources must be available for defense attorneys, regardless of the region of the state or the racial attributes of the defendant or victim. Jurors must unanimously agree that a given defendant, convicted of first-degree murder, deserves execution rather than live the rest of his or her life in prison. The Illinois Supreme Court must concur. The governor, if asked to consider executive clemency (whereby the death sentence can be commuted to a prison term), must also give a green light. Clearly, not everyone sentenced to death will be executed. Nonetheless, examining who is sentenced to death is a useful starting spot from which to begin studying who is executed.

According to data collected by the Center for Wrongful Convictions at Northwestern University, between mid-1977, when the current Illinois death penalty statute took effect, and December 31, 2001, the state sentenced 289 people to death. [\[FN1\]](#) Of these, 173 remained on death row on December 31, 2001; [\[FN2\]](#) the other 116 had been resentenced to prison terms, died from natural deaths or execution, or otherwise had been removed from death row. This is a tiny fraction of the state's 12.4 million residents. In their seminal study of death sentencing in Illinois, Gross and Mauro found that in the 3.5 years ending in December 1980, only 1% of homicides, and 1.4% of those with a known suspect, resulted in a death sentence for the perpetrator. [\[FN3\]](#) Hence, the death penalty has been infrequently imposed.

The present study utilizes ten years of data that describe cases *41 that ended with first-degree murder convictions. Characteristics of death penalty cases will be compared with the characteristics of other murder cases. Accordingly, this enables a closer examination of questions that have been raised about

the death penalty, such as whether it is typically imposed for more aggravated murders, or whether among cases with similar levels of aggravation, extra-legal factors such as race or region correlate with who is sentenced to death.

The decision to start with a sample of cases where people have already been convicted of first-degree murder is not the ideal way to shed light on what we refer to as the “continuous chain” of decisions, from the initial police investigation through appellate and clemency decisions, that result in (some) executions. Law enforcement officials, prosecutors, judges, and juries are all involved in deciding who to send to death row. Ideally, we would want to start a study such as this by initially focusing on how the race of defendant or victim might correlate with the amount of resources that law enforcement devotes to gathering evidence. Then, we would isolate and look solely at prosecutorial behavior, examining all cases (or a sample of cases) which, based on their characteristics, were eligible for the death penalty, and then comparing them with cases in which the prosecutor originally sought death-- whether or not a death sentence was ultimately imposed. We would like to know in which cases the prosecutor was willing to accept a guilty plea in exchange for a prison term. However, limitations on data for Illinois homicides would make such a study, if possible at all, a long-term and extremely high-cost project. In short, since death sentencing involves a chain of decisions, one dependent on another, any decisions made prior to the decisions that are reflected in the data negated herein, whether or not infected by improper bias, are invisible. Similarly, this study does not focus on what happens after imposition of a death sentence or explore any differences that may or may not exist between who is on death row (the 173 cases) and who has been sentenced to death but, for whatever reason, is no longer on death row (the 116 cases).

A comparison between those sentenced to death and the demographic characteristics of the state as a whole raises some interesting questions. Estimates by the U.S. Bureau of Census put the population of Illinois on April 1, 2000, at 12.42 million, of whom *42 75.1% are white and 15.6% black. [FN4] While blacks are 15.6% of the population, the Northwestern data indicate that 58.5% of those sentenced to death are black (169/289), 3.75 times more than their representation in the population. [FN5] Whites account for 75.1% of the Illinois population, but only 34.9% (101/289) of those sentenced to death. [FN6] And, while 40.8% of the African Americans sentenced to death were convicted of killing whites (69/169), only four of the 101 whites sentenced to death were convicted of killing blacks. [FN7] Of the twelve men executed in Illinois since 1977, eleven were convicted of killing at least one white victim. [FN8] Similarly, the racial makeup of inmates currently on death row in Illinois is quite different from the racial characteristics of the state’s population as a whole. Today, some 63% of the 173 condemned inmates in Illinois are African American. [FN9]

Obviously, these comparisons between census data and the racial characteristics of those sentenced to death do not control for differential involvement in, or victimization from, homicides (much less the most aggravated homicides). Therefore, in and of themselves they do not, and cannot, prove racial disparities. Instead, they simply challenge the researcher to examine, or “control for,” legally relevant factors that might explain the disparities. For example, to say that African Americans are 15.6% of the population and 58.5% of those sentenced to death leads to no conclusions; it simply invites one to see if the disparity is “explained” by such factors as the possibility that African Americans are more likely to be involved in highly-aggravated homicides than are whites.

The same may be true about the characteristics of homicide victims. As mentioned, between the time the Illinois death penalty statute took effect in 1977 and the end of 2001, 289 people were sentenced to death, of whom 173 remained on death row at the end of 2001. Table 1 displays the racial breakdowns of the homicide victims of the 288 death-sentenced defendants:

***43** Table 1 [\[FN10\]](#) Race-of-Victim Among Those Sentenced to Death in Illinois 1977-2001

(N=289)

White	164	(56.7%)
Black	97	(33.6%)
Latino	13	(4.5%)
Black & White	10	(3.5%)
Asian & White	1	(.3%)
Other	4	(1.4%)

Thus, among the 289 Illinois death sentences, the state convicted 175 (or 60%) of the defendants for killing at least one white victim. But if homicides with white victims are more aggravated or otherwise more death-eligible than homicides with black victims, this disparity can be explained by legally relevant variables.

Again, the above patterns raise important questions, but they do not at all “prove” that racial bias is present in death sentencing in Illinois. It is entirely possible, for example, that African Americans are more likely than whites to be arrested for and convicted of criminal homicides. If true, this would explain at least some of the above disparities. Even given a conviction for homicide, it is possible that whites tend to be convicted of homicides committed in the heat of passion (such as an argument with a friend or loved one), while blacks are more likely to be convicted of homicides which more closely match the statutory requirements for the imposition of a death sentence, such as homicides accompanied by a robbery or rape. In addition, it could be that the racial differences above are, in part, a reflection of defendants’ prior records of violent criminality. Given identical homicides, if black defendants tend to have longer records of prior arrests than white defendants do, perfectly appropriate, non-racial factors could explain at least some of the racial differences in death sentences.

Hence, to rigorously assess whether race, gender, region, or other inappropriate factors are associated with death sentencing, researchers need to “statistically control” for legally relevant factors that appropriately influence death sentencing. Accordingly, this study assesses whether these appropriate factors can account ***44** for any initial correlations observed between extra-legal factors (e.g., race) and death sentencing by measuring a broad range of such factors. As additional legally relevant variables

are statistically controlled, any race differences that remain serve to buttress the conclusion of racial bias.

After controlling for legally relevant factors--that is, assessing the effect of race and region among homicides with roughly similar levels of aggravation--there are three possible outcomes. First, if the death sentencing system operates in a fair manner, cases that have the highest level of aggravation would be those most likely to result in a death sentence, regardless of race or region. Cases with similar levels of aggravation would have roughly equal probabilities of resulting in a death sentence. A second possible outcome might be that even after taking into account legally relevant factors, it is difficult or impossible to figure out who has been sentenced to death and who was not among similar homicides. This result supports the conclusion that death sentencing is characterized by arbitrariness. Third, even after controlling for legally relevant factors, race or region may still predict who is, and who is not, sentenced to death. This is not arbitrariness in a strict sense--who is sentenced to death can be predicted, so it is not random or arbitrary--but death sentences are predicted on the basis of legally irrelevant factors.

Both arbitrariness and racial disparities, if found, have policy implications. For example, Walter Berns, one of the nation's most articulate supporters of the death penalty, points out that support for the death penalty in principle is quite different than support for the death penalty as it is actually applied. He argues that regardless of how strong a person may support the death penalty in theory, its propriety in practice "depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion." [FN11] Any penalty that is justified on the basis of its "justness" or on "just desserts" is undermined by injustices in its application.

If racial disparities in death sentencing remain after statistically controlling for legally relevant factors, the conclusion that race indeed affects death sentencing gains significant strength. Such a finding, however, does not mean that race necessarily operates in a given individual case. Thus, in the seminal 1987 decision *45 in *McCleskey v. Kemp*, the U.S. Supreme Court held that such statistical evidence of racial disparities in death sentencing cases was not legally sufficient for a defendant (*McCleskey*) to challenge his death sentence. [FN12] Written by Justice Lewis Powell, who later called *McCleskey* the worst decision he made while sitting on the Court, [FN13] this 5-4 ruling placed major blockades in the path of defendants alleging that race affected their death sentences. [FN14] This is because any race effect found in statistical studies of death sentencing can be either intentional or non-intentional (or, more likely, some combination of the two), and the Court held that, to prevail, a defendant must show intentional racial discrimination in his or her specific case. [FN15] Intentional racial discrimination is extremely difficult to prove; one would need to have a prosecutor who, in public, asserts (for example) that the state sought the death penalty in a specific case because the defendant was black or the victim was white. [FN16] Instead, the Court in *McCleskey* said that statistical patterns of racial bias were within the province of the executive and legislative branches of the government to correct. Thus, any statistical demonstration of disparities is of relevance to legislative and gubernatorial decisions, not judicial decisions.

"Nonintentional" discrimination is more insidious and difficult to prove or measure than overt racial bias. The racial disparities observed by researchers who have studied modern death penalty systems do not necessarily reveal, or even suggest, that the individual actors (judges, jurors, prosecutors, and defense attorneys) *46 in the system act with conscious discriminatory intent. [FN17] Statistical

patterns of racial biases in the application of the death penalty cannot be attributed solely (or even primarily) to “bad apples” in decision-making positions. Instead, the enormous costs of seeking a death penalty and securing an execution force prosecutors and other decision-makers to make very difficult decisions about which first-degree murders are “normal” and which are “worse.” In making those decisions, the race, ethnicity, and social class of the victim, while inappropriate, may be part of the ingredients used to determine which human lives are more valuable. As such, the decision becomes political.

