PLACE MATTERS (MOST): AN EMPIRICAL STUDY OF PROSECUTORIAL DECISION-MAKING IN DEATH-ELIGIBLE CASES

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This Article investigates prosecutorial discretion in death penalty prosecution in Missouri. Based upon an empirical analysis of all intentional-homicide cases from 1997–2001, this Article concludes that Missouri law gives prosecutors unconstitutionally broad discretion in charging these cases. This Article also finds that prosecutors exercise this broad discretion differently, leading to geographic and racial disparities in sentencing, and concludes with proposals for statutory reform.

INTRODUCTION

When it comes to the death penalty in America, race matters. Since the time of David Baldus' landmark study of the Georgia death penalty,[1] studies have found that white victims are afforded higher status—with their killers receiving harsher penalties—and in some cases black defendants are treated more harshly than white defendants, particularly if their victims are white.[2] Furthermore, death

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1. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990).

2. *See* David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience*, 81 NEB. L. REV. 486, 499–502 (2002) [hereinafter Nebraska Study]; 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, 1658–60 (1998) [hereinafter Philadelphia Study]. Still, this finding does not

penalty prosecutions in urban and rural areas are different. Unlike race-based differences, however, geography does not result in differential treatment that consistently disfavors the same group: depending on the particular region studied, sometimes defendants in urban communities are treated more harshly,[3] while in other regions, defendants in rural communities are treated more harshly.[4]

The most recent of these studies focused on states such as Nebraska and Maryland,[5] which have executed very few people.[6] In contrast, Missouri is one of the nation's leading death penalty states. Having executed sixty-six prisoners since the death penalty was reinstated, Missouri ranks fourth in the country in the total number of executions since 1976, behind Texas, Virginia and Oklahoma, and just ahead of Florida.[7] Missouri ranks fifth per capita, behind Oklahoma, Texas, Delaware, and Virginia.[8] This Article is the only recent study that provides a detailed empirical analysis of capital punishment in one of the "top five" death penalty states, except for an ABA-sponsored study of Florida.[9]

In focusing on Missouri, this Article finds that Missouri is no exception to the rule that race matters in the prosecution of murder and use of the death

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appear in all states, or all time periods. *See* Nebraska Study, *supra*, at 499–502. These studies measure charging, trial, and sentencing outcomes. Thus, harsher treatment includes a defendant being charged with a more serious crime (first-degree versus second-degree murder, for example); facing a death penalty trial (rather than a non-death-penalty first-degree murder trial); being given a harsher sentence, either in terms of life versus death, or a longer term of years; or, finally, being executed versus serving time in prison.

3. *See* Nebraska Study, *supra* note 2, at 623–24; Philadelphia Study, *supra* note 2, at 1658–60.

4. *See* RAYMOND PATERNOSTER ET AL., AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 30 (Jan. 7, 2003), *available at* http://www.newsdesk.umd.edu/pdf/finalrep.pdf [hereinafter Maryland Study].

5. *See* Nebraska Study, *supra* note 2; Maryland Study, *supra* note 4.

6. Maryland has executed only five people since 1976. Nebraska has executed three people. Death Penalty Info. Ctr., Executions in the United States, 1608–1976, By State, http://www.deathpenaltyinfo.org/executions-united-states-1608-1976-state (last visited Feb. 2, 2009).

7. Texas is in first place with 413 executions, followed by Virginia with 102 and Oklahoma with 87. Trailing closely behind Missouri are Florida with 65 executions, North Carolina with 43, and Georgia with 42. *See id.*

8. After rounding off the July 2006 populations of the states in millions to one decimal point, Missouri executed 11.4 per million population since 1976. Oklahoma led with 23.3 per million, followed by Texas with 16.3, Delaware with 15.5, and Virginia with 12.9. The census data is from U.S. Census Bureau, American FactFinder, http://factfinder.census.gov (last visited Feb. 2, 2009).

9. *See* ABA EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT (2006), *available at* http://www.abanet.org/moratorium/assessmentproject/florida.html [hereinafter Florida Study]. The ABA has conducted a series of studies of the death penalty in various states, focusing on process as defined statutorily. *See generally* A.B.A. Death Penalty Moratorium Implementation Project, http://www.abanet.org/moratorium/assessmentproject/home.html (last visited Feb. 20, 2009) [hereinafter A.B.A. Death Penalty Moratorium Project].

penalty.[10] But the analysis in this Article also demonstrates that "place" matters: there are large disparities in the decision-making process and in outcomes depending on the place of prosecution.[11]

In general, geographic factors are more significant than racial factors,[12] but there is substantial correlation among these factors. For instance, defendants in Missouri's two largest cities—St. Louis and Kansas City—are less likely to face capital trials and less likely to be sentenced to death than defendants in the rest of the state.[13] Notably, crimes in St. Louis and Kansas City are predominately black-on-black, whereas crimes in the rest of the state are predominately white-on-white.[14] Thus, consistent with the geographic findings, white defendants who kill white victims are more likely to face capital charges, and more likely to be sentenced to death, than black defendants who kill black victims.[15] Geographic variation alone is problematic because it raises concerns about arbitrariness in the implementation of capital punishment. However, geographic variation that combines with intra-race crime and housing demographics to create racial disparities is even more troubling given the history of racial discrimination in the criminal justice system.

The racial composition of the jury pool is another way in which both place and race matter. This study is unique in that it analyzes correlations between the racial composition of jury pools in different counties and the outcomes of homicide prosecutions. Compared to the rest of the state, St. Louis and Kansas City have high percentages of nonwhites in the jury pool. It may not be coincidental that the localities with a large percentage of nonwhites in the jury pool are the localities where defendants are least likely to receive a death sentence.

Geography reflects and magnifies demographic and political variations. Some of these variations are built into our system of government. When neighboring states have radically different laws—for example when a death penalty state sits next to a non-death penalty state—this radical difference is a natural result of our federal system of government.[16] The same is true for

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10. *See infra* Tables 3.3(A)–(C), 4.3(A)–(C).

11. These analyses do not adjust for the culpability of the individual, or the heinousness of the crime. Instead, the project provides a description of the disparities created across important fault lines by the decisions made by prosecutors, fact finders and defendants, whether justified by outside factors or not.

12. *See infra* Table 4.4.

13. *See infra* Table 4.2(A).

14. Black-on-black homicide accounts for 76% of the homicides in St. Louis City and 50% of homicides in Jackson County, which contains Kansas City. In the remaining counties, white-on-white crime constitutes 57% of all of the homicides.

15. *See infra* Table 4.3(C). Because of the collinearity between geography and racial demographics—that the race of defendants and victims is related to where the crime took place—it is difficult to determine which variable is the driving force behind the disparities found in this study. The point here, however, is that both types of differences are important, and implicate the fairness of murder prosecution in Missouri.

16. A distinctive set of federalism concerns defines overlapping state and federal jurisdiction. *See, e.g.*, Petite v. United States, 361 U.S. 529 (1960); DEP'T OF JUSTICE, UNITED STATES ATTORNEY MANUAL, § 9-2.031, Dual and Successive Prosecution Policy

variations in policy, where both states are death penalty states but one state makes frequent use of the sanction and the other does so only rarely.

Although principles of federalism protect state-to-state variations in the application of capital punishment, they do not protect county-to-county variation. While intrastate variation in the application of the law is permissible, or even warranted, in some situations,[17] it does not follow that county-to-county variation in death penalty policy is acceptable. For example, while the Supreme Court has held that the First Amendment protections for obscene speech vary in accordance with local community standards,[18] the implementation of capital punishment raises life-and-death issues where the stakes are substantially higher than disputes about obscene speech.[19] The Supreme Court has never even hinted that the Eighth Amendment prohibition on cruel and unusual punishment should be subject to the vagaries of local community standards.

Nevertheless, this study demonstrates that, in Missouri, local community standards play a crucial role in the decision-making process that determines whether a convicted murderer lives or dies. Missouri has 115 counties, each with its own local prosecutor. The homicide statutes in Missouri grant local prosecutors broad discretion to make life-and-death decisions, and prosecutors in different counties exercise that discretion in very different ways. On a national level, there are 2300 prosecuting authorities in this country, most at the county level.[20] This study does not address the question of whether the variation across counties in Missouri is characteristic of intrastate disparities in other states. If Missouri is typical, death penalty practice varies in systematic ways that call into question the fairness of the system, despite repeated attempts by the Supreme Court to impose a measure of national uniformity in the implementation of capital punishment.[21]

("Petite Policy"); *see also* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES & EXECUTIVE MATERIALS 953–54 (3d ed. 2007).

17. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (theorizing that local variation in policies is an efficient solution to heterogeneous policy preferences).

18. Miller v. California, 413 U.S. 15, 24–25 (1973).

19. The Supreme Court has consistently reiterated that with stakes, literally, of life and death, the constitutional concerns with respect to implementation of the death penalty are heightened. Zant v. Stephens, 462 U.S. 862 (1983); Kennedy v. Louisiana, 129 S. Ct. 1, 2 (2008) (mem.); Gregg v. Georgia, 428 U.S. 153, 188 (1976); Furman v. Georgia, 408 U.S. 238, 276–77 (1972).

20. *See* STEVEN W. PERRY, PROSECUTORS IN STATES COURTS, 2005 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf.

21. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (holding that individuals who were less than eighteen years old at the time of the crime are not eligible for capital punishment); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting execution of mentally retarded individuals); Ford v. Wainwright, 477 U.S. 399, 417–18 (1986) (prohibiting execution of insane people); *Zant*, 462 U.S. at 877 (requiring that statutory aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty"); Enmund v. Florida, 458 U.S. 782, 789 (1982) (holding that an individual cannot be sentenced to death "solely for participation in a robbery in which another robber takes life"); Lockett v. Ohio, 438 U.S. 586, 606–07 (1978) (statutes must give defendants broad leeway to present mitigating evidence and plea for mercy); Coker v. Georgia, 433

The analysis of geographic and racial disparities in homicide prosecution presented in this Article relies upon a "comprehensive database" of 1046 homicide cases that includes substantially all of the homicide cases prosecuted in Missouri over a five-year period that were initially charged as first-degree murder ("M1"), second-degree murder ("M2"), or voluntary manslaughter ("VM"), and that resulted in a homicide conviction.[22] Additionally, 247 cases (the "detailed database") selected from the comprehensive database were studied in greater detail.[23] We gathered substantial information about cases in the detailed database, and used this information to investigate the decision-making process in more depth, with a particular focus on disparate racial impact and interactions with geographic disparities.

By analyzing data gathered on all cases charged as M1, M2, or VM, the study provides a rough measure of how much "work" the statute does in selecting capital cases from the broader universe of intentional-homicide cases, and how much of that "work" is left to prosecutorial discretion. At least 76% of the cases in the comprehensive database are death-eligible under the statute;[24] the other 24% are not death-eligible. Only 2.5% of the homicide cases yielded sentences of death. In another 2.5% of the cases, juries or trial judges rejected a capital charge presented by a prosecutor. In total, only 5% of defendants in Missouri homicide cases faced a death penalty trial.

Therefore, death penalty-eligible cases in which prosecutors chose not to pursue capital charges comprise at least 71% of the cases in the comprehensive database. In rough terms, prosecutors are doing three times as much "work" as the statute in deciding which cases merit capital punishment, because the statute eliminated only 24% of the cases from the class of death-eligible offenses, whereas prosecutors eliminated 71% by electing not to pursue capital charges. These figures suggest that the Missouri legislature has abdicated its responsibility to establish statutory limits on capital punishment and delegated that legislative function to individual prosecutors. More fundamentally, our findings highlight what may be a critical problem with the administration of capital punishment in other states, to the extent that homicide statutes in other death penalty states grant similarly broad discretion to local prosecutors.

One response to the vast discretion prosecutors wield would be to remove the discretion altogether, making capital punishment mandatory for a certain class of crimes.[25] In *Woodson v. North Carolina*, the Supreme Court held mandatory

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U.S. 584, 600 (1977) (holding that a state cannot impose capital punishment for the rape of an adult woman).

22. For a more precise description of the parameters for including cases in the comprehensive database, see *infra* notes 31–32 and accompanying text.

23. We created the detailed database with a stratified random sample of homicide cases, oversampling cases in which the state sought the death penalty at some point in the prosecution. *See infra* Appendix II (describing the selection of the detailed database).

24. *See infra* Part II (explaining how this estimate is derived).

25. Of course, one cannot actually remove prosecutorial discretion altogether; this change would simply refocus the locus of the discretion to the initial decision to charge M1.

capital punishment unconstitutional, recognizing that discretion is necessary.[26] In particular, the Court reasoned that discretion was key to the constitutionality of capital punishment.[27] Legislatures, therefore, have a fine line to draw: the Supreme Court has stated that discretion is an important component of the constitutionality of the death penalty, but the Court has also held that the death penalty should be rare, and that the grounds for the death penalty should be narrow *by statute*.[28] This suggests that legislatures must narrow the reach of the death penalty to a reasonably small group of the worst homicides, at which point prosecutors may use their discretion to narrow the field further. One additional point suggests that legislatures should provide some guidance to prosecutors: the legislative process is open to the community, and allows input from all constituents. In contrast, prosecutors make their decisions without direct input from the community; the closed-door nature of prosecutorial decision-making is particularly troubling in the context of capital punishment, when the decision has such drastic effects.