We now turn our attention to studies that have examined the application of the death penalty in Illinois since 1977.

II. Prior Research on Post- Furman [\[FN18\]](#) Death Sentencing In Illinois

A. Gross and Mauro

Samuel Gross and Robert Mauro conducted the only post-Furman scholarly study to assess the possibility of racial disparities in death sentencing in Illinois. [\[FN19\]](#) Their study, which also examined seven other states, focused on the five-year period, January 1, 1976 through December 31, 1980, or, as they note, “for the portion of that period during which the state in question had a capital sentencing statute in force.” [\[FN20\]](#) Because Illinois did not have an active death penalty statute until mid-1977, Gross and Mauro confined their attention in Illinois to the period July 1, 1977 through 1980. [\[FN21\]](#)

The study gave special attention to death sentencing in Florida, Georgia, and Illinois--the three states with the largest death row populations at the time. Among the three states, Illinois had the lowest death sentencing rate. There, 1.4% of all homicides with known offenders received the death sentence, compared to 3.7% *47 in both Georgia and Florida. [\[FN22\]](#) Their study included forty-five death sentences in Illinois, [\[FN23\]](#) which is approximately 15% of all death sentences imposed in Illinois between mid-1977 and the end of 2001. These forty-five death sentences (out of 3,115 homicides) provide sufficient data to ascertain several statistically significant patterns (e.g., a correlation between victim’s race and death sentencing in several sub samples), [\[FN24\]](#) but not enough data to draw conclusions about other patterns (e.g., whether blacks convicted of killing whites during robberies are treated differently than whites convicted of killing whites). [\[FN25\]](#)

The homicide data used by Gross and Mauro came from the Supplemental Homicide Reports, which are compiled by local police departments and filed with the Uniform Crime Reports division of the Federal Bureau of Investigation. [\[FN26\]](#) They obtained data on the:

- (1) sex, age, and race of the victim or victims;
- (2) sex, age, and race of the suspected killer or killers;
- (3) date and place of the homicide;
- (4) weapon used;
- (5) commission of any separate felony accompanying the homicide; and
- (6) relationship between the victim(s) and the suspected killer(s). [\[FN27\]](#)

To determine which of these homicides resulted in a death sentence, Gross and Mauro used data on death penalty cases collected by the NAACP Legal Defense Fund. [\[FN28\]](#) The death row data set also included data on such characteristics as the county of the crime, its month and year, and the sex, age, and race of both the defendant and victim. [\[FN29\]](#) Hence, by comparing these items in both the Legal

Defense Fund and the SHR data, it became possible to “match” cases and identify those that resulted in a death sentence. [\[FN30\]](#)

According to the 1980 Census, the population of Illinois was 11.5 million, 80% of whom were white, 14.5% black, and 5.5% *48 Hispanic. [\[FN31\]](#) Despite the fact that blacks were only 14.5% of the total population, Gross and Mauro note that some 58.6% of the homicides in Illinois during the 3.5-year study period took the lives of blacks. [\[FN32\]](#) Thus, blacks were four times more likely to be victims of homicide than their representation in the population would suggest. As we have noted earlier in this report, however, comparison of the demographic characteristics of death row inmates and the larger state population can raise questions, but not offer conclusions.

Gross and Mauro then demonstrated that race was clearly associated with the imposition of death sentences. Among those suspected of killing whites, 2.9% went to death row, compared to 0.5% of those suspected of killing blacks. [\[FN33\]](#) In cases of blacks convicted of killing a white, 7.5% received the death sentence compared to 1.9% of the whites killing whites and 0.6% of the blacks killing blacks. None of the fifty-six whites suspected of killing blacks during the study period faced a death sentence. [\[FN34\]](#)

One hypothesis for what might account for these racial disparities is that homicides victimizing whites are generally more serious or “death penalty eligible” than those victimizing blacks. But if it was found that among only those highly aggravated cases (such as rape murders or multiple murders) those who victimize whites are still more likely to be sentenced to death, then solid evidence of racial disparities--or even racial discrimination--would remain. After all, in Illinois only 27.1% of the homicides involved an accompanying felony, but 75% of the death penalty cases involved accompanying felonies. [\[FN35\]](#) If felony circumstances were more prevalent in white-victim cases, then this suggests a race-neutral and legally relevant explanation for the racial differences.

Nonetheless, the presence of felony circumstances (i.e., a murder in the course of another felony) did not explain the racial disparities. In Illinois, 9.4% of the white victim cases with felony circumstances ended in a death sentence, compared to only 3.0% of similar cases with black victims. [\[FN36\]](#) The relationship between *49 defendant and victim, where 70% of death penalty cases, but only 22% of all homicides involved strangers, also did not explain racial disparities. [\[FN37\]](#) Here 5.8% of those suspected of killing white strangers were sentenced to death, compared to only 1.5% of those suspected of killing black strangers. [\[FN38\]](#) Similarly, 4% of all murders, but 44% of the death penalty cases, involved multiple murders. [\[FN39\]](#) But when the victims of those multiple murders included at least one white, 22.5% ended in a death sentence, compared to 6.8% of the cases where the victims were black. [\[FN40\]](#)

In the end, these “control variables” failed to explain the racial disparities in death sentencing. Among all homicides, those suspected of killing whites were 5.8 times more likely to be sentenced to death than those who kill blacks (2.9/0.5). Among those with accompanying felonies, the ratio is three to one (9.4/3.0). Among those suspected of killing strangers, the ratio was 3.9 (5.8/1.5). Among those suspected of multiple murders, the ratio was 3.3 (22.5/6.8).

To conclude their study, Gross and Mauro developed an Aggravation Scale by assigning each homicide one point for each of three factors: 1) the murder involved accompanying felonies, 2) the suspect and

victim were strangers, or 3) there were multiple victims. This Aggravation Scale accurately reflects who will receive the death sentence based on the circumstances surrounding the crime. Only 0.1% of the homicides with a “0” on this aggravation scale ended in a death sentence, 1.0% of those with a “1,” 7.4% of those coded as “2,” and 22.6% of those coded as “3.” [\[FN41\]](#) However, within each level of aggravation, those suspected of killing whites were more likely than other homicide suspects to be sentenced to death. For example, among those with a “2” or with a “2” or “3” level of aggravation, 12.4% of those suspected of killing whites in Illinois and 4.4% of those suspected of killing blacks were sentenced to death. After entering all variables into a logistic regression model, it was found that “[i]n Illinois the overall odds of an offender receiving the death penalty for killing a white were 4.0 times greater than for killing a black.” [\[FN42\]](#)

***50 B. Chicago Tribune**

In a 1999 analysis of 285 death penalty cases in Illinois, journalists Ken Armstrong and Steve Mills found that thirty-three cases involved defense attorneys who were subsequently disbarred or suspended, forty-six cases had conviction which rested on the testimony of jailhouse informants, twenty cases involved controversial hair analysis, and thirty-five cases had black defendants who were convicted and sentenced to death by all-white juries. [\[FN43\]](#) They concluded that the findings “reveal a system so plagued by unprofessionalism, imprecision and bias that they have rendered the state’s ultimate form of punishment its least credible.” [\[FN44\]](#)

We now turn our attention to the methodology we employed to examine these issues more thoroughly.

III. Methodology

A. Data Sources

The data used in this report are a subset of conviction data from the cases of all defendants convicted of first-degree murder in Illinois who received formal sentencing during the ten-year period of January 1, 1988 through December 31, 1997. The cases included in this study are analyzed in terms of sentencing events. As used in this report, the term “sentencing event” refers to a judicial proceeding in which a sentence is imposed. A defendant may be sentenced in one judicial proceeding for the murders of multiple victims where those murders occurred as part of the same course of conduct. Alternatively, where multiple murders occur in separate events, a defendant is more likely to be sentenced in separate judicial proceedings for each murder. As a result, defendants in the latter category appear in our data set on more than one occasion. A total of 5,310 cases or sentencing events in the study period were identified from Illinois Department of Corrections (IDOC) records, of which 115 ended with a death sentence. The subset of cases for which there is no missing data for any of the twenty-seven independent variables used in ***51** this analysis (see Table 2) is 4,182 cases, which contain seventy-six death sentence cases.

As discussed further in the conclusion, the focus on only those convicted of first-degree murder introduces a conservative bias into our results. Race or region, for example, might correlate with which types of homicide cases (other factors constant) are most likely to result in a conviction for first-degree

murder. It may correlate with the amount of effort made by the prosecutor to find mitigation sufficient to justify offering to reduce the penalty for first-degree charges. On the other hand, once a prosecutor brings a defendant charged with first-degree murder before a jury, race may correlate with the probability that the defendant is found guilty. Illinois is among several of the states criticized for the unbridled discretion that prosecutors have in deciding in which cases the death penalty will be sought. [\[FN45\]](#)

However, the multitude of decisions made before a defendant is convicted of first-degree murder are not examined in this project, so any possible impact on these decisions by political and extra-legal factors cannot be exposed. As mentioned earlier, the “continuous chain” of decisions that are necessary before a person is executed, with police, prosecutors, jurors, judges, appellate courts, and governors are all involved. The individual decisions may be invisible (that is, detailed data are not collected that would allow one to show consistency), but their effects are not. Therefore, if extra-legal factors are shown to correlate with sentencing decisions among those convicted of first-degree murder, the results will be conservative because these earlier decision points are not studied, and whatever improper biases may or may not exist will not be spotted. In addition, the data in this study measure only whether or not there was imposition of the death penalty, which involves decisions made not only by prosecutors, but also by judges and juries. To pinpoint any political influences in prosecutorial decisions, the ideal research project would examine all cases where prosecutors sought the death penalty, not only where it was imposed.