This Article is divided into five parts. Part I introduces our study, with an overview of the relevant law and practice in Missouri, focusing on the ways in which Missouri law defines the scope of prosecutorial discretion and providing an abbreviated description of our methodology and design.[29] Part II presents a rough quantitative measurement of the scope of prosecutorial discretion. Part III analyzes both racial and geographic disparities in charging and conviction rates for M1 versus M2—a key dividing line in homicide prosecution. Part IV investigates the implementation of the death penalty in Missouri, focusing on geographic and racial disparities in charging and sentencing outcomes. Part V presents potential policy implications arising from the study.

I. STUDYING PROSECUTORIAL DISCRETION IN MISSOURI

The analysis in this Article provides a statistical snapshot of homicide cases in Missouri. It does so by measuring the extent of prosecutorial discretion, and then focusing on how the discretionary decisions of prosecutors correlate with racial and geographic disparities along the dividing line between M1 and lesser homicide offenses, and along the divide between death sentences and lesser sentences.[30] This Part provides a brief overview of the study design and methodology, with particular attention to the details of Missouri law and how these details impact the study.

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26. 428 U.S. 280, 296–99 (1976).

27. *Id.*

28. *See* Kennedy v. Louisiana, 129 S. Ct. 1, 2 (2008) (mem.) (limiting capital punishment for any crime against a person to those individuals who commit murder); Zant v. Stephens, 462 U.S. 862, 879–80 (1983); Gregg v. Georgia, 428 U.S. 153, 194 (1976); Furman v. Georgia, 408 U.S. 238, 298–99 (1972).

29. A complete description is available *infra* Appendices I and II.

30. It bears emphasis, though, that the analysis does not support any conclusions about causal relationships between prosecutorial decisions and geographic/racial disparities. Investigation of causal relationships between prosecutorial decisions and different outcomes requires the introduction of control variables or other statistical techniques and data; that will be the focus of a subsequent study.

This study is based on a comprehensive database that includes 1046 cases that satisfy the following criteria: (1) the initial indictment or information is dated between January 1, 1997 and December 31, 2001; (2) the defendant was initially charged with either murder or voluntary manslaughter;[31] and (3) the defendant was ultimately convicted of a homicide offense.[32] We divided the cases in the comprehensive database into two categories: "capital charges" and "noncapital cases." "Capital charges" are cases in which the prosecutor sought the death penalty at some point during the prosecution. For example, cases in which the prosecutor initially charged death, and then later accepted a plea bargain for a lesser sentence, count as capital charges for these purposes. All other cases in the database are "noncapital cases." After compiling the comprehensive database, we selected a "detailed database" of cases to study in greater detail. The detailed database consists of 247 cases, including 127 capital charges and 120 noncapital cases.

A. Classification of Homicide as Murder

Missouri, like a majority of death penalty states, classifies murder in two degrees: first-degree murder and second-degree murder. There are only two permissible punishments for M1 in Missouri: the death penalty, or life imprisonment without eligibility for probation or parole ("LWOP").[33] In contrast, M2 is punishable as a Class A felony[34] by ten to thirty years imprisonment, or by life imprisonment with eligibility for parole.[35] Thus, the punishment for M1 is much harsher than the punishment for M2.

Even so, the statutory definitions of M1 and M2 are almost identical. A defendant commits M2 if he "knowingly causes the death of another person."[36] A defendant commits M1 if he "knowingly causes the death of another person after deliberation upon the matter."[37] Thus, the deliberation requirement is the only factor that distinguishes M1 from "knowing" second-degree murder. Deliberation is defined as "cool reflection for any length of time no matter how brief."[38] As the analysis in Appendix I demonstrates, the deliberation requirement is satisfied in almost every case involving knowing second-degree murder. Therefore, the primary difference between M1 and M2 is the severity of the punishment.

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31. Although cases charged as second-degree murder or voluntary manslaughter are not death-eligible under the statute, these cases are included because prosecutorial discretion affects the decision whether to charge a case as first-degree murder ("M1"), second-degree murder ("M2"), or voluntary manslaughter ("VM"). The analysis in Part III, *infra*, demonstrates that many of the cases charged as M2 or VM satisfy the statutory requirements for an M1 charge and are death-eligible under the statute.

32. The methodology for creating both the comprehensive and detailed databases is described in detail *infra* Appendix II.

33. MO. REV. STAT. § 565.020.2 (2008).

34. *Id.* § 565.021.2.

35. *Id.* § 558.011.1(1).

36. *Id.* § 565.021.1(1). Under Missouri law, felony murder and reckless homicide are also classified as second-degree murder. See infra Appendix I.

37. *Id.* § 565.020.1.

38. *Id.* § 565.002(3).

Beyond the M1/M2 distinction, prosecutors must prove one or more statutory aggravating factors beyond a reasonable doubt in order to obtain a death sentence.[39] The Missouri Penal Code lists seventeen statutory aggravating factors. This Article uses the following terms to refer to the seventeen statutory aggravators: prior record, multiple homicide, hazardous device, for money, public official, agent or employee, wantonly vile, peace officer, escaped custody, avoiding arrest, felony murder, killing witness, corrections officer, hijacking, concealing drug crime, other drug crime, and gang activity.[40]

The number and breadth of statutory aggravators in Missouri expands the class of death-eligible offenses, thereby broadening the scope of prosecutorial discretion. With seventeen statutory aggravating factors, Missouri ranks eighth among the thirty-five death penalty states in terms of the number of statutory aggravators.[41] In general, states with a greater number of statutory aggravators give prosecutors more discretion to decide which cases should be charged as capital cases. The sheer number of aggravators is only part of the story, though, because states vary widely in the breadth of individual aggravators. Part III, *infra*, provides a more detailed analysis of the broadest statutory aggravators.

B. Design of the Study

The main objectives of this study are: (1) to measure the relative importance of different decision-makers in creating and implementing homicide and death penalty policy; (2) to analyze correlations between prosecutorial discretion and disparate impacts on different racial and geographic groups within Missouri; and (3) to determine the extent to which statutory limitations constrain the exercise of prosecutorial discretion and promote consistent application of capital punishment across counties. This subsection discusses the methodology and design of the study. A more detailed discussion of the methodology can be found in Appendix II.

There are four key methodological issues that studies of this nature must address: (1) determining the population of cases to be investigated; (2) defining which cases are "death-eligible"; (3) deciding what source(s) of data to utilize; and (4) developing measures to control for crime-specific characteristics, where

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39. *Id.* § 565.030.4(2).

40. The statutory definitions of all seventeen aggravators are included *infra* Appendix I.

41. The only jurisdictions with a larger number of aggravators are: California (twenty-eight aggravators), CAL. PENAL CODE § 190.2(a) (West 2008); Delaware (twenty-two aggravators), DEL. CODE. ANN. tit. 11, § 4209(e) (2009); Illinois (twenty-one aggravators), 720 ILL. COMP. STAT. 5/9-1(b) (2008); Utah (nineteen aggravators), UTAH CODE ANN. § 76-5-202 (1) (2008); Colorado (eighteen aggravators), COLO. REV. STAT. § 18-1.3-1201(5) (2008); Oregon (eighteen aggravators), OR. REV. STAT. §163.095(1)–(2) (2007); and Pennsylvania (eighteen aggravators), 42 PA. CONS. STAT. § 9711(d) (2008). With seventeen aggravators, Missouri is tied with Florida, FLA. STAT. § 921.141(5) (2008), in eighth place among the thirty-five death penalty states. For the forty-two federal offenses that may trigger the death penalty, see Death Penalty Info. Ctr., Federal Laws Providing for the Death Penalty, http://www.deathpenaltyinfo.org/federal-laws-providing-death-penalty (last visited Feb. 3, 2009).

appropriate, that properly inform the charging and sentencing decisions. With respect to the first point, the present study investigates a population of cases that includes substantially all of the intentional-homicide cases prosecuted in Missouri over a five-year period. We adopt this inclusive approach to reduce selection bias in the final database; it is necessary to include all cases that could have been death penalty cases, or M1 cases, in order to compare the charging practices of prosecutors in different counties. If this study excluded cases not charged as capital cases, it would risk vastly understating the importance of the prosecutor's charging decisions. Recent comprehensive studies have adopted a similar approach, although some studies focus only on cases charged as capital cases.[42]

Regarding the second methodological choice, this study uses a probable cause standard to determine which cases are death-eligible.[43] Prior studies generally use a more conservative standard for assessing death eligibility. For example, the Maryland Study requires clear evidence that the crime satisfies all the statutory requirements for capital punishment.[44] This study uses the lower "probable cause" standard because that is the only legal requirement necessary to indict for M1 and to seek the death penalty. Although prosecutors must prove the case beyond a reasonable doubt to the jury, most cases end in plea bargaining.

With respect to the third design issue, this study uses a variety of data sources to investigate cases in the detailed database, including police investigative reports, FBI records of criminal histories, court records, newspaper articles, and appellate decisions. The goal is to recreate as closely as possible the data available to the prosecutor at the time the prosecutor makes initial charging and plea-bargaining decisions. In contrast, other studies gather facts from records created later in the process, notably pre-sentencing reports and trial transcripts. This study did not rely upon trial transcripts because most of the cases in the study were resolved by plea agreements.[45] Despite the advantages of presentencing reports[46] this study excluded them as well because Missouri prosecutors often do not have this information when making pretrial decisions. Hence, the information would not explain any of the charging and plea-bargaining decisions made before trial, which are the central focus of this study.

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42. *See, e.g.*, A.B.A. Death Penalty Moratorium Project, *supra* note 9.

43. Specifically, a crime initially charged as M2 or VM is "M1-eligible" if a prosecutor could make a good-faith, reasonable argument that the statutory requirements for M1 are satisfied. Additionally, all crimes charged as M1 are deemed M1-eligible. An M1-eligible crime in which the prosecution did not seek death is "death-eligible" if the prosecution could make a good-faith, reasonable argument that one or more statutory aggravating factors are present. Additionally, all cases charged as capital crimes are deemed death-eligible.

44. *See* Maryland Study, *supra* note 4, at 15–16.

45. In the comprehensive database, 61.3% were resolved by plea agreements; similarly, 55.5% of the cases in the detailed database were resolved by plea agreements.

46. Presentencing reports have advantages when focusing solely on the decision whether to sentence an individual to death, because they provide more balanced information about mitigating and aggravating factors, similar to what would be presented in a death penalty trial.

Our final design decision was to focus on disparate impact, rather than causality. Because of this, the study does not control for culpability. Instead, it focuses on the racial and geographic disparities associated with prosecutorial decision-making. These disparities may be justified by other factors, but they exist nonetheless, and inform our judgment of how the criminal justice system works. Disparate impact is of primary importance in policy discussions because it affects perceptions of fairness, bias, and legitimacy. We plan to do a separate study that examines causal relationships between prosecutorial decision-making and racial and geographic disparities.

C. Analytical Methodology

The analysis in the remainder of this Article is divided into three parts. Part II measures the extent to which statutory constraints limit the exercise of prosecutorial discretion in charging decisions, concluding that prosecutorial discretion is largely unconstrained by the statutory scheme created by the Missouri legislature. Part III provides unadjusted measures of geographic and racial disparities in the decision-making process that determines which defendants are convicted of M1, and which defendants are convicted of lesser included offenses.[47] Part IV provides unadjusted measures of geographic and racial disparities in the decision-making process that determines which defendants are sentenced to death. As Parts III and IV demonstrate, the unconstrained discretion that prosecutors wield leads to significant geographic and racial disparities in charging, conviction, and sentencing patterns in Missouri.

To provide measures of geographic disparities, this Article analyzes the complete universe of cases in the comprehensive database because, for every case in the comprehensive database, the database contains information about the county of origin and the decisions made in each stage of the decision process. To provide measures of racial disparities, we derive estimates from the detailed database because information about race of victims and race of defendants is available only for cases in the detailed database. Those estimates are based on a weighted average that accounts for the sampling method employed.[48]

II. STATUTORY CONSTRAINTS ON PROSECUTORIAL DISCRETION

Prosecutorial discretion is a key component of our criminal justice system. Prosecutorial discretion allows for individualized application of general laws, allows prosecutors to tailor application of the laws to the specific community, and is a necessary part of our justice system, given the need to prioritize prosecutions to conserve scarce resources. But unfettered prosecutorial discretion is harmful as well: there are significant dangers in arbitrary and prejudicial application of the law. The secrecy of prosecutorial decision-making exacerbates these concerns, making discriminatory application of the law, for example, much more difficult to discover. Given these dangers, it is key for the

47. The term "unadjusted measures" means that these measures do not control for the culpability of individual defendants.