The researchers studied several sources of official data to develop the analytic database for this study. The final database for *52 this analysis came exclusively from data supplied and/or collected by the State of Illinois. Specifically, the sources of this data are:

1. Department of Corrections

IDOC provided the “master list” of cases used in the study. This is a confidential, non-public database made available exclusively for the study. The IDOC maintains an “Offender Tracking System” (OTS) data file that contains a wide array of information about the offender and the offense(s) for which she or he was convicted. It includes only those cases where defendants were sentenced for first-degree murder between January 1, 1988 and December 31, 1997.

In addition to providing the sample of events that are the basis for this study, IDOC data also allowed the construction of a broad range of variables that measure the potential seriousness of a homicide(s) associated with the first-degree homicide offenders in our sample. This is possible because IDOC data provide information on all previous and contemporaneous offenses for which a first-degree homicide offender has been convicted and incarcerated in the Illinois Department of Corrections. Two types of indicators of legally relevant factors were developed from IDOC data on offenses for which defendants were incarcerated: indicators of (1) death sentence eligibility and (2) aggravating facts for the death sentencing proceeding. Finally, IDOC data also provide information on the race and sex of offenders and on the county from which offenders in this study were sentenced.

While the IDOC data provide detailed information on the offense, three additional sources of data permitted information-gathering about the victims.

2. Chicago Homicide Data

Approximately three-quarters of Illinois homicides occur in Cook County, and almost all of those take place in the City of Chicago. Detailed data on Chicago homicides has been collected by the Chicago Police Department, on and off, for at least 130 years. The Illinois Criminal Justice Information Authority (ICJIA), a state agency responsible for research on the criminal justice system in Illinois, provided data from cases during the study period. The data give important information about the circumstances of the crime and characteristics of the victim. The *53 Chicago Police data also contained a unique number that allowed the linking of the case with the information on the offender in the IDOC database [FN46] for 2,898 (or 54.7%) of the offenders in the sample.

3. Victim Data from Selected State and Local Records

Information on the race, ethnicity, and sex of victims for non-Chicago first-degree murders in the study sample was obtained primarily by the ICJIA. The ICJIA gathered this information through a search of a variety of official records, both state and local, including some law enforcement records. From this source data were obtained on the age, gender, and race of victims of non-Chicago first-degree murder offenders in the study sample. Data were gathered on the race of victims for an additional 1,091 (or 20.6%) first-degree murder offenders in the sample.

4. Supplemental Homicide Reports Data

For offenders in the study for which no victim information was available from the search of state records or from linking to Chicago police data, a final search for victim information was conducted through use of the Supplemental Homicide Report (SHR) data. SHRs represent homicide data gathered by local police departments and forwarded to the Federal Bureau of Investigation for national tabulations. While the data do not give the name of the victim or offender, or the specific date of the offense, they do contain information on the county, month, and year of the offense, the gender, race, and age of the defendant and victim, and information on (1) the victim-defendant relationship, (2) the method of killing, and (3) information on the type of felony (if any) that accompanied the homicide. There was sufficient SHR information on the race, age, and sex of offenders, as well as on the date and county of offense to “match” SHR victim data with comparable information from the Department of Corrections. Using SHR data we were able to link homicide victim information to 263 additional offenders in the sample that did not already have victim data from the state or Chicago Police *54 sources. Linking to SHR data added an additional 4.9% of offenders where the victim information was available. Overall race of victim information was matched to 80.1% of the offenders in our sample.

B. Variables Used for the Analysis

Two major categories of variables were developed for this analysis: legally-relevant factors that could be expected to affect the likelihood of a first-degree murder offender receiving a death sentence, and extra-legal factors which should not affect whether an offender receives a death sentence. Among the legally relevant factors two types of indicators were developed for the first-degree murder offenders in this study: (1) indicators of death sentence eligibility, and (2) indicators of aggravating facts. Below is a review of the specific variables used in the analysis within their major substantive categories.

1. Indicators of Death Sentence Eligibility

Illinois has a bifurcated death-sentencing proceeding. The first part focuses on the question of whether the defendant is eligible for the death penalty. Here the State must prove, beyond a reasonable doubt, that the defendant is at least age eighteen, and prove the existence of at least one of the twenty death penalty eligibility factors provided for under Illinois law. Using IDOC offender data, we developed indicators for two major classes of death penalty eligibility; specifically, indicators were developed for “multiple-murder factor” first-degree murders and “in the course of another felony” first-degree murders. Under the multiple-murder factor a defendant may be eligible for the death penalty if he or she has been convicted of murdering two or more individuals. Case law indicates that these contemporaneous and/or prior convictions must be for intentional murder or for knowing murder (not for felony murder) to qualify as a multiple murder eligibility factor. Variables 1 and 2 in Table 2 present the indicators of contemporaneous and prior multiple murder eligibility factors used in this analysis. Appendix I presents the specific Illinois statutory citations for convictions that define these factors in the present study.

Under the “in the course of another felony” factor a defendant is eligible for the death penalty where the murder has occurred in the course of any one of several statutorily specified felonies. *55 Using IDOC data a number of specific “in the course of another felony” eligibility indicators were developed, based on convictions for felonies that occurred within the same sentencing event as the first-degree murder for which the defendant was incarcerated. Variables 3 through 12 in Table 2 present the indicators of “in the course of another felony” eligibility factors used in this study. Appendix I presents the specific Illinois statutory citations that identify crimes as potential contemporaneous felonies. There is a requirement that, in addition to a contemporaneous felony offense, [\[FN47\]](#) there be some element of intentional or knowing conduct on the part of offender. This element cannot be measured with IDOC data.

Finally, three additional indicators of death penalty eligibility were developed from victim information obtained from the Chicago Police Department, state records, or SHR data sources: indicators for the murder of an elderly person (over age fifty-nine), a young person (underage twelve), and for multiple-victim murders (contemporaneous murders, but not necessarily “intentional or knowing”). For the age of the victim to qualify as a death penalty eligibility factor requires “brutal and heinous” conduct, which is a factor that was undeterminable for the purposes of this study. Variables 13 through 15 in Table 2 present these indicators.

2. Indicators of Aggravating Facts

After the defendant is determined to be eligible for the death penalty, court proceedings move on to the “aggravation/mitigation” phase. At that point, the state provides evidence of aggravating factors (such as prior criminal history) and the defendant provides mitigation evidence. In theory, those defendants with the worst set of aggravating facts (e.g., the worst criminal history) should be more likely to receive the death penalty (assuming level of culpability, etc., is constant).

IDOC data provides information on evidence of aggravating factors such as other contemporaneous or prior murder convictions (e.g., solicitation for murder, conspiracy to murder, attempted murder, etc.), and an offender’s prior criminal history. In terms of prior criminal history, IDOC provides information

on *56 the number of prior IDOC incarcerations for all Class X, 1, 2, 3, and 4 offenses for the first-degree offenders in our sample (see variables 16 through 22 in Table 2 for the indicators of other serious murder convictions and prior criminal history). Appendix I presents the specific Illinois statutory citations that identify other serious murder convictions and other felony convictions.

3. Indicators of Extra Legal Factors

Information on the race, ethnicity, and sex of victims was provided from victim information that we acquired from the Chicago Police Department, selected state records, or SHR data sources (see variables 23 and 24 in Table 2). IDOC data provides information on the race and sex of offenders (see variables 25 and 26 in Table 2) and on the county from which offenders in this study were sentenced (see variable 27 in Table 2). Information on offender's trial court sentencing county allows us to investigate the possibility of geographic disparities in death penalty sentencing. The offender's sentencing county was coded into four standard Illinois sub-regions used by the ICJIA: Cook County, "collar" counties, other urban counties, and rural counties. Because of its size, Cook County is its own category. The "collar" counties are the five counties which border Cook County (DuPage, Lake, Kane, McHenry and Will). Urban and rural counties are defined by whether or not they lay within a Metropolitan Statistical Area (MSA). Based on this definition, there are twenty-eight counties in Illinois that are part of a MSA (these include Cook county, and the "collar" and urban counties) and seventy-four counties that are not part of a MSA or rural counties.

A number of obvious potential extra-legal factors are not included in the analysis, such as the social class of the victim, whether the victim was a member of the community, adequacy of legal counsel, and the quality of police/forensic investigative work on the case. In addition to these more obvious factors, this class of variables has the peculiar quality of containing information that may seemingly be far removed from the legal process of a given case, but may nevertheless sometimes have a direct and significant effect on the imposition of a death sentence. Such factors may include events such as violent crime waves or spectacular media coverage of violent crime, or they may include organizational and political phenomena, such as political campaigns or local community pressures. Very little is known about *57 the influence of these types of factors on processes in the criminal justice system, because they are very difficult to study. Nevertheless they do provide some examples of types of extra-legal factors that are potentially useful to examine in death penalty research and may be important in the monitoring of the death sentencing process.