48. See *infra* Appendix II for more details.

legislature to provide significant guidance to prosecutors to channel their discretion appropriately. In *Zant v. Stephens*, the Supreme Court recognized the importance of a legislative check on prosecutorial discretion in the death penalty context.[49] But the death penalty is only the final decision in a homicide prosecution; equally important is the initial decision to charge M1.

As mentioned above, this Article defines the term "M1-eligible" to mean that a reasonably aggressive prosecutor could make a good-faith, reasonable argument that the statutory requirements for an M1 charge are satisfied. The study defines the term "death-eligible" to mean that a reasonably aggressive prosecutor could make a good-faith, reasonable argument that the statutory requirements for a capital charge are satisfied. Part II of this Article analyzes cases that were initially charged as M2 or VM to derive an estimate of the percentage of cases in the comprehensive database that are M1-eligible. Similarly, this study analyzes cases that were not charged as capital cases to derive an estimate of the percentage of cases in the comprehensive database that are death-eligible. The estimates of the percentage of cases that are M1-eligible and death-eligible provide a rough quantitative measure of the extent to which statutory constraints limit the exercise of prosecutorial discretion.

A. First-Degree Versus Second-Degree Murder

Using conservative assumptions, approximately 62% of the cases in the comprehensive database that were initially charged as M2 or VM satisfy the statutory requirements for an M1 charge. Overall, an estimated 84.5% of the cases in the comprehensive database are M1-eligible under the statute.

There are 1046 cases in the comprehensive database, including 617 cases initially charged as M1, and 429 cases initially charged as M2 or VM. To determine how many of the 429 cases charged as M2 or VM are M1-eligible, it is necessary to extrapolate from the cases in the detailed database because we do not have sufficient information about all the cases in the comprehensive database. There are 247 cases in the detailed database, including sixty-one cases that were initially charged as either M2 or VM. Two law professors independently reviewed the files for all sixty-one cases that were initially charged as either M2 or VM to determine which cases were M1-eligible. For each case, each professor answered either "yes" or "no" to the question of whether the case was M1-eligible. There were thirty-eight cases that both professors agreed are M-1 eligible, and fifty-three cases that at least one professor thought was M1-eligible. Conservatively, using only the thirty-eight cases for which both professors agreed,[50] 62.3% of the cases

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49. 462 U.S. 862, 876 n.15 (1983) (recognizing "the need for legislative criteria to limit the death penalty to certain crimes"). *Zant* focuses on the legislative check on the prosecutor's power; it specifically endorses the Georgia system of undirected jury decision-making. *Id.* at 880 (noting that "the absence of legislative or court-imposed standards to govern the jury in weighing the significance of either or both of those aggravating circumstances does not render the Georgia capital-sentencing statute invalid as applied in this case").

50. If one uses the higher figure of fifty-three cases that at least one professor thought were M1-eligible, this would suggest that 86.9% of the cases initially charged as M2 or VM are M1-eligible.

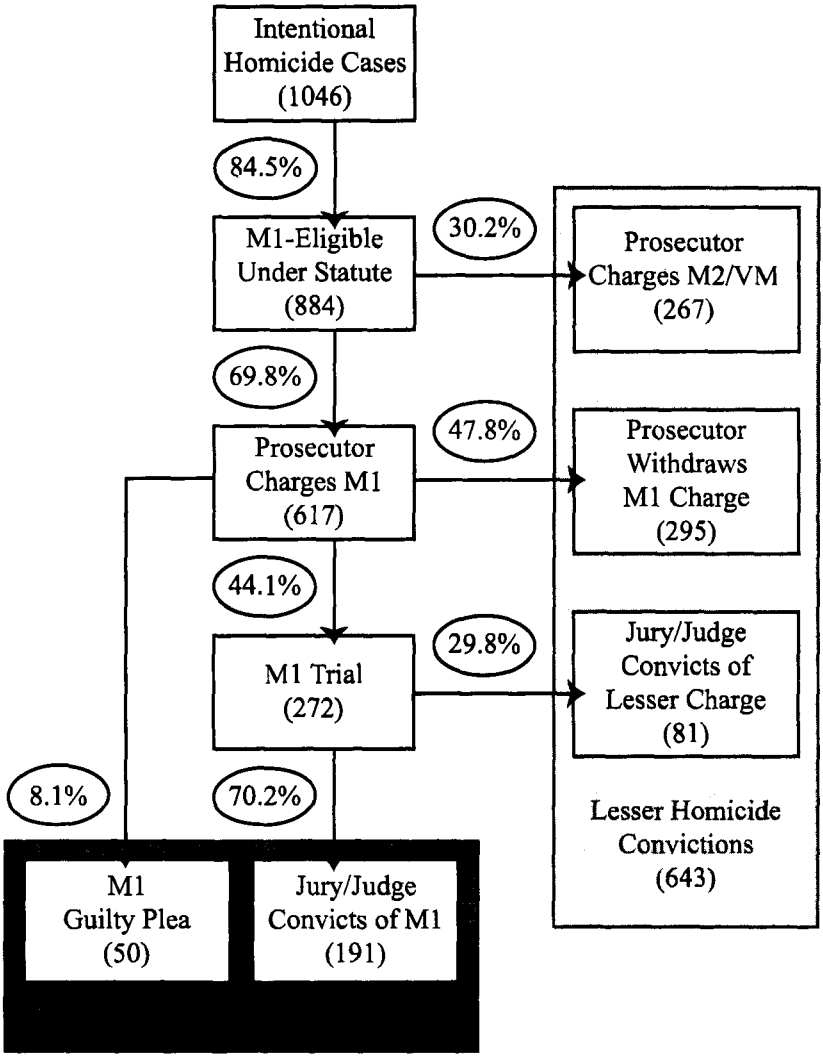
in the detailed database that were initially charged as M2 or VM are M1-eligible under the statute.[51] Assuming that 100% of the cases in the comprehensive database that were initially charged as M1 are M1-eligible under the statute, and assuming that 62.3% of the cases that were initially charged as M2 or VM are M1-eligible under the statute, 84.5% of the intentional homicide cases prosecuted in Missouri are M1-eligible under the statute.[52]

Figure 2.1 compares the influence of the statute to the influence of prosecutorial discretion in determining which cases yield M1 convictions. Given that 84.5% of the intentional-homicide cases prosecuted in Missouri are M1-eligible under the statute, it follows that the statute eliminates only about 15.5% of the cases from the class of M1-eligible offenses. Prosecutors filed M1 charges in only 69.8% of the M1-eligible cases.

51. Because we are extrapolating from a subsample of data, there is additional error in this estimate. To be precise, the conservative estimate is that 62% ± 12% are M1-eligible.

52. Incorporating the error in the original 62.3% estimate, our conservative estimate is that 84.5% ± 5.8% of the cases in the comprehensive database are M1-eligible. If one used the more liberal estimate that fifty-three out of sixty-one M2/VM cases in the detailed database are M1-eligible, a similar calculation yields the estimate that about 94.6% of the cases in the comprehensive database are M1-eligible.

Figure 2.1:
Schematic of M1–M2 Decision Tree



In effect, prosecutors eliminated 30.2% of the M1-eligible cases by choosing not to file an M1 charge. Moreover, prosecutors eliminated 47.8% of the cases initially charged as M1 by voluntarily reducing the M1 charge.[53] Overall,

53. The vast majority of cases in which prosecutors withdrew M1 charges were resolved by guilty pleas. Indeed, 284 out of 295 cases in this group were resolved by guilty pleas. The other eleven cases in this category are cases where the prosecutor filed an amended information before trial to reduce the charge from M1 to M2.

discretionary choices by prosecutors eliminated about 53.7% of the intentional-homicide cases from the M1 category,[54] whereas the statute eliminated only about 15.5% of the cases from the M1 category. Thus, prosecutors do about 3.5 times more "work" than the statute in narrowing the class of intentional-homicide cases to yield M1 convictions.

It is worth noting that the *minimum* penalty for an M1 conviction is harsher than the *maximum* penalty for an M2 conviction. The statute provides only two possible sentences for a defendant convicted of M1: death, or life without parole.[55] In contrast, the maximum penalty for a defendant convicted of M2 is life with parole, and the minimum penalty is ten years' imprisonment.[56] About one-fourth of the cases in the comprehensive database were M1 convictions; the remaining defendants were convicted of lesser included offenses.[57] The 241 M1 convictions yielded twenty-six death sentences (11%) and 215 LWOP sentences (89%). In contrast, the 805 cases where defendants were convicted of lesser included offenses yielded 151 life sentences and 651 fixed-term sentences.[58] The average sentence for defendants sentenced to a term of years was 15.8 years. Thus, prosecutors' charging and plea-bargaining decisions drastically alter the potential sentencing landscape that a defendant faces.

There is a huge difference in sentencing outcomes between defendants convicted of M1 and defendants convicted of lesser included offenses. Despite that difference, the statute gives prosecutors extremely broad discretion to choose which defendants should be convicted of M1, and which defendants should be convicted of lesser offenses. Effectively, the Missouri statute delegates to prosecutors the legislative task of determining which types of homicide merit harsher punishment. This, in turn, means that 115 county prosecutors are making separate decisions regarding charging practices, which leads to significant geographic and racial disparities.

To address this issue, the Missouri legislature could amend the statutory definition of "deliberation" to require evidence of advance planning or a preconceived design; this is the approach adopted by California, Arizona, West Virginia, and other states.[59] We estimate that only 15% of the cases initially charged as M2 or VM would be M1-eligible under the revised statute, compared to at least 62.3% under the existing statute, and about 60% of the cases initially charged as M1 would remain M1-eligible. Overall, we estimate that only 36% of the cases in the comprehensive database would be M1-eligible under the revised

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54. (267+295)/1046 = .537

55. MO. REV. STAT. § 565.020.2 (2008).

56. *See id.* §§ 565.021.2, 558.011.1(1).

57. This figure includes 542 M2 convictions, 138 voluntary-manslaughter convictions, and 125 convictions for other offenses, most of which were involuntary manslaughter.

58. The comprehensive database includes three cases where defendants were convicted of M2, but we lack information about sentencing outcomes.

59. *See infra* Appendix I. This would reinstate the plain meaning of the statute's current language, rather than the somewhat strained interpretation of "deliberation" that the Missouri Supreme Court has applied.

statute, compared to at least 84.5% under the current statute.[60] Hence, this type of statutory amendment would significantly constrain prosecutorial discretion in choosing which cases to charge as M1 and which cases to charge as M2.

B. Prosecutorial Discretion and the Choice Between Life and Death

The study also finds that prosecutors have immense discretion when determining in which cases to seek the death penalty. The detailed database contains a total of 247 cases; under the most liberal assumptions, the detailed database includes 239 cases that are M1-eligible.[61] Those 239 cases include 127 capital charges and 112 noncapital cases. One or more statutory aggravating factors are present in ninety-nine of the 112 M1-eligible cases that were not charged as capital cases.[62] Thus, 88.4% of the M1-eligible, noncapital cases in the detailed database are death-eligible under the current statute. This represents a conservative estimate of the percentage of M1-eligible cases that are death-eligible under the statute.

Table 2.1 displays two different estimates of the percentage of death-eligible cases in the comprehensive database derived from the 88.4% figure of death-eligible cases. Part II.A, *supra*, provides a conservative estimate that 84.5% of the cases in the comprehensive database are M1-eligible.[63] In addition, as a more liberal estimate, as many as 94.6% of the cases may be M1-eligible.[64] Using the conservative figure, approximately 76.2% of the intentional-homicide cases

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60. These estimates are derived as follows. Two law professors reviewed the files for every case in the detailed database. For each case, each professor answered "yes" or "no" to the question whether a reasonably aggressive prosecutor could make a good-faith charge of M1 under a California-type statute. We divided the results into three categories: cases charged as M1 capital charges, cases charged as M1 noncapital cases, and cases charged as M2 or VM. We assumed that, for each of these three categories, the percentage of cases that would be M1-eligible under the revised statute is the same for the comprehensive database as it is for the detailed database when properly accounting for our sampling design. Based on that assumption, we estimated the number of comprehensive database cases in each category that would be M1-eligible under the revised statute, and derived an estimate for the comprehensive database as a whole on that basis. The conservative estimate uses only those cases that both professors agreed would be M1-eligible; the liberal estimate uses those cases where at least one of the professors believed the case to be M1-eligible.

61. As discussed above, two law professors independently analyzed the sixty-one detailed database cases that were initially charged as M2 or VM to ascertain which ones were not M1-eligible. *See supra* Part II.A. There were only eight cases that both professors agreed were not M1-eligible. For present purposes, we assume that those eight cases are not M1-eligible, and all the others are M1-eligible. Subtracting those eight cases from the total of 247 detailed database cases, we assume that the detailed database contains 239 M1-eligible cases.

62. The figure of ninety-nine cases is derived from the data compiled on the aggravator forms described *infra* Appendix II. An aggravator is present in a case if the prosecutor actually charged that aggravator, or if the prosecutor could make a good-faith, reasonable decision to charge that aggravator.