Table 2 Independent Variables for Death Sentence Analysis

1. MPMFM1
Prior Intentional/Knowing Murder (no=0; yes=1)
2. MCMFACTR
Contemporaneous Intentional/Knowing Murder (no=0; yes=1)
3. MCGRPA1
Contemporaneous Armed Robbery (no=0; yes=1)

4. MCGRPB1
Contemporaneous Aggravated Criminal Sexual Assault (no=0; yes=1)
5. MCGRPC1
Contemporaneous Home Invasion (group 3c) (no=0; yes=1)
6. MCGRPD1
Contemporaneous Aggravated Kidnapping (group 3d) (no=0; yes=1)
7. MCGRPE1
Contemporaneous Arson (no=0; yes=1)
8. MCGRPF1
Contemporaneous Simple Robbery (no=0; yes=1)
9. MCGRP3BR
Contemporaneous Residential Robbery (no=0; yes=1)
10. MCGRP3CR
Contemporaneous Armed Violence (no=0; yes=1)
11. MCGRP3DR
Contemporaneous Vehicular Hijack (no=0; yes=1)
12. MCBFCTR1
Contemporaneous Burglary (no=0; yes=1)
13. VCCNTT4
Number of Additional Homicide Victims (0, 1, 2, 3+)
14. VICGT59D
Homicide Victim/s Over Age 59 (no=0; yes=1)
15. VICLT12D
Homicide Victim/s Under Age 12 (no=0; yes=1)
16. MCSM2
Contemporaneous Other Serious Murder Convictions (0, 1, 2+)
17. MPSM2
Prior Other Serious Murder Convictions (0, 1, 2+)
18. MPCLAS12
Prior Class 1 Offenses (0, 1, 2+)

- 19. MPCLAS22
Prior Class 2 Offenses (0, 1, 2+)
- 20. MPCLAS32
Prior Class 3 Offenses (0, 1, 2+)
- 21. MPCLAS42
Prior Class 4 Offenses (0, 1, 2+)
- 22. MPCLASX2
Prior Class X Offenses (0, 1, 2+)
- 23. VICSEX_D
One or more female victims (none = 0, 1+)
- 24. VICRACE
Victim's Race (1=only white, 2=only black, 3=only Hispanic, 4=only other race, 5= victims from more than one race)
- 24a. VICBLK_D
At least one black victim (none = 0, 1+). This is a dichotomous version of variable 24.
- 25. MI_RSEX
Offender's sex is female (0=not female, 1=female)
- 26. OFFRACE
Offender's Race (1=white, 2=black, 3=Hispanic, 4=other race)
- 26a. OFFBLACK
(0=not black, 1=black). This is a dichotomous version of variable 26.
- 27. COUNTY
County of Trial (1=Cook County, 2=Collar Counties, 3=Other Urban Counties, 4=Rural Counties)
- 27a. COOKOTH
County of Trial (0=Not Cook County, 1=Cook County). This is a dichotomous version of variable 27.
- 27b. CNTYCOUR
County of Trial (0=Not Collar or Other Urban counties, 1=Collar or Other Urban Counties). This is a dichotomous version of variable 27.

*58 C. Statistical Approach

The analysis first examines the bivariate relationships between sentencing and twenty-two indicators of legally relevant factors that are potential determinants of death sentencing in Illinois. These indicators include measures of death penalty eligibility factors (variables 2-15 in Table 2), and measures of facts of aggravation (variables 16-22 in Table 2). The analysis also examines the bivariate relationship between death sentencing and three potential extra-legal factors including the race and sex of victims, the race and sex of homicide offenders, and the county where the offenders were sentenced (variables 23-27 in Table 2).

After presenting the results of these cross-tabulations, this study assesses the unique ability of each of these variables to explain *59 who is and who is not sentenced to death. That is, it examines the potential impact of extra-legal factors on death sentencing while statistically controlling for legally relevant factors. To do this, logistic regression analysis was employed. Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1.

The dependent variable is a natural logarithm of the odds ratio, y , of having received the death penalty. Thus, $y = P / 1-P$ and;

$$(1) \ln(y) = \hat{\alpha}_0 + X\hat{\alpha} + \hat{\epsilon}_i$$

where $\hat{\alpha}_0$ is an intercept, $\hat{\alpha}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ϵ_i is the error term.

Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

IV. Findings

A total of 5,310 cases in the study time frame were identified from IDOC records, of which 115 ended with a death sentence. Of the 5,310 cases, there was information on the county of trial for 5,300 cases. It was possible to match 4,252 cases with race of victim information (80.1%). Of the total universe of cases, the race of victim was matched in 84.1% of the cases from Cook County, 60.8% of the cases from the collar county region, 72.9% of the cases in the urban county region, and 66.1% of the cases in the rural county region. The subset of cases for which there are *60 no missing data for any of the twenty-seven independent variables used in this analysis (see Table 2) includes 4,182 cases, of which seventy-six ended with a death sentence.

1. Bivariate Analysis of Death Sentence Eligibility.

Tables 3 through 17 are presented in Appendix II. They examine the imposition of the death penalty by the indicators of death sentence eligibility. These include indicators for the “multiple murder factor” (i.e., conviction for a contemporaneous or prior “intentional or knowing murder” in addition to the offender’s first-degree murder conviction), and for “in the course of another felony” murders. In addition, death sentence eligibility indicators are examined for the murder of an elderly person (over age fifty- nine), the murder of a young person (under age twelve), and for multiple victim murders. [\[FN48\]](#)

Tables 3 and 4 examine the imposition of a death sentence by convictions for prior and contemporaneous murder. Both variables show a statistically significant relation with death sentencing. Under the “in the course of another felony” factor, a defendant is eligible for the death penalty when the murder has occurred in the course of any one of several statutorily specified felonies. Tables 5 through 14 examine the imposition of the death penalty by our indicators of “in the course of another felony” eligibility factors. Of the ten accompanying felony indicators examined, nine showed a statistically significant relationship with imposition of the death sentence based on the Pearson chi-square test, and six showed a significant relation base on the Yates Continuity Correction for the chi-square test. [\[FN49\]](#) Some of these indicators may not have achieved a statistically significant relationship with death sentences due to the low frequency of their occurrence in the sample. In addition, the magnitude of the relationships between the “in the course of another felony” factors and imposition of a death sentence shows considerable variability *61 across the ten indicators. Among the indicators showing a statistically significant effect on death sentencing, the percent of death sentences imposed where one of these eligibility factors is present varies from a low of 4.1% for the armed robbery indicator (Table 5) to a high of 15.7% for the aggravated kidnapping indicator (Table 8). Since these variables represent indicators of death penalty eligibility, the data indicate that the eligibility factors vary considerably in their overall importance in death penalty decisions.

Tables 15 through 17 examine imposition of the death penalty by the three indicators of death sentence eligibility derived from homicide victim data: the murder of an elderly person (over age fifty-nine), the murder of a young person (under age twelve), and for multiple victim murders. As would be expected, each of these indicators shows a statistically significant correlation with imposition of the death sentence, with the multiple victims murder indicator showing the largest effect on death sentencing.

2. Bivariate Analysis of Facts of Aggravation

As noted, after a defendant is determined to be eligible for the death penalty, the judicial proceedings then move on to the “aggravation/mitigation” phase. At that point, the state provides evidence in aggravation (e.g., prior criminal history), and defendant provides mitigation evidence. IDOC data provides information on evidence in aggravation in the form of measures of contemporaneous or prior “other serious murder convictions” (e.g., solicitation for murder, conspiracy to murder, attempted murder, etc.), and in the form of measures of offender’s prior criminal history that go beyond the offender’s prior history of murder.

Tables 18 and 19 examine imposition of the death penalty by contemporaneous and prior “other serious murder convictions.” Convictions for contemporaneous offenses are not statistically related to the imposition of a death sentence. Cases with one or more convictions for prior “other serious murder

offenses” show a statistically significant relationship with imposition of the death sentence only using the Pearson Chi-square test, but not with the Continuity Correction.

In terms of prior criminal history, IDOC provides information on the number of prior IDOC incarcerations for all Class X, 1, 2, 3, and 4 offenses for the first-degree offenders in our sample. Tables 20 through 24 examine the relationship between offenders’ *62 prior criminal record and imposition of the death sentence. Of the five indicators of prior criminal record examined, three show a statistically significant relationship with death sentencing. The indicators not statistically related to the death sentence were (1) an offender’s prior record of incarcerations of Class 1 offenses (Table 21), and (2) their prior record of Class 4 offenses (Table 24).

3. Bivariate Analysis of Extra-Legal Factors

Extra-legal factors represent those factors that should not affect whether an offender receives a death sentence. A major objective of this study is to examine the potential impact of extra-legal factors on death sentencing in Illinois. Factors we examined include geographic region of the state, the race and sex of the first-degree murder victims and offenders.

Geographic Region. Information on county of sentence allows us to investigate the possibility of geographic disparities in death penalty sentencing decisions. To this end, offender’s county of trial was coded into the four standard Illinois sub-regions used by the Illinois Criminal Justice Information Authority: Cook County, collar counties, other urban counties, and rural counties. Table 25 shows patterns of death sentencing in these four regions. In Cook County, 1.5% of the first-degree murders ended with a death sentence, versus 3.3% of the cases in the collar counties, 3.4% of the cases in other urban counties, and 8.4% of the cases in rural counties. The cross regional differences were statistically significant at < .001 level of significance.

Sex and Race of Victim. Table 26 examines the imposition of the death sentences by the sex of the homicide victims. Examination of Table 26 shows that the sex of murder victims is significantly related to imposition of the death sentence. Specifically, 4.3% of the offenders who were convicted of killing one or more females received the death penalty, versus 1.2% of the offenders who were convicted of killing solely male victims.

Table 27 reveals statistically significant differences in the imposition of the death penalty by race of first-degree murder victims. Specifically, 3.8% of the first-degree murder cases where the victim(s) was white resulted in a death sentence, versus 1.1% of the cases where the murder victim(s) was black, and 1.5% of the *63 cases where the victim(s) was Hispanic. [FN50] Where the victim was “other” race or was part of a mixed race multiple homicide case, the death sentence was imposed 5.7 and 4.0% of the time respectively. This disparity in the imposition of the death sentence was statistically significant at a < .001 level of significance.

Sex and Race of Offender. Table 28 examines the imposition of death sentences by the sex of the offender. Examination of Table 28 shows that 1.3% of the women and 2.2% of the men in our sample were sentenced to death. This difference, however, is not statistically significant.

Examination of Table 29 reveals statistically significant differences in the imposition of the death penalty by race of offender. Specifically, 4.5% of the first-degree murder cases where the offender was white resulted in a death sentence, versus 1.8% of the cases where the offender was black, and .7% of the cases where the offender was Hispanic. [FN51] None of the twenty-three cases where the offender's race was listed as "other" ended in a death sentence. This disparity in the imposition of the death sentence was statistically significant at a $< .001$ level of significance. However, as discussed below, focusing simply on the race of the offender without also including the race of the victim is very misleading.

Race of Victim and Offender Combinations. Initial examination of Table 29 shows that black offenders are less likely to receive the death penalty than white offenders, given a conviction for first-degree murder. However, most murders are intra-racial incidents, and, as Table 27 shows, first-degree murders with black victims are the least likely to receive the death sentence. Thus, in order to examine the imposition of the death penalty by the race of the offender, it is important to also control for the race of victim. In comparing white and black homicide offenders, it is important to control for the race of the victim because the data show that blacks are most likely to be convicted for killing other blacks, and the murders of black victims are the least likely to receive a death sentence.

Table 30 examines the imposition of the death sentence by the race of victim and offender combinations for white and black victims *64 and offenders. Examination of this Table shows that when the race of the victim is taken into consideration, the offender-race differences largely disappear. Thus, among offenders convicted of killing white victims, 4.5% of the black offenders received a death sentence, versus 4.8% of the white offenders. In contrast, only 1.1% of the black offenders who killed black victims were sentenced to death. Finally, 4.8% of the whites who were convicted of killing blacks received the death sentence, but this percent is based on only sixty-two cases in this category.

4. Multivariate Analysis of Indicators of Death Eligibility, Aggravating Facts, and Extra-Legal Factors

In the final stage of analysis, the study assesses the potential impact of extra-legal factors on death sentencing while statistically controlling for legally relevant factors. To do this, as noted above, required the use of logistic regression analysis. Logistic regression models estimate the effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death while controlling for the other variables in the equation.

Logistic regression is the preferred statistical approach for analysis of dichotomous dependent variables such as the dependent variable in this study that measures the presence or absence of a death sentence. Nevertheless, any multivariate statistical technique will be limited by the quality and scope of available data. As noted, despite extensive efforts to obtain data, there may be important legal and/or extra-legal factors that have not been included in the present analysis. In addition, although most of the independent variables in the study have very little missing data, there are some missing data on race and sex of victims.

Finally, this analysis limits its scope to more recent first-degree murder cases (i.e., cases that were sentenced between 1/1/88 and 12/31/97). It is assumed that these more recent cases better reflect the death penalty today than do the pre-1988 cases not examined.

Table 31a presents the results of the logistic regression analysis. Two important extra-legal correlates of death sentencing that were originally identified in the bivariate analysis, race of victim and sentencing county/region, remain statistically significant when entered into a logistic regression equation that controls for twenty-two other indicators of legally relevant factors developed *65 for this study. Of the statutorily defined indicators of death penalty eligibility (variables 1-12 in Table 2 and in the logistic regression) introduced into the analysis, seven out of twelve indicators remained statistically significant predictors of death sentencing when the effects of all the other variables were controlled.

Comparison across all the variables in the logistic regression analysis shows that sentencing county/region (i.e., Cook County) and race of victim (one or more black victims versus all other race of victim categories-- see variable 24a in Table 2) are among the five independent variables (out of twenty-seven variables) that achieved the highest level of statistical significance (see the Wald statistic in Table 31a). To examine the estimated effect of an independent variable, controlling on the other variables, we use the exponentiated value of the Beta (B) coefficient, which is the logistic regression beta coefficient, Exp(B) (see Table 31a for these coefficients). The Exp(B) coefficient is the B coefficient expressed as an odds ratio.

Examination of the Exp(B) coefficients in Table 31a shows that the odds of receiving a death sentence for killing a black victim(s) decrease by a factor of .404, controlling on the other twenty-six independent variables. As noted, .404 (the Exp(B) value for black victims) is the odds ratio of a first-degree murder offender who killed a black victim being sentenced to death. An odds ratio of exactly 1.0 would mean that the likelihood of receiving the death sentence changed by a factor of one, or not at all. In this case, the results indicate that the odds of receiving a death sentence, if a first-degree murder offender kills a black victim, are on average 59.6% lower (i.e., $1 - .404 = .596$ or 59.6%) controlling for the other twenty-six variables in the analysis.

Turning to the question of geographic region, Table 31a indicates that the odds of receiving a death sentence for killing a victim(s) in Cook County decrease by a factor of .164 (i.e., the Exp(B) value for Cook County in Table 31a). Hence, the odds of receiving a death sentence for killing a victim(s) in Cook County are on average 83.6% lower than for killing a victim(s) in the rural county region of Illinois controlling for the other twenty-six variables in the analysis.

Readers of this report will disagree among themselves about the policy implications suggested by our finding of geographic disparities. Some will say that the finding that first-degree murder offenders in Cook County are less likely to receive the death *66 sentence than offenders in other counties may mean that the Cook County criminal justice system is not pursuing potential death sentence cases with sufficient rigor. Others will argue that rural counties are imposing the death sentence too liberally and/or without sufficient oversight. However, one consequence to carefully consider in proposing that Cook County is not rigorously and/or properly pursuing death sentences is that a more rigorous application of the death sentence by Cook County would result in dramatically higher numbers of offenders sentenced to death in Illinois.

Overall, the statistical analysis reveals some surprises about what factors correlate with death sentences in Illinois. Some of the predictor variables that would be expected to affect death sentencing do not show statistically significant relationships with sentence outcomes. For example, of the twelve indicators of statutorily-defined death eligibility included in the analysis, only seven were significantly

related to death sentencing, even though each one of the twelve are legally relevant in identifying which first-degree murder cases are eligible for a death sentence. These twelve indicators represent two (i.e., the multiple murder factor and the “in the course of another felony” factor) of the twenty death eligibility factors identified in Illinois statutes. Nonetheless, these two factors are the most commonly used factors in death sentence cases, and thus account for a high proportion of death eligible cases.

V. Conclusions and Policy Recommendations

A. Limits to this Study

The results of this study are limited by both scope and data. First, the goal of this study was to examine only those cases that involved a conviction for first-degree murder, comparing cases that resulted in a death sentence with those that did not. This study examines only sentencing decisions, not charging decisions or a wide array of other decisions involved in sending a defendant to death row. It is quite possible that disparities correlated with extra-legal factors (e.g., race, social class, region, or gender) also exist, either at a greater or lesser strength, in decisions in the criminal justice system that are not examined in this research.

Critics of this study who point to its limited scope and limited *67 number of variables should realize that the addition of more data could very well increase the power of non-legal explanatory variables. Baldus et al., for example, point to nine states where both well-controlled and less- well-controlled studies of death sentencing have been conducted. In two-thirds of these states, the racial disparities were stronger in the well-controlled studies than in the less complex work. [\[FN52\]](#) Certainly the data gathered for this research is strong enough to raise serious concerns in the minds of both those who support and oppose the death penalty about whether it is being equitably applied in Illinois.

A second limitation of this research is missing victim data on cases included in our analysis. As noted, it was possible to match 4,252 cases with race of victim information (80.1%) to form the final sample for our analysis. However, missing data are only a problem if the cases excluded are somehow different than the cases for which there is complete data. We see nothing to indicate that the cases with missing data in this study are significantly different than the cases for which there are data.

B. Summary of Major Conclusions

Indicators of two extra-legal factors, the race of first-degree murder victims and geographic region, were found statistically related to the imposition of the death sentence in Illinois controlling on the other variables in this study. Although there are limitations to the present study, these findings on race and geography are consistent with those reported in many other studies. This pattern of findings raises important concerns about how the death sentence is imposed in Illinois.

A major limitation of this study is the lack of high-quality data needed to measure additional factors that may affect death penalty decision-making. A great deal of time and effort was expended to acquire data necessary for the present study, and despite these efforts, the present study’s data are limited in both scope and completeness. The data problems encountered in this study are not the responsibility of the Illinois state and local agencies that participated in this study. They provided extensive support and

consultation (at no cost) to the project. The problem arises because present criminal justice information systems were designed primarily to support administrative functions of *68 the agencies they assist. These systems were not designed to support research activities and, equally important, judicial monitoring activities. Thus the limitations of data and information encountered by this study directly mirror the limitations that any death sentencing monitoring system would encounter in Illinois. Indeed, properly conducted assessments of death sentences in Illinois would resemble smaller scale projects of the type conducted for this project. Critically, today's criminal justice information systems are entirely inadequate to collect, manage and integrate the range and quality of information on criminal cases necessary to support a reliable criminal justice monitoring system. As a result, the quality of available criminal data will greatly limit the integrity of any death sentencing monitoring system for the foreseeable future.

C. Recommendations

The results of our analysis lead us to suggest two policy recommendations:

1. Proportionality Review. The data suggest the necessity for the Illinois Supreme Court, as the body responsible for reviewing death penalty cases, to pay special attention to issues of proportionality. [FN53] Like New Jersey, the court might consider a comparison between cases in which the death penalty was imposed and other death-eligible cases with equal levels of aggravation and mitigation in which the defendant was sentenced to a prison term. [FN54] This type of review, however, will be very limited if only cases that end with a death sentence are examined and information and cases from prior stages of the criminal justice system decision-making process are not available. [FN55]

*69 2. Monitoring. To conduct a meaningful proportionality review, officials will need to construct, maintain, and use a database on Illinois homicides. As criminologists, one of the most important lessons learned from this research is that data on Illinois homicides are fragmented, difficult to obtain, and often of poor quality. It has been gathered not for purposes of ensuring even-handedness in sentencing, but rather for unique needs of individual state agencies (e.g., local police departments, Department of Corrections). If the death penalty is to be continued, comprehensive high-quality data need to be gathered and made available to a diverse group of researchers so that issues of equity can be monitored.