63. *See supra* notes 43–45 and accompanying text.

64. *See supra* note 60.

prosecuted in Missouri are death-eligible under the statute. If one uses the more liberal figure, about 85.2% of the intentional-homicide cases are death-eligible.[65]

Table 2.1

	Conservative Estimate	Liberal Estimate
M1-Eligible Under Statute	84.5%	94.6%
Death-Eligible Under Statute	76.2%	85.2%
M1-Eligible, but Not Death-Eligible	8.3%	9.5%

Figure 2.2 illustrates the process by means of which defendants sentenced to death are selected from the class of death-eligible defendants. This Figure uses the conservative estimate that 76.2% of the intentional-homicide cases prosecuted in Missouri are death-eligible under the statute. Prosecutors filed capital charges in only 16.7% of the death-eligible cases. Moreover, prosecutors withdrew the capital charge in more than 60% of the cases that were initially charged as capital cases.[66] Overall, only fifty-three cases resulted in capital trials,[67] and juries returned death verdicts in only twenty-six of those cases. In sum, in the process of generating twenty-six death verdicts out of 1046 cases, the statute eliminated about 24% of the cases from the class of death-eligible offenses, prosecutors eliminated about 71% of the cases from the pool, and juries weeded out only 2.6% of the cases. Thus, discretionary choice by individual prosecutors is the dominant factor shaping decisions about who will live and who will die.[68]

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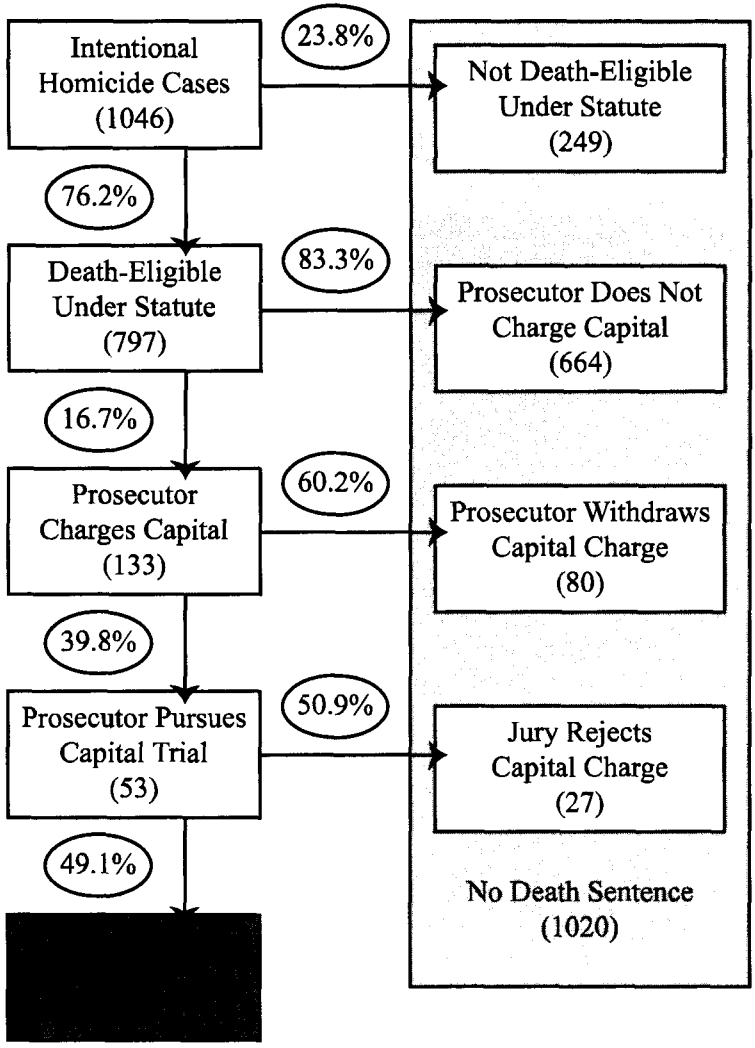
65. These estimates assume that 100% of the capital charges in the comprehensive database are death-eligible under the statute, and 88.4% of the M1-eligible noncapital cases are death-eligible.

66. Prosecutors withdrew capital charges in eighty of the 133 cases that were initially charged as capital cases. Those eighty cases include sixty-four cases resolved by guilty pleas, eleven cases that were tried before a judge (after the capital charge was withdrawn), and five cases that were tried before a jury (after the capital charge was withdrawn).

67. The fifty-three capital trials include four bench trials and forty-nine jury trials. The forty-nine jury trials include four cases where a prosecutor charged death and presented an M1 charge to a jury, but the jury returned a verdict of M2 or VM. Those cases are counted as "capital trials" even though the cases never reached a penalty phase. Similarly, the four bench trials include three cases where a prosecutor charged death and presented an M1 charge to a judge in a bench trial, but the judge returned a verdict of M2. Those cases are also counted as capital trials even though the cases never reached a penalty phase. Finally, the "capital trial" category includes one case from Jackson County where the parties agreed to conduct penalty-phase proceedings before a judge, instead of a jury.

68. Of course, prosecutors make decisions partly based upon their understanding of how a jury would react. This fact does not negate the significant amount of discretionary power that prosecutors hold.

Figure 2.2:
Schmatic of Decision Tree for Death or Lesser Sentence



C. The Narrowing Effects of Statutory Aggravating Factors

The purpose of statutory aggravators is to significantly narrow the immense discretion that prosecutors wield in making decisions to seek the death penalty and juries wield in making decisions to impose the death penalty.[69] Table 2.1 demonstrates that the statutory aggravators in Missouri fail in this goal. Specifically, Table 2.1 provides the percentage of cases in the comprehensive

69. Zant v. Stephens, 462 U.S. 862, 877 (1983).

database that are M1-eligible, but not death-eligible, measuring the extent to which the statutory aggravators narrow the class of death-eligible offenses. Conservatively, the requirement to prove one or more statutory aggravators eliminates only 8.3% of the total cases from the class of death-eligible offenses.[70] Alternatively, using a more liberal estimate of M1-eligibility, it follows that the requirement to prove a statutory aggravator eliminates about 9.5% of the total cases from the class of death-eligible offenses. In light of these figures, it is doubtful whether the Missouri statute satisfies the constitutional requirement, articulated in *Zant v. Stephens*, that aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty."[71]

The failure of Missouri's statutory aggravators to narrow the class of death-eligible offenses is primarily attributable to two factors. First, the sheer number of statutory aggravators tends to broaden the class of death-eligible offenses. Second, there are six aggravating factors that are quite broad in application, and therefore exacerbate this effect: wantonly vile, felony murder, killing witness, avoiding arrest, for money, and agent/employee.[72] Table 2.2 summarizes the application of Missouri's statutory aggravating factors, listing the seventeen aggravating factors ranked in terms of the number of cases in which a particular aggravator is present.

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70. The 8.3% estimate shown in Table 2.1 is derived as follows. The top row in Table 2.1 is the percentage of cases that are M-1 eligible under the statute. The second row is the percentage of cases that are death-eligible. The difference between these two figures is the percentage of cases that are M-1 eligible but not death-eligible. Due to rounding, the percentages in the right-hand column do not precisely total 100%.

71. 462 U.S. 862, 877 (1983). *Zant* did not articulate a specific measure for "narrowness" of a statute. However, excluding fewer than 10% of cases is well within the range of statutes with which *Zant* was concerned.

72. See *infra* Appendix I for statutory definitions of these aggravators.

Table 2.2:
Application of Statutory Aggravating Factors[73]

Aggravator	Prosecutor Actually Charged ("PAC") (n = 108)	Prosecutor Could Have, but Did Not Charge ("CHC") (n = 239)	Aggravator Present ("PAC" + "CHC") (n = 239)
Wantonly Vile	94	125	219 (91.6%)
Felony Murder	67	58	125 (52.3%)
Killing Witness	33	86	119 (49.8%)
Avoiding Arrest	28	88	116 (48.5%)
For Money	51	56	107 (44.8%)
Agent/Employee	22	76	98 (41.0%)
Multiple Homicide	34	21	55 (23.0%)
Prior Record	30	22	52 (21.8%)
Hazardous Device	12	21	33 (13.8%)
Conceal Drug Crime	3	5	8 (3.3%)
Escape Custody	5	2	7 (2.9%)
Gang Activity	1	5	6 (2.5%)
Peace Officer	6	0	6 (2.5%)
Public Official	3	3	6 (2.5%)
Other Drug Crime	1	4	5 (2.1%)
Corrections Officer	1	4	5 (2.1%)
Hijacking	0	0	0

As Table 2.2 demonstrates, the single broadest aggravating factor is the "wantonly vile" aggravator, which was present in over 90% of all M1-eligible cases. The Missouri Supreme Court has construed this factor so broadly that there

73. Although there are 127 capital charges in the detailed database, there are only 108 cases for which we obtained information about the actual charging of aggravators. The figures in the PAC column reflect the actual usage of aggravators in those 108 cases. The column labeled "could have charged" indicates the number of cases in which the prosecutor could make a good-faith, reasonable argument in support of a decision to charge that aggravator, but did not; it therefore does not include the cases in which the prosecutor actually charged that aggravator. The right-hand column shows the percentage of M1-eligible cases in which particular aggravating factors are present.

are very few M1-eligible murders that do *not* satisfy the "wantonly vile" aggravator. The court has approved the application of this aggravator in cases involving multiple injuries to the victim;[74] a series of attacks directed at the victim;[75] a period of time in which the victim is aware of his/her impending death;[76] and where a victim was bound prior to the killing.[77]

Apart from the "wantonly vile" aggravator, the two most frequently charged aggravators are the "felony murder" and "for money" aggravators, charged in sixty-seven and fifty-one cases, respectively. These two aggravators tend to broaden the class of death-eligible offenses because the statutory provisions, on their face, apply to most of the M1-eligible homicides committed in Missouri. In fact, at least one of the two factors is present in about 60% of the M1-eligible cases. [78] For instance prosecutors often charge both aggravators in cases where the defendant commits robbery and/or burglary in conjunction with the murder.[79] The felony murder aggravator also applies to cases involving rape, sodomy, kidnapping, and certain drug crimes.[80] The "for money" aggravator also applies in cases where the defendant kills the victim to obtain an inheritance and in murder-for-hire cases.[81]

Two additional statutory aggravating factors—the "killing witness" and "avoiding arrest" aggravators—are present in almost 50% of the M1-eligible

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74. *See, e.g.*, State v. Strong, 142 S.W.3d 702, 710 (Mo. 2004).

75. *See, e.g.*, State v. Mercer, 618 S.W.2d 1, 10 (Mo. 1981).

76. *See, e.g.*, State v. Tisius, 92 S.W.3d 751, 764 (Mo. 2002); State v. McMillin, 783 S.W.2d 82, 103 (Mo. 1990), *abrogated on other grounds by* Morgan v. Illinois, 543 U.S. 719 (1992).

77. *See, e.g.*, State v. Brown, 902 S.W.2d 278, 284 (Mo. 1995); *McMillin*, 783 S.W.2d at 103. The court has also approved the application of this aggravator in cases where the defendant was motivated by pecuniary gain, *see, e.g.*, State v. Gill, 167 S.W.3d 184, 197 (Mo. 2005); the defendant manifested a lack of remorse, *see, e.g.*, State v. Griffin, 756 S.W.2d 475, 490 (Mo. 1988); State v. Preston, 673 S.W.2d 1, 11 (Mo. 1984); the victim was chosen at random, *see, e.g.*, State v. Clayton, 995 S.W.2d 468, 483–84 (Mo. 1999); State v. Leisure, 749 S.W.2d 366, 382 (Mo. 1988); and the murder was one of a series of murders, *see, e.g.*, State v. Anderson, 79 S.W.3d 420, 442 (Mo. 2002).

78. The "felony murder" aggravator is present in 52.3% of the cases. The "for money" aggravator is present in 44.8% of the cases. *See supra* Table 2.2. However, there is not a perfect overlap between the two aggravators. There are a total of eighty-nine cases in which both factors are present. Additionally, there are fifty-four other cases in which one of the two factors is present. Thus, at least one of the two factors is present in 143 out of 239 cases, or about 59.8% of the M1-eligible cases.

79. Prosecutors charged the "felony murder" aggravator in forty out of fifty-one cases where they charged the "for money" aggravator.

80. MO. REV. STAT. § 565.032.2(11) (2008) ("The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo.").

81. *See, e.g.*, State v. Davis, 814 S.W.2d 593, 604–05 (Mo. 1991) (inheritance); State v. Bannister, 680 S.W.2d 141, 149 (Mo. 1984) (murder for hire).

cases.[82] While the statutory language suggests that these are two distinct aggravators,[83] in practice, the Missouri Supreme Court has interpreted them as coextensive.[84] Thus, for example, if a defendant robs a victim, and then kills the victim one minute later, the court says that both aggravators are present because the victim was a witness to his own robbery, and the defendant killed the victim to avoid arrest for the robbery.[85]

Rounding out the list of the six broadest aggravators, the "agent or employee" aggravator is present in about 41% of the M1-eligible cases. The Missouri Supreme Court has upheld the application of this aggravator in murder-for-hire situations,[86] and in cases where the defendant killed the victim in response to the verbal encouragement of a co-defendant.[87] Prosecutors have charged this aggravator in cases where there is a conspiracy to commit murder, including cases that do not involve a typical agency or employment relationship between co-defendants.[88] In practice, this aggravator applies to any case where two co-

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82. The "killing witness" aggravator is present in 49.8% of the cases. The avoiding arrest aggravator is present in 48.5% of the cases. *See supra* Table 2.2.