A monitoring system built on a foundation of comprehensive high-quality data can be used both to help ensure that race and other inappropriate factors are not involved in death sentencing decisions, and to help ensure that pure arbitrariness (inequities not attributable to either legal or non-legal factors) does not permeate sentencing. While it is beyond the mandate given to the current authors to design a comprehensive monitoring system, it is clear that there must be an intensive effort by all parties involved in capital cases in Illinois to gather detailed data on all aspects of homicide cases. Here we are not suggesting data collection on decisions made from charging through sentencing, but, rather, going back to the day of the homicide and beginning with measures of the quality of the investigation by the police. If the police devote more resources to the investigation of the murders of prominent white victims than to other cases, even if all other decision-makers (e.g., prosecutors, judges, jurors, and governors) are fair, racial bias will still permeate the system. In addition, a database needs to be constructed to follow all cases from the *70 time a death sentence is imposed to the time the person exits death row (via court or gubernatorial action, natural death, suicide, or execution). All links in the

“continuous chain” of decision makers need to be involved in gathering data, which they can use to monitor their own performance. [\[FN56\]](#)

In some cases, data gathering itself may add an element of fairness in the system. For example, a study that examines charging decisions would most certainly remind prosecutors of their duty to be even-handed. But even if they were, decisions made at earlier points (e.g., by police) would remain invisible. Gathering data at all decision-points on the chain of decisions makes the decisions more transparent, more accountable, and reminds everyone that their work is no longer invisible. Those designing such a database would need input from prosecutors, defense attorneys, judges, law enforcement investigators, forensic experts and other criminal justice personnel, as well as scholars and other more disinterested parties. To be sure, there will undoubtedly be differences in informed opinion between various parties in the debate, but if all cooperate in data gathering, the system will be made much more transparent.

Recent research has also shown the importance of gathering data on the racial characteristics of potential jurors in capital cases, and on how (and why) jurors are excused through peremptory challenges. The most thorough research to address this issue focused on 317 capital prosecutions in Philadelphia from 1981 through 1997. The authors found that “discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread.” [\[FN57\]](#) They found that prosecutors are more successful than defense attorneys in controlling jury composition, and that these biases tend to increase the number of death sentences and the degree of racial discrimination in death sentencing decisions. The opportunity for prosecutors and defense attorneys to interview jurors after they have completed their service and rendered their verdicts ^{*71} might reveal occasional acts of overt racism that may have infected their work.

D. A Final Note

In conclusion, the unique character of homicide in general and the death penalty in particular raises the distinct possibility of powerful political and psychological factors intruding on and interfering with the criminal justice and judicial decision process and with the goal of equity in administration of the death penalty. Hence the importance of vigilant monitoring. When a murder occurs, all who hear about it--citizens, prosecutors, jurors--feel a threat and a need to confront, to varying degrees, personal fears of death. One way to deal with the threat is to retreat to the comfort of people who are familiar to us. When the murder victim is among those communities with which we are most familiar (and race and social class are part of the victim’s social or human capital that can make them part of that familiar community) and the killer is more of an outsider (in both in social and geographic sense), the fear and outrage grow.

In the past thirty years, the potential for death penalty decisions to become more political has grown like never before. One reason for this is media pressure--the media can sensationalize homicides and prioritize them in terms of outrage and threat (not all murders are given equal media coverage), and it can put pressure on decision-makers to accept those priorities. In addition, all of the reforms in the death penalty in the past three decades have made it extremely costly and time-consuming to pursue. Especially in these days where state budgets are constrained, prosecutors must make priority decisions. There may be pressure from one source to pursue death (e.g., from the media), but also pressure from the office accountant not to do so.

Rational and informed citizens will continue to disagree on the death penalty, but certainly one point on which all interested parties can agree is that if we are going to make these life and death decisions, we need to make them as carefully and equitably as possible.

*72 Appendix I Indicators of Death Sentence Eligibility and Aggravating Facts Documentation and Indicators of Death Penalty Eligibility and Facts in Aggravation

This appendix identifies the specific Illinois statutes and amendments to statutes that were used to develop indicators of death penalty eligibility and also facts in aggravation from Illinois Department of Corrections records for the first-degree murder offenders in our sample. Below are presented the specific indicators that were developed and their accompanying statutory citations. Statutory citations include references to Chapter 38 of the Criminal Code of 1961 and to the Illinois Compiled Statutes (ILCS), a comprehensive renumbering of the Illinois statutes, which took effect in 1993.

I. Indicators of Death Penalty Eligibility Factors

In Illinois, there are twenty statutory eligibility factors. Two commonly used eligibility factors could be identified in this database by virtue of information about convictions: the Multiple Murder factor (720 ILCS 5/9- 1(b)(3)) and the Course of a Felony factor (720 ILCS 5/9-1(b)(6)).

Under eligibility factor (b)(3), a defendant may be eligible for the death penalty if he has been convicted of intentionally murdering two or more individuals. Illinois law recognizes three varieties of first-degree murder: intentional murder, murder where the person knows or should know death is the probable result, and felony murder. Case law suggests that the prior murder conviction must be for intentional murder or for knowing murder in order to make the defendant eligible for the death penalty. Generally speaking, a prior conviction for felony murder would not satisfy this requirement without proof of a separate intent to murder. This item is a factor in demonstrating that the defendant is actually eligible for the death penalty. The fact of multiple murder convictions may also be considered as an aggravating factor when the jury makes a determination of whether or not to impose the death penalty.

A defendant may also be eligible for the death penalty if he *73 has been convicted of first-degree murder “in the course of another felony.” 720 ILCS 5/9-1(b)(6). This factor makes a person eligible for the death penalty when the murder has occurred in the course of any one of several specified felonies. Illinois law also imposes the requirement that there be some element of intentional or knowing conduct by the defendant; those who are only tangentially involved in the criminal enterprise would not likely be eligible under this factor.

1.1. As a proxy for death eligibility under the Multiple Murder eligibility factor, we identified any offender in our sample with a prior conviction and incarceration in the Illinois Department of Corrections on one of the following:

MPMFM1, Table 2 Number of occurrences = 176

Label	Statutory cite
1st Deg.	38/9-1
1st Deg.	38/9-1A
1st Deg.	720 ILCS 5/9-1A1
1st Deg.	720 ILCS 5/9-1A
1st Deg. StrongPr	38/9-1 (A) (2)
1st Deg. StrongPr	720 ILCS 5/9-1 (A) (2)

This covers the range of intentional or knowing first-degree murders.

1.2. As a proxy for death eligibility under the Multiple Murder factor, we also identified any offender in our sample with a contemporaneous conviction and incarceration in the Illinois Department of Corrections on one of the following:

MCMFACTR, Table 2 Number of occurrences = 6

Label	Statutory cite
1st Deg.	38/9-1
1st Deg.	38/9-1A
1st Deg.	720 ILCS 5/9-1A1
1st Deg.	720 ILCS 5/9-1A
1st Deg. StrongPr	38/9-1 (A) (2)
1st Deg. StrongPr	720 ILCS 5/9-1 (A) (2)

1.3 Indicators of “in the course of another felony” eligibility factor.

As a proxy for this eligibility factor, we identified persons convicted of first-degree murder (720 ILCS 5/9-1) who were also *74 convicted contemporaneously for certain felonies. As of 1984, the last year amendments were made before the study period, the statute made the following felonies eligible: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, taking indecent liberties with a child, aggravated arson, home invasion, aggravated criminal

sexual assault, or the attempt of any of these. Between 1988 and 1996 (which is the period of the study), additional felonies were added to the eligibility factor on almost a yearly basis.

Group 1 below includes the original felonies contained when the death penalty statute was enacted in 1977, and also the amendments to the statute between 1982 and 1984, which added additional felonies. As a result, Group 1 represents the felonies that could make a defendant eligible for the death penalty at the beginning of the study period in 1988. Group 2 represents the amendments between 1988 and 1997, with the effective dates of the statutes. The Illinois Compiled Statutes (ILCS), a comprehensive rewrite and reorganization of all Illinois statutes, took effect in January of 1993. Finally, we included among felony factors only those that occurred in this sample five or more times.

1.3.1 Group 1

Below are listed the felonies included in (b)(6) “in the course of a felony” prior to 1985.

Group 1 A Armed Robbery Group

MCGRPA1, Table 2 Number of occurrences = 723

Label	Statutory cite
Armed Robbery	38/18-2<X>
Armed Robbery	720 ILCS 5/18-2 (A) <X>
Armed Robbery	720 ILCS 5/18-2<X>
Attempt Armed Robbery	38/18-2, 8-4<1>
Attempt Armed Robbery	720 ILCS 5/18-2, 8-4<1>

*75 Group 1 B Aggravated Criminal Sexual Assault Group

MCGRPBI, Table 2 Number of occurrences = 99

Rape	38/11-1<X>
Attempt Rape	38/11-1, 8-4<1>
AggCrimSexAss/BodHarm	38/12-14 (A) (2) <X>
AggCrimSexAss/BodHarm	720 ILCS 5/12-14 (A) (2) <X>
AggCrimSexAss/ThreatLif	720 ILCS 5/12-14- (A) (3) <X>
AggCrimSexAss/Felony	38/12-14 (A) (4) <X>

AggCrimSexAss/Felony	38/12-14<X>
AggCrimSexAss/Felony	720 ILCS 5/12-14<X>
AggCrimSexAss/Weapon	38/12-14 (A) (1) <X>
AggCrimSexAss/Weapon	720 ILCS 5/12-14 (A) (1) <X>
AttAggCrimSexAss/F	38/12-14, 8-4 <1>
AttAggCrimSexAss/F	720 ILCS5/12-14, 8-4<1>

Group 1 C Home Invasion Group

MCGRPC1, Table 2 Number of occurrences = 139

Home Invasion	38/12-11<X>
Home Invasion	720 ILCS5/12-11<X>
Home Inv/Armed/Force	720 ICLS5/12-11 (A) (1) <X>
Home Inv/Cause Injury	720 ILCS5/12-11 (A) (2) <X>

Group 1 D Aggravated Kidnapping Group

MCGRPD1, Table 2 Number of occurrences = 70

Label	Statutory cite
AggKidnapping/InflHarm	720 ILCS 5/10-2 (A) (3) <1>
AggKidnapping/No Rans.	38/10-2<1>
AggKidnapping/No Rans.	720 ILCS 5/10-2<1>
AggKidnapping/Armed	720 ILCS 5/10-2 (A) (5) <1>
AggKidnapping/Ransom	38/10-2<X>
AggKidnapping/Ransom	720 ILCS 5/10-2<X>
Attempt AggrKidNoRans.	38/10-2, 8-4<2>

***76 Group 1 E Arson/Aggravated Arson Group**

MCGRPE1, Table 2 Number of occurrences = 70

Arson	38/20-1<2>
Arson	720 ILCS 5/20-1
Aggravated Arson	38/20-1. 1 <X>
Aggravated Arson	720 ILCS 5/20-1. 1<X>
Attempt (Arson)	38/20-1, 8-4<3>

Group 1 F Simple Robbery Group

MCGRPF1, Table 2 Number of occurrences = 65

Robbery	38/18-1<2>
Robbery	38/18-1<X>
Robbery	720 ILCS 5/18-1<2>
Robbery/VicHand, 60+	38/19-1<2>
Robbery/VicHand, 60+	720 ILCS 5/18-1<2>
Attempt Robbery	38/18-1, 8-4<3>
Attempt Robbery	720 ILCS 5/18-1, 5/8-4<3>
AttemptRob/VicHand, 60+	38-18-1, 8-4<2>

Group 1 G Burglary and Attempted Burglary

MCBFCTR1, Table 2 Number of occurrences = 294

Label	Statutory cite
Burglary	38/19-1<2>
Burglary	720 ILCS 5/19-1<2>
Attempt Burglary	38/19-1, 8-4 <3>
Attempt Burglary	720 ILCS 5/19-1, 5/8-4<3>

1.3.2 Group 2

Group 2 contains the felonies added to (b)(6) “in the course of a felony” statute along with the effective date of the amendment.

Group 2A Calculated Criminal Drug Conspiracy

Effective September 7, 1989; adds calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act. There were no instances of an offender having *77 calculated criminal drug conspiracy as a contemporaneous offense in the sample. As a result, this variable was not included in the analysis.

Group 2 B Residential Burglary Effective July 1, 1990; adds residential burglary

MCGRP3BR, Table 2 Number of occurrences = 67

Label	Statutory cite
Residential Burglary	38/19-3<1>
Residential Burglary	720 ILCS 5/19-3<1>
AttResidential Burglary	38/19-3, 8-4<2>
AttResidential Burglary	720 ILCS 5/19-3, 8-4<1>

Group 2 C Armed Violence Effective December 15, 1994; adds armed violence

MCGRP3CR, Table 2 Number of occurrences = 15

Label	Statutory cite
ArmViol/Categ. I Weap.	38/33A-2<X>
ArmViol/Categ. I Weap.	720 ILCS 5/33A-2<X>
ArmViol/Categ. IIWeap/1st	38/33A-2<2>
ArmViol/Categ. IIWeap/1st	720 ILCS5/33A-2<2>
ArmViol/Categ. IIWeap/2nd+	38/33A-2<1>

ArmViol/Categ. IIWeap/2nd+	720 ILCS 5/33A-2<1>
ArmViol/Categ. IIWeap.	720 ILCS 5/33A-2*1<X>
ArmViol/Categ. IIIWeap.	720 ILCS 5/33A-2*1<2>

***78 Group 2 D Armed Violence, Aggravated Vehicular Hijacking, and Aggravated Stalking**

Effective July 1, 1995; adds Armed Violence, Aggravated Vehicular Hijacking, and Aggravated Stalking

MCGRP3DR, Table 2 Number of occurrences = 6

Label	Statutory cite
AggVehicular Hijack	38/18-4<X>
AggVehicular Hijack	720 ILCS 5/18-4<X>
AggVeh. Hijack/Weapon	720 ILCS 5/18-4 (A) (3) <X>

[Agg. Stalking does not appear in the database]

Group 2 E Predatory Criminal Sexual Assault of a Child

Effective December 13, 1995; adds Predatory Criminal Sexual Assault of a child. There was only one instance of an offender having a predatory criminal sexual assault of a child as a contemporaneous offense in the sample. As a result, this variable was not included in the analysis.

II Indicators of Facts in Aggravation

In addition to providing indicators of death sentence eligibility, IDOC data can also provide information about the defendant that would be considered during the “aggravation” phase of the sentencing trial. While a variety of facts might be submitted at this time, the IDOC data only provide information with respect to the defendant’s prior criminal history, generally considered to be an important factor in the imposition of the death penalty.

2.1. As a proxy for other, serious murder convictions (as opposed to just other serious felony convictions) the following were used:

***79 MPSM2, Table 2 Number of occurrences = 133**

Label	Statutory cite
Vol. Manslaughter	38/9-2<1>
Vol. Mans.prior1/82	38/9-2<2>
2nd Deg. M.	38/9-2D<1>
2nd Deg. M.	38/9-2D-553C8<X>
2nd Deg. M.	720 ILCS 5/9-2D<1>
Att. M., Intent	38/9-1, 8-4 <X>
Att. M., Intent	38/9-1A, 8-4<X>
Att. M., Intent	720 ILCS 5/9-1 (A) (1), 8-4<X>
Att. M., Intent	720 ILCS 5/9-1A, 8-4<X>
Att. M., StrngPro	720 ILCS 5/9-1 (A) (2), 8-4<X>
Consp. M., Intent	38/9-1 (A) (1), 8-2<X>
Consp. M., Intent	38/9-1, 8-2<2>
Consp. M., Intent	38/9-1, 8-2<4>
Consp. M., Intent	38/9-1A, 8-2<2>
Consp. M., Intent	720 ILCS5/9-1A, 8-2<2>
Sol. M., Intent	38/9-1, 8-1<X>
Sol. M., Intent	38/9-1A, 8-1<X>
Sol. M, for Hire	38/8-1.2<X>
Sol. M., for Hire	720 ILCS 5/8-1.2<X>

2.2. As a proxy for other contemporaneous serious murder convictions (as opposed to just other serious felony convictions) the following were used:

***80 MCSM2, Table 2 Number of occurrences = 527**

Label	Statutory cite
Vol. Manslaughter	38/9-2<1>
Vol. Mans.prior1/82	38/9-2<2>
2nd Deg. M.	38/9-2D<1>
2nd Deg. M.	38/9-2D-553C8<X>
2nd Deg. M.	720 ILCS 5/9-2D<1>
Att. M., Intent	38/9-1, 8-4 <X>
Att. M., Intent	38/9-1A, 8-4<X>
Att. M., Intent	720 ILCS 5/9-1(A) (1), 8-4<X>
Att. M., Intent	720 ILCS 5/9-1A, 8-4<X>
Att. M., StrngPro	720 ILCS 5/9-1(A) (2), 8-4<X>
Consp. M., Intent	38/9-1(A) (1), 8-2<X>
Consp. M., Intent	38/9-1, 8-2<2>
Consp. M., Intent	38/9-1, 8-2<4>
Consp. M., Intent	38/9-1A, 8-2<2>
Consp. M., Intent	720 ILCS5/9-1A, 8-2<2>
Sol. M., Intent	38/9-1, 8-1<X>
Sol. M., Intent	38/9-1A, 8-1<X>
Sol. M, for Hire	38/8-1.2<X>
Sol. M., for Hire	720 ILCS 5/8-1.2<X>

2.3. Other felony convictions

Illinois also ranks felony convictions for purposes of sentencing by a classification system. Under that system, a felony may be ranked as Class X (MPCLASX2, Table 2), the most serious non-murder felony carrying a mandatory minimum sentence, or ranked as Class 1 through 4 (MPCLAS12, MPCLAS22, MPCLAS32, and MPCLAS42, Table 2). Of the felonies ranked Class 1 through 4, Class 1 felonies are the most serious for purposes of sentence determination, and Class 4 are the least serious. Armed Robbery, for example, is a Class X felony, while Robbery is a Class 1 felony. The conviction data provided by IDOC contains information as to the classification of all felony convictions. As a consequence, measures could be developed in the database with respect to the seriousness of the felony record for an individual defendant.