83. The "killing witness" aggravator applies to any case where "the murdered individual was a witness or potential witness in any past or pending investigation . . . ." MO. REV. STAT. § 565.032.2(12). The "avoiding arrest" aggravator applies where the murder "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest . . . ." *Id.* § 565.032.2(10).

84. The "avoiding arrest" aggravator is present in 115 out of 119 cases where the "killing witness" aggravator is present. Similarly, the "killing witness" aggravator is present in 115 out of 116 cases where the "avoiding arrest" aggravator is present.

85. *See, e.g.*, State v. Simmons, 955 S.W.2d 752, 767–68 (Mo. 1997) (upholding application of "killing witness" aggravator in a robbery/murder case); State v. Brown, 902 S.W.2d 278, 294 (Mo. 1995) (upholding application of both "killing witness" and "avoiding arrest" aggravators in kidnapping/murder case); State v. Kilgore, 771 S.W.2d 57, 68–70 (Mo. 1989) (upholding application of "avoiding arrest" aggravator in a robbery/murder case).

86. *See, e.g.*, State v. Basile, 942 S.W.2d 342, 359–62 (Mo. 1997).

87. *See, e.g.*, State v. Ringo, 30 S.W.3d 811, 816 (Mo. 2000) (after two co-defendants robbed a restaurant and forced victim to hand over money from a safe, one co-defendant shot victim in response to verbal encouragement from the other co-defendant).

88. For example, in detailed database case numbers 5002 and 5003 the two co-defendants conspired to kill and rob the victim. They lured the victim to the defendant's residence and beat the victim to death with a bat. The prosecutor sought death and charged the "agent/employee" aggravator against both defendants. Prosecutors also charged this aggravator in a case where two co-defendants jointly committed a nonhomicide offense, and one of the co-defendants subsequently killed the victim, contrary to the express wishes of the other co-defendant. In detailed database case numbers 1702 and 1705, two co-defendants conspired to assault a victim. After beating the victim until he was probably unconscious, defendant 1702 set the victim's house on fire, contrary to the express wishes of defendant 1705. The victim was alive when the fire started but died from carbon monoxide poisoning caused by the fire. The prosecutor brought capital charges and charged the "agent/employee" aggravator against both defendants.

defendants jointly commit a crime that results in death, even if they did not conspire to commit murder.[89]

Under the current statute, 100% of the capital charges in the comprehensive database are death-eligible. An estimated 88.4% of the M1-eligible, noncapital cases are death-eligible under the current statute. Overall, about 76.2% of intentional homicides are death-eligible. If the legislature amended the statute by eliminating the six broadest statutory aggravating factors, the percentage of death-eligible cases would decline dramatically. Under the revised statute, we estimate that only 58% of the capital charges in the comprehensive database would be death-eligible, and only 37% of the M1-eligible, noncapital cases would be death-eligible.[90] Overall, we estimate that only 40% of the M1-eligible cases in the comprehensive database would be death-eligible under the revised statute. This would be one method to narrow prosecutorial discretion and satisfy the constitutional requirement articulated in *Zant v. Stephens*, although there are other possible strategies. We outline some possible amendments, based upon our analysis, at the end of this Article.

In sum, under the current statute, statutory aggravating factors eliminate only about 8–10% of the cases from the class of death-eligible offenses.[91] Consequently, approximately 88.4% of the M1-eligible, noncapital cases are death-eligible under the statute, and about 76.2% of the total cases are death-eligible under the statute.[92] Under this statutory scheme, the Missouri legislature has arguably abdicated its responsibility to "make the law" governing capital punishment and delegated that responsibility to individual prosecutors. A revised statute, with a smaller number of narrowly drawn aggravating factors, would shift the locus of decision-making from prosecutors to legislators and would provide one way to satisfy the constitutional requirement that aggravating circumstances "must genuinely narrow the class of persons eligible for the death penalty."[93]

III. DISPARATE IMPACT IN HOMICIDE CASES

Having provided a rough measure of the scope of prosecutorial discretion in Part II, this Part turns to an investigation of how prosecutors use their discretion. Overall, M1 charging and conviction rates vary drastically across prosecutors, creating large differences in M1 charging and conviction rates across defendants

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89. The defendants do, however, have to satisfy the specific intent requirement for M1, because felony murder is an M2 charge unless there was a specific intent to kill the victim. *See infra* Appendix I.

90. These figures are derived from aggravator data coded into our detailed database. *See infra* Appendix II. For each case in the detailed database, the file records one of three possible entries for each of the seventeen statutory aggravators: the prosecutor actually charged ("PAC") that aggravator, the prosecutor could have charged ("CHC") that aggravator but did not, or there is no evidence ("NE") to support that aggravator. We determine whether a case is death-eligible under this alternative scenario by deleting the six aggravators and then determining whether a prosecutor did or could have charged at least one of the remaining aggravators.

91. *See supra* Table 2.2.

92. *See supra* Part II.B.

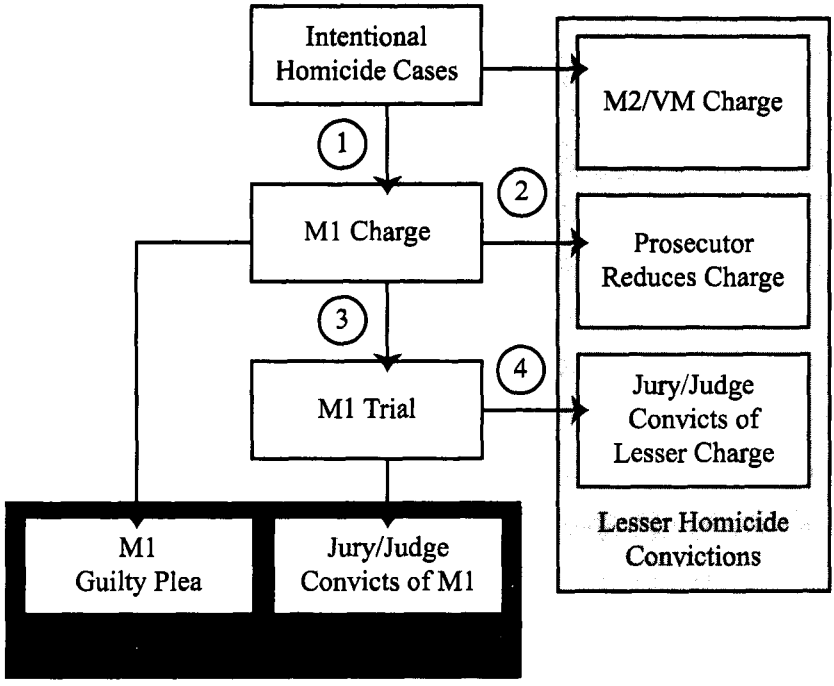
93. Zant v. Stephens, 462 U.S. 862, 877 (1983).

when grouped by geographic region or by racial demographic. The Missouri homicide statute gives prosecutors extremely broad discretion to choose which defendants should be convicted of M1 and which defendants should be convicted of lesser included offenses. At the same time, there are substantial differences in sentencing outcomes between defendants convicted of M1 and defendants convicted of lesser included offenses.[94] This combination of factors—broad discretion and substantial differences in sentencing outcomes—raises questions of uniformity: does the exercise of discretion by different prosecutors affect different groups of people in significantly different ways?

Beyond uniformity, there is the further question of disparate impact: which group(s) are most affected by the differences? Given society's history of racial discrimination, particularly in the criminal justice system, a racial pattern in sentencing outcomes is disturbing. This study investigates the disparate impact across race-of-defendant and race-of-victim. A disparate impact of prosecutors' decisions on particular racial groups would question the cost of the broad discretion Missouri affords prosecutors now. In addition to disparate impact, the study also investigates the interplay between race and the death penalty by determining whether the decisions made correlate with the racial composition of the jury pool. One hypothesis is that racial tension leads to heightened use of the death penalty and other harsh sentences, particularly in interracial crimes. The study finds evidence consistent with this theory, although a causal analysis would be needed to test the theory directly.

94. *See supra* notes 55–57 and accompanying text.

Figure 3.1



In order to describe the decision-making process that the study analyzes, Figure 3.1 depicts this process for M1 convictions versus lesser included offenses. This Part examines racial and geographic disparities at different points in that decision-making process, focusing on the four decision points identified in Figure 3.1, as well as the M1 outcomes at the bottom of the picture. Section A examines geographic disparities, and Section B analyzes racial disparities. Section C presents the results of a regression analysis that examines the interactions among these two sets of variables.

Throughout Part III, the data tables have column headings identical to the headings in Table 3.1 below. The headings of Columns 1–4 correspond to the points labeled 1, 2, 3, and 4 in Figure 3.1. In Table 3.1, the percentages in the top row are based upon the comprehensive database and are therefore unweighted. The percentages in the bottom row are based on weighted averages in the detailed database, as explained in Appendix II. The number in parentheses in each cell is the number of cases upon which the percentage in that cell is based.

Table 3.1

	Pros. Charge dM1 (1)	Pros. Withdrew M1 Charge (2)	Pros. Took M1 Charge to Trial (3)	Jury Convict. of Lesser Charge (4)	M1 Convict. After M1 Charge (5)	Total M1 Convict (6)
Comprehens. Database (1046 Cases)	59.0% (1046)	47.8% (617)	44.1% (617)	29.8% (272)	39.1% (617)	23.0% (1046)
Detailed Database (247 Cases)	55.8% (247)	43.6% (186)	46.8% (186)	33.3% (91)	40.8% (186)	22.8% (247)

The percentages in Columns 1–4 are calculated on the basis of the previous node in the decision tree. Thus, the percentage in the top row of Column 1 means that prosecutors filed an M1 charge in 59% of all intentional-homicide cases. The percentage in the top row of Column 2 means that prosecutors withdrew the M1 charge in 47.8% of the cases that were charged as M1. Because Column 3 corresponds to the third decision point in Figure 3.1, the denominator of the fraction in Column 3 is the number of cases charged as M1. Similarly, the denominator of the fraction in Column 4 is the number of cases in which prosecutors pursued an M1 charge at trial.

Columns 5 and 6 display two different percentages. For both percentages, the numerator is the sum of all M1 convictions, including M1 guilty pleas and M1 jury verdicts, which is the darker shaded area in Figure 3.1. The denominator for the percentage in Column 5 is the number of cases in which the prosecutor filed an M1 charge. The denominator for the percentage in Column 6 is the universe of all intentional-homicide cases. All the remaining tables in Part IV use the same format to analyze geographic and racial disparities. Table 3.1 also demonstrates that the detailed database reasonably represents the large sample, which is consistent with the sampling methodology of this study.

A. Geographic Disparity

The broad discretion afforded prosecutors in Missouri translates directly into disparities in outcomes across different geographic regions. Specifically, the study finds that defendants charged in Jackson County are significantly less likely to be charged or convicted of M1, and that jury pool demographics are also correlated to M1 charging and conviction rates. Defendants who face almost exclusively white jury pools are charged with M1 more often, but are then convicted of M1 less often. Tables 3.2(A) to 3.2(C) present more detailed findings on geographic disparity in the process for deciding which defendants are convicted

of M1. In all three tables, St. Louis City and Jackson County (Kansas City)[95] are treated as separate geographic units. Table 3.2(A) divides the other Missouri counties into two groups: Metropolitan Statistical Areas ("MSA") and rural.[96] Table 3.2(B) divides the other Missouri counties into three groups according to the percentage of the nonwhite people included in the jury pool.[97] Table 3.2(C) combines these measures by dividing the other Missouri counties in both ways: rural vs. MSA and high vs. low percentage of nonwhites in the jury pool, thus presenting the results from the interaction of jury pool demographics and rural vs. MSA. In each column, we also note the statistical significance of the pattern of percentages across that column.[98]

Several features in Table 3.2(A) are noteworthy. First, prosecutors in Jackson County charged M1 at a much lower rate than prosecutors in the rest of the state. Jackson County prosecutors charged M1 in only 28.9% of the intentional-homicide cases they prosecuted. In contrast, prosecutors in St. Louis City charged M1 in 85.5% of their intentional-homicide cases. Apart from Jackson County, prosecutors in every other geographic category had an M1 charging rate above 50%, with a statewide average of 59.0%. The difference across regions is highly statistically significant. Given the low M1 charging rate in Jackson County, it is not surprising that prosecutors in that county secured M1 convictions at a much lower rate than the rest of the state. Only 10.5% of the Jackson County cases yielded M1 convictions, compared to a statewide average of 23.0%.