***81** Appendix II Tables 3 through 31 of the Findings

Table 3. Death Sentence by Conviction for Prior Intentional or Knowing Murder
SEE PRINT EDITION FOR TABLE

Table 4. Death Sentence by Contemporaneous Intentional or Knowing Murder
SEE PRINT EDITION FOR TABLE

***82** Table 5. Death Sentence by Contemporaneous Armed Robbery
SEE PRINT EDITION FOR TABLE

Table 6. Death Sentence by Contemporaneous Aggravated Criminal Sexual Assault
SEE PRINT EDITION FOR TABLE

***83** Table 7. Death Sentence by a Contemporaneous Home Invasion
SEE PRINT EDITION FOR TABLE

Table 8. Death Sentence by Contemporaneous Aggravated Kidnapping
SEE PRINT EDITION FOR TABLE

***84** Table 9. Death Sentence by a Contemporaneous Arson
SEE PRINT EDITION FOR TABLE

Table 10. Death Sentence by a Contemporaneous Simple (Unarmed) Robbery
SEE PRINT EDITION FOR TABLE

***85** Table 11. Death Sentence by Contemporaneous Burglary
SEE PRINT EDITION FOR TABLE

Table 12. Death Sentence by Contemporaneous Residential Burglary
SEE PRINT EDITION FOR TABLE

***86** Table 13. Death Sentence by Contemporaneous Armed Violence
SEE PRINT EDITION FOR TABLE

Table 14. Death Sentence by Contemporaneous Vehicular Hijacking
SEE PRINT EDITION FOR TABLE

***87** Table 15. Death Sentence by Number of Additional Homicide Victims
SEE PRINT EDITION FOR TABLE

Table 16. Death Sentence by One or More Victims over 59
SEE PRINT EDITION FOR TABLE

***88** Table 17. Death Sentence by One or More Victims Under 12
SEE PRINT EDITION FOR TABLE

Table 18. Death Sentence by Contemporaneous Other Serious Murder Conviction
SEE PRINT EDITION FOR TABLE

***89** Table 19. Death Sentence by Prior Other Serious Murder Conviction
SEE PRINT EDITION FOR TABLE

Table 20. Death Sentence by Prior Class X Offenses
SEE PRINT EDITION FOR TABLE

***90** Table 21. Death Sentence by Prior Class 1 Offenses
SEE PRINT EDITION FOR TABLE

Table 22. Death Sentence by Prior Class 2 Offenses
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***91** Table 23. Death Sentence by Prior Class 3 Offenses
SEE PRINT EDITION FOR TABLE

Table 24. Death Sentence by Prior Class 4 Offenses
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***92** Table 25. Death Sentence by Region
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Table 26. Death Sentence by Sex of Victim
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***93** Table 27. Death Sentence by Race of Victim
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Table 28. Death Sentence by Sex of Offender
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***94** Table 29. Death Sentence by Race of Offender
SEE PRINT EDITION FOR TABLE

Table 30. Death Sentence by Race of Victim/Offender Combination for Whites and
Blacks
SEE PRINT EDITION FOR TABLE

***95** Table 31a. Logistic Regression of Legally Relevant and Extra-legal
Indicators with Death Sentence
SEE PRINT EDITION FOR TABLE

***96** Table 31b. Omnibus Tests and Model Summary for Logistic Regression of
Legally Relevant and Extra-legal Indicators with Death Sentence
SEE PRINT EDITION FOR TABLES

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We would like to express our appreciation to Illinois Governor George Ryan and his Commission on Capital Punishment for the invitation to study their state's death sentencing patterns. This Article is a slightly revised version of our Final Report submitted to the Governor and the Commission and released April 15, 2002. Funding support was provided by the State of Illinois. Our special thanks go to Deputy Governor Matthew R. Bettenhausen, both a member of the Commission and its Executive Director, for facilitating the cooperation of state agencies with respect to collection of data and providing other support for this study.

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[FN1]. Center on Wrongful Convictions, Northwestern University School of Law, Persons Sentenced to Death in Illinois Since 1977, Nov. 10, 2001 [hereinafter Illinois Death Sentences] (on file with Oregon Law Review); Sara Burnett, Casteel Sentenced to Death, Jurors Say Killer's Lack of Remorse Played Role in Decision, Chi. Daily Herald, Nov. 21, 2001, at 1 (reporting the sentencing of the last person to be sentenced to death in Illinois in 2001).

[FN2]. Deborah Fins, NAACP Legal Defense and Educational Fund, Inc., Death Row USA, Winter 2002, at 40 (on file with Oregon Law Review). The precise count of inmates varies depending on whether one includes inmates who are awaiting resentencing.

[FN3]. Samuel R. Gross & Robert Mauro, Death & Discrimination: Racial Disparities in Capital Sentencing 43 (1989).

[FN4]. See Northeastern Illinois Planning Commission, Profiles of General Demographic Characteristics, 2000 Census; May 2001, at <http://www.nipc.cog.il.us-GDP-counties/gdp17.pdf>.

[FN5]. See Illinois Death Sentences, *supra* note 1; Burnett, *supra* note 1.

[FN6]. See Illinois Death Sentences, *supra* note 1; Burnett, *supra* note 1.

[FN7]. See Illinois Death Sentences, *supra* note 1; Burnett *supra* note 1.

[FN8]. Death Row U.S.A., *supra* note 2, at 10-23.

[FN9]. *Id.* at 40.

[FN10]. See Illinois Death Sentences, *supra* note 1; Burnett, *supra* note 1.

[FN11]. Walter Berns, Defending the Death Penalty, 26 Crime & Delinquency 503, 511 (1980).

[FN12]. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

[FN13]. John C. Jeffries, Justice Lewis F. Powell, Jr.: A Biography 451 (1994).

[FN14]. “[I]n this century, no American court has upheld a legal claim alleging racial discrimination in the use of the death penalty.” 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, 1643 (1998).

[FN15]. It is for that reason that Illinois courts have not been receptive to previous studies examining race and death sentencing in Illinois, most notably the work published by Gross and Mauro, *supra* note 3. However, the lack of interest expressed by the courts in their work has nothing to do with its quality. See, e.g., *Illinois v. Davis*, 518 N.E.2d 78, 80 (Ill. 1987); *Illinois v. Stewart*, 520 N.E.2d 348 (Ill. 1988).

[FN16]. Although rare, it is not unheard of for judges or prosecutors to use racially derogatory language when referring to minority defendants. For example, in a Florida death penalty case in the mid-1980s, the trial judge referred to the African-American defendant’s family with a racially derogatory term. *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986).

[FN17]. Sheri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016, 1018-19 (1988).

[FN18]. *Furman v. Georgia*, 408 U.S. 238 (1972).

[FN19]. Gross & Mauro, *supra* note 3; Samuel R. Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984).

[FN20]. Gross & Mauro, *supra* note 3, at 35.

[FN21]. *Id.* at 233.

[FN22]. *Id.* at 43.

[FN23]. *Id.* at 44, tbl.4.1.

[FN24]. *Id.* at 44-68.

[FN25]. *Id.* at 68.

[FN26]. *Id.* at 35.

[FN27]. *Id.*

[FN28]. *Id.* at 36.

[FN29]. *Id.*

[FN30]. *Id.* at 38.

[FN31]. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1981* (102d edition), 32-33.

[FN32]. Gross & Mauro, *supra* note 3, at 43.

[FN33]. *Id.* at 44.

[FN34]. *Id.* at 45.

[FN35]. *Id.*

[FN36]. *Id.* at 47.

[FN37]. *Id.* at 49.

[FN38]. *Id.*

[FN39]. *Id.* at 48.

[FN40]. *Id.* at 51.

[FN41]. *Id.* at 59.

[FN42]. *Id.* at 66.

[FN43]. Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment into Its Least Credible*, Chi. Trib., Nov. 14, 1999, at C1.

[FN44]. *Id.*

[FN45]. William G. Potratz, *The Prosecutor's Discretionary Power to Initiate the Death Sentencing Hearing--People ex rel. Carey v. Cousins*, 29 DePaul L. Rev. 1097 (1980).

[FN46]. The Chicago Police Department's unique identifying link, which the Department provided to connect IDOC case numbers to victim information, was provided by the Chicago Police Department. These linking identifiers are generally not available to the public. They were obtained for this study pursuant to a confidentiality agreement.

[FN47]. An actual conviction for the contemporaneous felony is not required for an offense to serve as a death sentence eligibility factor. Since we can only measure the cases where there was an actual conviction that makes our data more conservative.

[FN48]. It should be noted that the multiple murder conviction factor and the multiple victim murder indicator are not duplicative since one depends almost entirely on prior murder convictions and one relates to the number of victims in a single incident.

[FN49]. In using the chi-square as a test for statistical significance, care must be taken if in a given table some of the expected frequencies are very low (under 10). In this case the Yates continuity correction reduces the difference between the observed and expected frequencies by .5. This reduces the overall size of the chi-square and provides a more conservative estimate of statistical significance.

[FN50]. No information on ethnicity was available on the 263 cases that were matched to SHR for race of victim data. For these 263 cases, victims who were Hispanic would have been coded as white or possibly black victims.

[FN51]. See *id.*

[FN52]. Baldus et al., *supra* note 14, at 1661-62.

[FN53]. For an elaboration on this and on other ideas to improve the administration of the death penalty, see The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 27-28 (2001).

[FN54]. This proportionality review has the added advantage of alerting prosecutors and trial courts to the importance of issues of proportionality, which in turn may affect decisions on when to seek a death sentence. The New Jersey Supreme Court, for example, has struck down only one death sentence because of issues of proportionality. *State v. Papasavvas*, 790 A.2d 798 (N.J. 2002).

[FN55]. A further limitation on proportionality review is that it does not provide a mechanism for criminal defendants to address the racially discriminatory impact of the death penalty. In 1988, the U.S. Congress introduced the Racial Justice Act (RJA) which would have allowed all state and federal death

penalty death row inmates to challenge their sentences retroactively in the face of discrimination. The Act prohibited the imposition of the death penalty where there was an unacceptable risk of racial discrimination. Unlike the Supreme Court ruling in *McCleskey*, the RJA determined that intentional discrimination could be proven by statistical evidence showing racial disparities. The Act also provided for specific procedures to adjudicate racial claims including the requirement that states designate a central agency to oversee the collection of data on capital sentencing. Further, the Act required federal courts to provide counsel to indigent persons to research criminal justice statistics and other expert services to assist in developing a claim of racial disparity. The Act failed to get enacted during the 100th Congress, although it passed in the House of Representatives.

To date, only one state (Kentucky) has passed an RJA. Under the Kentucky law, courts may consider statistical evidence of racial discrimination relating to whether the decision to seek the death penalty was influenced by the race of the victim or defendant. Ky. Rev. Stat. Ann. § 532.300 (Michie 2001). Other than Kentucky, no jurisdiction has enacted legislation to address the racially discriminatory impact of the death penalty.

[FN56]. The racial and ethnic backgrounds of these decision-makers are one example of data needed (as well as continued efforts to bring more diversity into the decision-making circle).

[FN57]. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001); see also William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001).