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95. Jackson County includes some areas that are outside the geographic limits of Kansas City, but Kansas City accounts for the bulk of the population and land area of Jackson County.

96. As defined by the U.S. Census Bureau, any county with a population density of at least 1000 people per square mile is part of an MSA. Aside from St. Louis City and Jackson County, there are twenty counties in Missouri that are within an MSA. MSA counties in Missouri include some small cities (such as Springfield and Columbia) and some suburban counties near St. Louis and Kansas City.

97. We use Census 2000 data to determine the percentage of nonwhite adults in each county. Unfortunately, we cannot limit the sample to citizens, as these data are not available, and so our estimate of the percentage of nonwhite jurors may be biased if immigrants are more likely to be nonwhite than the general public. Missouri does not have a large immigrant population, so this bias is likely to be small.

98. Consistent with standard statistical practice, "NS" signifies "Not Significant"; "+" signifies a p-value of 0.10 or less; "*" indicates a p-value of 0.05 or less; "**" indicates a p-value of 0.01 or less; and "***" indicates a p-value of 0.001 or less. A p-value is a measure of how likely it is that one would obtain results at least as skewed as those shown even if the differences were, in fact, simply random variation. A p-value of 0.05 or less is generally considered to be statistically significant and evidence of a relationship between the two variables at issue (for example, the relationship between geographic region and M1 charging decisions found in Table 3.2(A), column 1).

Table 3.2(A):
M1 Charging and Sentencing, Rural vs. Urban

	Pros. Charged M1 *** (1)	Pros. Withdrew M1 Charge (NS) (2)	Pros. Took M1 Charge to Trial (NS) (3)	Jury Convicted of Lesser Charge *** (4)	M1 Convict. After M1 Charge *** (5)	Total M1 Convict. *** (6)
SL City (262 Cases)	85.5% (262)	50.9% (224)	46.4% (224)	39.4% (104)	30.8% (224)	26.3% (262)
Jackson County (228 Cases)	28.9% (228)	53.0% (66)	45.5% (66)	23.3% (30)	36.4% (66)	10.5% (228)
MSA Counties (274 Cases)	59.1% (274)	47.5% (162)	40.7% (162)	15.2% (66)	46.3% (162)	27.4% (274)
Rural Counties (282 Cases)	58.5% (282)	41.8% (165)	43.6% (165)	31.9% (72)	44.2% (165)	25.9% (282)
Total (1046 Cases)	59.0% (1046)	47.8% (617)	44.1% (617)	29.8% (272)	39.1% (617)	23.0% (1046)

Table 3.2(A) shows that, after separating St. Louis City and Jackson County from other MSA counties, there are no significant differences between rural and MSA counties. Prosecutors in rural and MSA counties charged M1 at approximately the same rate (58.5% and 59.1%, respectively) and secured M1 convictions at approximately the same rate (25.9% and 27.4%, respectively). While it appears that prosecutors in MSA counties were more likely than their rural counterparts to withdraw an M1 charge, this result was not statistically significant. In contrast, jurors in rural counties were twice as likely as their MSA counterparts to reject an M1 charge proffered by a prosecutor, and this difference is statistically significant.

Table 3.2(B):
M1 Charging and Sentencing, Demographics of Jury Pool

	Pros. Charged M1 *** (1)	Pros. Withdrew M1 Charge (NS) (2)	Pros. Took M1 Charge to Trial (NS) (3)	Jury Convict. of Lesser Charge ** (4)	M1 Convict. After M1 Charge ** (5)	Total M1 Convict. *** (6)
SL City, 57% nonwhite (262 Cases)	85.5% (262)	50.9% (224)	46.4% (224)	39.4% (104)	30.8% (224)	26.3% (262)
Jackson County, 32% nonwhite (228 Cases)	28.9% (228)	53.0% (66)	45.5% (66)	23.3% (30)	36.4% (66)	10.5% (228)
Jury Pool, 10–30% nonwhite (204 Cases)	59.3% (204)	44.6% (121)	43.8% (121)	17.0% (53)	47.9% (121)	28.4% (204)
Jury Pool, 5–10% nonwhite (169 Cases)	55.0% (169)	40.9% (93)	44.1% (93)	17.1% (41)	51.6% (93)	28.4% (169)
Jury Pool, 0–5% nonwhite (183 Cases)	61.7% (183)	47.8% (113)	38.9% (113)	38.6% (44)	37.2% (113)	23.0% (183)
Total (1046 Cases)	59.0% (1046)	47.8% (617)	44.1% (617)	29.8% (272)	39.1% (617)	23.0% (1046)

Table 3.2(B) presents geographic results broken down by jury pool demographics. As noted in the Table, the jury pool in St. Louis City is 57.0% nonwhite, and the jury pool in Jackson County is 32.3% nonwhite. Thus, one could divide the five geographic categories in Table 3.2(B) into three groups: those with a high percentage (30% and higher) of nonwhites in the jury pool (St. Louis City and Jackson County), those with a medium percentage (5–30%), and those with a low percentage (0–5%).[99] Viewed in this way, it is evident that counties with a medium percentage of nonwhites in the jury pool have the highest M1 conviction

99. Aside from St. Louis City and Jackson County, there are only four counties in the state with jury pools that are more than 20% nonwhite. They are: Pemiscot County (29.4%), Pulaski County (24.3%), St. Louis County (24.0%), and Mississippi County (22.7%). Of these four, St. Louis County is an MSA county and the others are rural counties.

rate, measured as a percentage of the M1 charges.[100] Counties in the 5–10% range have an M1 conviction rate of 51.6%, and those in the 10–30% range have an M1 conviction rate of 47.9%. In contrast, counties with a low percentage of nonwhites in the jury pool (0–5%), and those with a high percentage of nonwhites (St. Louis City and Jackson), all have M1 conviction rates between 30–38%. Interestingly, the high M1 conviction rate for counties with a medium nonwhite population appears to be largely a function of jury decision-making, rather than aggressive charging by prosecutors. The jurors in these counties were much more likely than their counterparts in other counties to return an M1 conviction instead of convicting the defendant of a lesser included offense. This is further bolstered by the result that there are no statistically significant differences across geographic regions in the prosecutor's decision to withdraw M1 charges or in the rate at which prosecutors took M1 charges to trial. The prosecutor's initial M1 charging decision and the jury's decision to reject the M1 charge at trial are the two primary decision points that demonstrate geographic disparities.

Table 3.2(C) shows that the higher M1 conviction rate for counties with a moderate percentage of nonwhites in the jury pool applies separately to both rural and MSA counties. Using a 5% cut-off to divide the rural counties into two groups,[101] Table 3.2(C) shows that rural counties with a nonwhite population in the 5–30% range have an M1 conviction rate of 51.9%. In contrast, rural counties with a nonwhite population below 5% have an M1 conviction rate of only 37.2%. For MSA counties (other than St. Louis and Jackson), the difference is less pronounced, but not unimportant. MSA counties with a nonwhite population in the 10–30% range have an M1 conviction rate of 50.0%, compared to a 42.5% rate for MSA counties with a nonwhite population below 10%.[102] While a smaller absolute difference, the change represents a 15% decrease in the M1 conviction rate for counties with a more homogeneous jury pool.

100. If one measures the M1 conviction rate as a percentage of the total cases, Jackson is an outlier, as noted above. Here, though, we focus on the M1 conviction rate as a percentage of the M1 charges, which is the percentage in column 5.

101. We use a 5% cut-off to divide rural counties, and a 10% cut-off to divide MSA counties, primarily to ensure an adequate number of cases in each group. If we used a 5% cut-off for MSA counties, the total number of cases in the 0–5 category would be very small. Similarly, if we used a 10% cut-off to divide rural counties, the total number of cases in the 10–30 category would be quite small.

102. This pattern of differences is highly statistically significant.

Table 3.2(C):
M1 vs. M2, Combine Rural/Urban and Jury Pool Demographics

	Pros. Charged M1 *** (1)	Pros. Withdrew M1 Charge (NS) (2)	Pros. Took M1 Charge to Trial (NS) (3)	Jury Convict. of Lesser Charge *** (4)	M1 Convict. After M1 Charge *** (5)	Total M1 Convict. *** (6)
SL City, 57% nonwhite (262 Cases)	85.5% (262)	50.9% (224)	46.4% (224)	39.4% (104)	30.8% (224)	26.3% (262)
Jackson County, 32% nonwhite (228 Cases)	28.9% (228)	53.0% (66)	45.5% (66)	23.3% (30)	36.4% (66)	10.5% (228)
MSA, 10–30% nonwhite (128 Cases)	64.1% (128)	43.9% (82)	43.9% (82)	13.9% (36)	50.0% (82)	32.0% (128)
MSA, 0–10% nonwhite (146 Cases)	54.8% (146)	51.2% (80)	37.5% (80)	16.7% (30)	42.5% (80)	23.3% (146)
Rural, 5–30% nonwhite (146 Cases)	54.1% (146)	38.0% (79)	46.8% (79)	21.6% (37)	51.9% (79)	28.1% (146)
Rural, 0–5% nonwhite (136 Cases)	63.2% (136)	45.3% (86)	40.7% (86)	42.9% (35)	37.2% (86)	23.5% (136)
Total (1046 Cases)	59.0% (1046)	47.8% (617)	44.1% (617)	29.8% (272)	39.1% (617)	23.0% (1046)

One possible explanation for the data is that M1 conviction rates are highest in areas that have the greatest racial tension. It is plausible to suggest that racial tension is low in counties where the population is virtually all white (0–5% nonwhite), and in counties where nonwhites constitute a majority, or a substantial minority, of the population (St. Louis and Jackson). In contrast, racial tension may be greatest in counties with an intermediate level of nonwhite population.[103] While this Article cannot answer this question directly, Section C investigates the

103. The combined lack of interracial homicides and the small number of venue changes (both of which are ways to try to answer this question) make testing this hypothesis directly quite difficult.

interaction of geography with race effects. First, however, Section B describes the results of an analysis of race-of-victim and race-of-defendant effects.

B. Racial Disparities

Traditionally, empirical investigations of racial disparities in murder convictions have broken down disparities by race of the defendant, race of the victim, and their interaction. This Section follows this framework.[104] Because the racial identities of defendants and victims are only known in our detailed database, we use this smaller dataset to explore the potential racial disparities in M1 outcomes. Relying on the smaller sample implies that some large absolute differences in outcomes will not be statistically significant; that is, they may have resulted from our random sampling rather than from the decisions made in individual cases. Thus, these tables also indicate the statistical significance of the differences: the top row of each table notes whether the disparities in outcomes are statistically significant across races.[105] In addition, because of our sampling plan, where we oversampled capital cases relative to other homicide cases, each cell contains the weighted average of the appropriate case outcome. This is an unbiased estimate of the true percentage in the comprehensive database.

Generally, the disparities in processing M1 charges based upon the defendant's race are not statistically significant.[106] Focusing first on the initial decision to charge M1, Table 3.3(A) demonstrates that there is no evidence of a disparate impact in M1 charging based upon the race of the defendant. Prosecutors charge both white and black defendants with M1 about 55% to 60% of the time. Prosecutors charging other-race defendants charge M1 less often (28.1% of the time). With a small number of other-race defendants, overall, this could be due to chance variation in our detailed database; there is no evidence of a statistically significant difference between the charging rates.

There is also no evidence of a race-of-defendant disparity in the M1-withdrawal rate; for white and black defendants, this happens about 40.4% and 46.5% of the time, respectively. Prosecutors withdrew M1 charges against other-race defendants less often (18%), but, again, with only five other-race defendants charged with M1, this difference is not statistically significant.

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104. *See supra* Tables 3.3(A)–3.3(C) (detailing the results).

105. The significance level is, in some sense, a measure of the likelihood that the observed difference in percentages was too extreme to be caused by chance. More exactly, it is the probability that a deviation from the null hypothesis at least as large as the observed deviation would be observed. In this case, the null hypothesis is that race is independent from charging practices. The significance level is calculated based on a Pearson Chi-squared test of independence. See ALAN AGRESTI, CATEGORICAL DATA ANALYSIS (2002) for details. Pearson Chi-Squared tests are a good approximation of an exact test when the expected number of cases within each cell is greater than five; there are some cases where the expected number of cases is fewer than five. We mention this in the text when relevant, and perform exact tests, which do not suffer from this problem, whenever possible.

106. *See supra* Table 3.3(A).

Table 3.3(A):
M1 vs. M2, Race of Defendant

	Pros. Charged M1 NS (1)	Pros. Withdrew M1 Charge NS (2)	Pros. Took M1 Charge to Trial NS (3)	Jury Convicted of Lesser Charge + (4)	M1 Convict. After M1 Charge NS (5)	Total M1 Convict. NS (6)
White Defendant (122 Cases)	55.0% (122)	40.4% (98)	44.2% (98)	43.0% (43)	40.7% (98)	22.3% (122)
Black Defendant (116 Cases)	58.3% (116)	46.5% (83)	47.3% (83)	24.9% (45)	41.7% (83)	24.3% (116)
Other-Race Defendant[107] (9 Cases)	28.1% (9)	18.0% (5)	82.0% (5)	78.0% (3)	18.0% (5)	5.1% (9)
Total (247 Cases)	55.8% (247)	43.6% (186)	46.8% (186)	33.3% (91)	40.8% (186)	22.8% (247)

There is some evidence of racial differences in the rate at which the jury convicts a defendant of a lesser charge in an M1 trial. White defendants are almost twice as likely as black defendants to be convicted of a lesser charge (43.0% versus 24.9% lesser-charge conviction rates).[108] In the final stage, however, there is no statistically significant race-of-defendant disparity in the proportion of M1 convictions. Thus, throughout the homicide case decision tree, there is little evidence that the decisions of the prosecutor or the jury[109] create disparities between defendants based on their race.

Table 3.3(B) provides estimates of outcome probabilities by race-of-victim and shows that there are no statistically significant disparities based upon race-of-victim. Prosecutors initially charged M1 about 55% of the time and withdrew those charges about 40–50% of the time. While there is slight variation across race-of-victim in these percentages, the differences are not statistically significant.[110] Finally, there is no evidence of a disparity in the rate at which cases yielded M1 convictions, either in the subset of cases that went to trial or in all

107. "Other-race" defendants are Hispanic or Asian. There were no individuals in the detailed database identified as Native American, either as defendants or as victims.

108. This finding is only marginally statistically significant.

109. For ease of exposition, throughout this Article, we use the word "jury" to describe the fact-finder at trial, although many trials were, in fact, bench trials decided by a judge. We do not wish, however, to confuse the judge's decision-making role over the trial (for example, in excluding evidence) with the judge's fact-finding role in a bench trial.

110. Cases involving other-race victims have lower rates of M1 charges and the withdrawal of M1 charges, but with only eight such cases, the differences are not statistically significant.

homicide cases. Overall, there is no evidence of race-of-victim disparities in homicide decisions regarding the M1 versus M2 distinction.

Table 3.3(B):
M1 vs. M2, Race of Victim

	Pros. Charged M1 (NS) (1)	Pros. Withdrew M1 Charge (NS) (2)	Pros. Took M1 Charge to Trial (NS) (3)	Jury Convict. of Lesser Charge (NS) (4)	M1 Convict. After M1 Charge (NS) (5)	Total M1 Convict. (NS) (6)
White Victim(s) (149 Cases)	52.3% (141)	40.5% (116)	45.8% (116)	27.8% (53)	46.8% (116)	24.7% (141)
Black Victim(s) (87 Cases)	59.9% (82)	49.1% (64)	45.0% (64)	31.4% (34)	36.6% (64)	21.9% (82)
Other-race Victim(s) (9 Cases)	46.1% (9)	5.5% (6)	89.0% (6)	87.6% (4)	16.5% (6)	7.6% (9)
Total (247 Cases)	55.8% (247)	43.6% (186)	46.8% (186)	33.3% (91)	40.8% (186)	22.8% (247)

The single-variable results from Tables 3.3(A) and 3.3(B) may mask interactions between variables that are significant. In particular, the single-variable analysis cannot determine how the decision-making process differs for interracial homicides. Table 3.3(C) presents the data broken out by both race-of-defendant and race-of-victim in order to investigate potential racial disparities further. Because most homicides in Missouri involve defendants and victims of the same race, investigating the disparities based on these two variables separately masks which variable is more important. Put another way, because of the strong correlation between defendant's race and victim's race, a difference in the treatment of defendants based upon their race may secondarily cause a disparity in treatment of defendants based upon the race of their victims, and vice versa. In addition, studies of death penalty disparities have often found that the interaction of race-of-defendant and race-of-victim is more than the sum of its parts; that is, that the disparate impact seen across defendants' race depends on the race of the victim. Table 3.3(C) demonstrates that this is true to some extent in M1 prosecution as well.

Table 3.3(C):
M1 vs. M2, Combined Race of Defendant / Race of Victim

	Pros. Charged M1 (NS) (1)	Pros. Withdrew M1 Charge (NS) (2)	Pros. Took M1 Charge to Trial (NS) (3)	Jury Convicted of Lesser Charge + (4)	M1 Convict. After Charge (NS) (5)	Total M1 Convict. (NS) (6)
White Defendant, White Victim (115 Cases)	53.7% (115)	40.0% (92)	43.6% (92)	39.2% (40)	42.9% (92)	23.1% (115)
White Defendant, Black Victim (4 Cases)	100% (4)	50.0% (4)	50% (4)	87.6% (2)	6.2% (4)	6.2% (4)
Black Defendant, White Victim (31 Cases)	52.7% (31)	41.5% (22)	51.4% (22)	2.7% (12)	57.1% (22)	30.0% (31)
Black Defendant, Black Victim (84 Cases)	59.4% (84)	49.3% (60)	44.7% (60)	27.3% (32)	38.5% (60)	22.9% (84)
Other Combos. (13 Cases)	36.3% (13)	9.9% (8)	85.1% (8)	85.5% (5)	19.8% (8)	7.2% (13)
Total (247 Cases)	55.8% (247)	43.6% (186)	46.8% (186)	33.3% (91)	40.8% (186)	22.8% (247)

Consistent with Tables 3.3(A) and (B), there is no statistically significant disparity based on the combination of race-of-defendant and race-of-victim in the initial charging decision, the decision to withdraw an M1 charge, or the decision to pursue a trial on M1 charges. However, Table 3.3(C) demonstrates a marginally statistically significant racial disparity in the percentage of cases in which the jury convicts the defendant of a lesser homicide charge at trial. Juries were more lenient with white defendants who killed white victims, convicting them of a lesser charge 39.2% of the time, compared to 27.3% of the time for black defendants who killed black victims.

While the number of cases for interracial homicides taken to M1 trial was quite small, these cases demonstrate a large racial disparity in conviction rates. White defendants who killed black victims had only a 6.2% chance of being

convicted of M1 at trial, whereas black defendants who killed white victims had a 97.3% chance of being convicted of M1 at trial.[111]

Overall, the primary racial disparity in the homicide prosecution decision tree appears during the trial in the jury's decision to convict on M1 or on a lesser homicide charge. This disparity does not remain when looking at the entire process as a whole; there is no statistically significant disparity in M1 convictions by race. The disparity is not necessarily causal; we have not investigated whether race is the reason behind the differences in decision-making. Nevertheless, it does implicate how the criminal justice system makes decisions and allows such disparate impact to continue across the fault line of race.

C. Interaction Effects

To conclude the analysis of M1 charging and conviction patterns in Missouri, Table 3.4 presents logistic regressions of each decision on multiple variables at once, rather than separating the variables to investigate individual disparities. These regressions demonstrate, once again, that place matters. Even after controlling for race, the primary results of Table 3.2(C) hold St. Louis City charges M1 aggressively but then drops these charges more readily than other counties, while Jackson County refrains from charging M1 much more frequently than other counties. The regressions also demonstrate that race matters: black defendants in a murder trial are much more likely to be convicted of M1 than their white counterparts, as juries are more lenient with white defendants.

As a descriptive matter, a logistic regression of several variables at once demonstrates which variables have larger disparities and which disparities are more likely to be a by-product of another disparity (for example, whether the disparity in race-of-victim is a by-product of a disparity in race-of-defendant). For these reasons, it is important to investigate the interaction among variables. Documenting disparities based upon individual variables, as the earlier tables do, is equally important because it demonstrates what disparities the system creates across these critical fault lines in our society. Homicide charges are very serious; large disparities across counties in charging and sentencing practices are troublesome because they inject an element of arbitrariness into a process where the stakes are so high.[112] However, geographic disparities that lead to racial disparities are, perhaps, even more worrisome, because of the historical legacy of discrimination in the criminal justice system. The fact that one can control for racial disparities by including geography as a variable does not negate the overall impact of racial differences; it simply suggests that geographic differences may be causing racial disparities.

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111. Table 3.3(C) lists the probability of being convicted of a lesser charge at trial; from this number, one can compute the probability of being convicted of M1 at trial. For example, black defendants who kill white victims are convicted of a lesser charge at trial 2.7% of the time, making their M1 conviction rate after trial 97.3% (100% - 2.7%).

112. The Supreme Court has consistently recognized that because the death penalty is the "ultimate sanction," death penalty jurisprudence requires a heightened consideration of constitutional concerns. McCleskey v. Kemp, 481 U.S. 279, 313 (1987); Gregg v. Georgia, 428 U.S. 153, 188 (1976); Furman v. Georgia, 408 U.S. 238, 286 (1972).

Table 3.4:
M1 vs. M2, Interaction of Racial and Geographic Differences

	Pros. Charged M1 R^2=0.09[113] (1)	Pros. Withdrew M1 Charge R^2=0.10 (2)	Pros. Took M1 Charge to Trial R^2=0.09 (3)	Jury Convicted of Lesser Charge R^2=0.31 (4)	M1 Convict. After M1 Charge R^2=0.09 (5)	Total M1 Convict. R^2=0.06 (6)
Baseline: MSA, 10–30% nonwhite jury pool; White D, White V	1	1	1	1	1	1
White D, Black V (4 Cases)	∞[115] (4)	1.7 (4)	1.1 (4)	∞[114] (2)	0.3* (4)	0.4 (4)
Black D, White V (31 Cases)	1.1 (31)	1.2 (22)	1.1 (22)	0.01** (12)	2.8 (22)	2.0 (31)
Black D, Black V (84 Cases)	1.0 (84)	2.2+ (60)	0.6 (60)	0.08** (32)	1.5 (60)	1.2 (84)
Other Racial Combos. (13 cases)	0.5 (13)	0.2+ (8)	8.0+ (8)	2.7 (5)	0.5 (8)	0.3 (13)
SL City (46 Cases)	2.0 (46)	7.1* (39)	0.2* (39)	1.9 (18)	0.2* (39)	0.4+ (46)
Jackson County (39 Cases)	0.3* (39)	3.5 (15)	0.4 (15)	0.3 (8)	0.5 (15)	0.3* (39)
MSA, 0–10% nonwhite (45 Cases)	0.6 (45)	14.6* (34)	0.1* (34)	0 (12)	0.6 (34)	0.4 (45)
Rural, 5–30% nonwhite (45 Cases)	0.9 (45)	4.4 (38)	0.2 (38)	0.3 (20)	0.7 (38)	0.7 (45)
Rural, 0–5% nonwhite (35 Cases)	1 (35)	5.1 (30)	0.2 (30)	0.02** (13)	1.2 (30)	1.1 (35)

Table 3.4 presents logistic regressions of critical decision points. Logistic regressions estimate the "odds ratio" of a case with the given attributes (for example, a case from St. Louis City) compared with a baseline case. The odds

113. The pseudo-R^2 is a measure of how much of the variation in decision-making a model explains. A pseudo-R^2 of 1 would mean that the model completely explained the outcomes in every case. A small pseudo-R^2, around 0.10, means that the model explains little of the variation in outcomes—that is, that other, unobserved differences in the cases explain most of the variation.

114. Because all cases in this category were treated the same way, the model cannot estimate an odds ratio. As the ratio is 100% to 0%, the odds are infinite. Similarly, for cases in which the ratio is 0% to 100%, the odds are 0, which is also indeterminate (because logistic regressions actually estimate natural logarithm of odds ratios, and the logarithm of zero is indeterminate).

ratio is defined as the odds of an outcome for a case with given attributes divided by the odds of an outcome for the baseline (or comparison) cases. For Table 3.4, the baseline case is a case from a county in an MSA with a 10–30% nonwhite jury pool, a white defendant, and a white victim.[115]

The results presented in Table 3.4 demonstrate that geography is the strongest predictor of M1 charging and conviction patterns; most of the statistically significant variables are geographic. First, in the decision to charge M1, Jackson County has odds of 0.3 to 1 compared to the baseline. Thus, the Jackson County disparity in M1 charging practice does not disappear when controlling for race; it is also of about the same magnitude as Table 3.2(C) suggests. Jackson County is the only factor listed in Table 3.4 that presents a statistically significant disparity in M1 charging patterns. With respect to the next decision point, whether the prosecutor withdrew the M1 charge, the primary disparity is between MSA counties with small minority jury pools and the baseline (of MSA counties with larger minority jury pools). Among cases from MSA counties with 0–10% nonwhite jury pools, the prosecutor was 14.6 times more likely to have withdrawn the M1 charge than the baseline case. In addition, cases from St. Louis City and cases with black defendants and black victims are more likely to be those in which the prosecutor withdrew the initial M1 charge. In St. Louis City, the odds are seven times greater than the baseline; for black defendants who kill black victims, the odds are 2.2 times as large as the baseline.

The final two columns of Table 3.4 present the odds ratios for M1 convictions. Geographic disparities, once again, are more significant than racial disparities. With respect to the odds of an M1 conviction after an initial M1 charge, cases from St. Louis City had an odds ratio five times smaller than the baseline. This exacerbates the disparity between St. Louis City and other counties that exists without controlling for race: different distributions of racial groups hide a larger geographic disparity for St. Louis City, where the odds of an M1 conviction are 2.5 times smaller than the baseline odds. This contrasts with

115. Thus, the odds ratio of 2.0 for St. Louis City in M1 charging means that the odds were two times higher that a white defendant with a white victim from St. Louis City was charged with M1 as compared to the odds that a white defendant with a white victim from a county in an MSA with 10–30% minority jury pool was charged with M1. Similarly, with an odds ratio of 1.0, the odds that a black defendant who killed a black victim was charged with M1 are the same as the odds that a white defendant who killed a white victim was charged with M1. In general, the closer the odds ratio is to one, the smaller the disparity in outcomes between the baseline and the variable at issue. One final note: in order to estimate accurately, logistic regression must have some variation in outcomes. If all cases of one type have the same outcome, logistic regression estimates that all potential cases of the same type would have that outcome—i.e., that one could predict perfectly what would happen in these cases. Thus, the logistic regression for the M1 charging decision cannot estimate the odds ratio of white defendants with black victims, because that value is infinite. In situations with a small number of cases (such as here, with only four such cases), one cannot rely on this estimate; it simply means that out of the four cases which had white defendants with black victims, all four defendants were charged with M1. It does not determine whether that fact is statistically significant. Operationally, these four cases are dropped from the analysis, because they provide no information to help estimate other parameters, and because the model cannot estimate an infinite odds ratio.

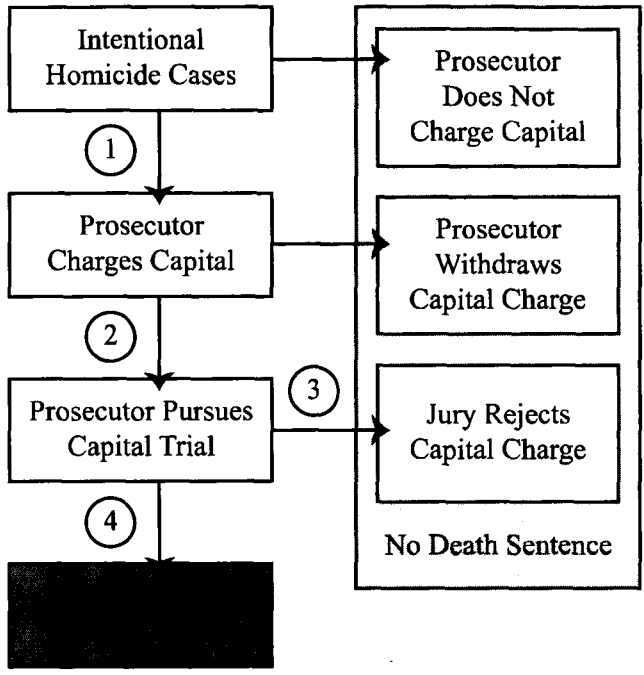
Jackson County, where controlling for race does not change the geographic pattern much, remaining at 3.3 times smaller than the odds for the baseline case. While the odds ratio for cases with white defendants who kill black victims is also statistically significant, with only four cases of this type, the result is not terribly robust. Overall, disparities across different counties are significant and enduring. St. Louis City and Jackson County have significantly different charging and conviction patterns than other counties, even after controlling for race. With respect to racial disparities, there are large disparities in the rate at which judges and juries convict defendants of M1, rather than a lesser homicide charge. Focusing on race alone, when prosecutors take M1 charges to trial, they are more likely to secure M1 convictions for black defendants than for white defendants.

IV. LIFE VERSUS DEATH

The Missouri homicide statute gives prosecutors extremely broad discretion to make charging decisions that largely determine which defendants should be sentenced to death and which defendants should receive less harsh sentences.[116] This broad discretion raises questions about whether the exercise of discretion differs across regions or racial lines. Figure 4.1 depicts the process that produces decisions about which defendants live and which ones are sentenced to death. This Part examines racial and geographic disparities at different points in this decision-making process, focusing on the four decision points identified in Figure 4.1. Section A examines geographic disparities and Section B analyzes racial disparities. Section C presents the results of a regression analysis that examines the interactions among these two sets of variables. In brief, the analysis demonstrates that the discretionary choices that prosecutors make in capital prosecutions allow for significant disparities in the manner in which defendants of different races and from different regions are prosecuted.

116. *See supra* notes 91–92 and accompanying text.

Figure 4.1



Following the convention in Part III, the data tables throughout Part IV have column headings identical to the headings in Table 4.1 below. The headings of Columns 1–4 correspond to the points labeled 1, 2, 3, and 4 in Figure 4.1. The percentages for the comprehensive database in the top row of Table 4.1 are unweighted. The percentages for the detailed database in the bottom row are based on weighted averages. The number in parentheses in each cell is the unweighted denominator; that is, the number of cases that the percentage in that cell is based upon. The percentages in Columns 1–3 are calculated on the basis of the previous node in the decision tree. Thus, the percentage in the top row of Column 1 means that prosecutors filed a capital charge in 12.7% of all intentional-homicide cases. Similarly, the percentage in the top row of Column 2 means that prosecutors pursued a capital trial in 39.8% of the cases that were charged as capital cases. Columns 4 and 5 display two different measurements for the frequency of death sentences. The denominator for the percentage in Column 4 is the number of cases in which the prosecutor took a capital charge to trial. The denominator for the percentage in Column 5 is the universe of all intentional-homicide cases. We utilize the same format for all the remaining tables in Part V to analyze geographic and racial disparities.

Table 4.1

	Prosecutor Filed Capital Charge (1)	Prosecutor Pursued Capital Trial (2)	Jury Rejected Capital Charge at Trial (3)	Death Sentences After Capital Trial (4)	Total Death Sentences (5)
Comprehensive database (1046 Cases)	12.7% (1046)	39.8% (133)	50.9% (53)	49.1% (53)	2.5% (1046)
Detailed database (247 Cases)	13.0% (247)	39.4% (127)	48.0% (50)	52.0% (50)	2.7% (247)

A. Geographic Disparity

Investigating the geographic disparities in capital prosecution, the study finds significant disparities in capital prosecution across regions. If one compares St. Louis City and Jackson County to the rest of the state, it appears that their very low capital conviction rates can be attributed primarily to low initial capital charging rates. In contrast, if one leaves aside St. Louis City and Jackson County and compares the remaining groups of counties to each other, the differences in sentencing outcomes have more to do with downstream prosecutorial decisions and jury behavior, rather than the initial decision to charge a case as capital or noncapital. Tables 4.2(A) to 4.2(C) provide more specific details regarding the regional disparities in capital prosecution. These tables follow the same rubric as in Part III.A above.

Several aspects of the data in Table 4.2(A) are noteworthy. First, prosecutors in St. Louis City and Jackson County filed capital charges much less frequently than prosecutors in the rest of the state. In St. Louis City, prosecutors charged capital in 6.5% of the intentional-homicide cases; in Jackson, the comparable figure was 1.3%. But in the rest of the state, prosecutors charged capital in roughly 20% of the intentional-homicide cases. This pattern of differences is highly statistically significant. On a related point, prosecutors in St. Louis City and Jackson County also obtained capital convictions far less frequently than their counterparts in the rest of the state. St. Louis prosecutors obtained capital convictions in fewer than one-half of 1% of intentional-homicide cases. Jackson prosecutors produced no capital convictions in more than 200 cases. In contrast, prosecutors in the rest of Missouri obtained capital convictions in about 4.5% of all intentional-homicide cases. This pattern is highly statistically significant.

If one sets aside St. Louis City and Jackson County, and focuses on the rest of the state, other points illustrate the complex interplay between race and geography in capital prosecutions. While Table 4.2(A) shows that rural counties and MSA counties have fairly similar capital charging and sentencing rates, Table 4.2(B) shows that there is greater variability across groups of counties if one

utilizes the racial composition of the jury pool to divide counties into groups. Defendants in counties where the jury pool is 10–30% nonwhite were more than twice as likely to be sentenced to death as defendants in counties where the jury pool is just 5–10% nonwhite. This difference does not correlate with differences in capital charging rates between the two groups: indeed, the charging rate in the 5–10% group was slightly higher. Rather, the difference in sentencing outcomes is primarily attributable to the fact that juries in the 5–10% counties were twice as likely to reject capital charges at trial as juries in the 10–30% counties.

Table 4.2(A):
Capital Charging and Death Sentences, Rural vs. Urban[117]

	Prosecutor Filed Capital Charge *** (1)	**Prosecutor Pursued Capital Trial (NS)** (2)	**Jury Rejected Capital Charge at Trial *** (3)	**Death Sentences After Capital Trial *** (4)	**Total Death Sentences ***** (5)
SL City (262 Cases)	6.5% (262)	47.1% (17)	87.5% (8)	12.5% (8)	0.4% (262)
Jackson County (228 Cases)	1.3% (228)	66.7% (3)	100.0% (2)	0 (2)	0 (228)
MSA Counties (274 Cases)	17.9% (274)	36.7% (49)	44.4% (18)	55.6% (18)	3.6% (274)
Rural Counties (282 Cases)	22.7% (282)	39.1% (64)	40.0% (25)	60.0% (25)	5.3% (282)
Total (1046 Cases)	12.7% (1046	39.8% (133)	50.9% (53)	49.1% (53)	2.5% (1046)

117. The statistical test used for columns 2–4 in Tables 4.2(A)–(C) was Fisher's Exact test, which does not rely on large samples, but instead provides an exact estimate of the p-value. Throughout this Article, Fisher's Exact test was used whenever possible (because of some small cell counts). Because of the sampling scheme, however, the more general Pearson Chi-Squared Test was used for much of the detailed database testing, specifically when both capital charges and noncapital cases are being compared.

Table 4.2(B):
Capital Charging and Death Sentences, Demographics of Jury Pool

	Prosecutor Filed Capital Charge *** (1)	Prosecutor Pursued Capital Trial (NS) (2)	Jury Rejected Capital Charge at Trial * (3)	Death Sentences After Capital Trial * (4)	Total Death Sentences *** (5)
SL City (262 Cases)	6.5% (262)	47.1% (17)	87.5% (8)	12.5% (8)	0.4% (262)
Jackson County (228 Cases)	1.3% (228)	66.7% (3)	100.0% (2)	0 (2)	0 (228)
Jury Pool 10–30% nonwhite (204 Cases)	19.1% (204)	48.7% (39)	31.6% (19)	68.4% (19)	6.4% (204)
Jury Pool 5–10% nonwhite (169 Cases)	21.3% (169)	38.9% (36)	64.3% (14)	35.7% (14)	3.0% (169)
Jury Pool 0–5% nonwhite (183 Cases)	20.8% (183)	26.3% (38)	30% (10)	70.0% (10)	3.8% (183)
Total (1046 Cases)	12.7% (1046)	39.8% (133)	50.9% (53)	49.1% (53)	2.5% (1046)

Table 4.2(C):
Capital Charging and Death Sentences,
Combine Rural/Urban and Jury Pool Demographics

	Prosecutor Filed Capital Charge *** (1)	Prosecutor Pursued Capital Trial (NS) (2)	Jury Rejected Capital Charge at Trial * (3)	Death Sentences After Capital Trial * (4)	Total Death Sentences *** (5)
SL City (262 Cases)	6.5% (262)	47.1% (17)	87.5% (8)	(12.5%) (8/262)	0.4% (262)
Jackson County (228 Cases)	1.3% (228)	66.7% (3)	100.0% (2)	0 (2)	0 (228)
MSA, Jury Pool 10–30% nonwhite (128 Cases)	16.4% (128)	52.4% (21)	27.3% (11)	72.7% (11)	6.2% (128)
MSA, Jury Pool 0–10% nonwhite (146 Cases)	19.2% (146)	25.0% (28)	71.4% (7)	28.6% (7)	1.4% (146)
Rural, Jury Pool 5–30% nonwhite (146 Cases)	24.0% (146)	45.7% (35)	43.7% (16)	56.2% (16)	6.2% (146)
Rural, Jury Pool 0–5% nonwhite (136 Cases)	21.3% (136)	31.0% (29)	33.3% (9)	66.7% (9)	4.4% (136)
Total (1046 Cases)	12.7% (1046)	39.8% (133)	50.9% (53)	49.1% (53)	2.5% (1046)

Table 4.2(C) demonstrates that there is significant variability in death penalty prosecution across groups of counties other than Jackson and St. Louis City. The initial capital charging rates, while ranging only from a low of 16.4% (MSA, 10–30%) to a high of 24.0% (rural, 5–30%), demonstrate a statistically significant relationship between geographic region and capital charging. In contrast, while there is much more variability in the rate at which prosecutors took capital charges to trial (Column 2), this pattern is not statistically significant, and there is no evidence to suggest that the variability across geographic regions is systematic. The differences in the rates at which juries rejected capital charges at trial (Column 3), however, are also statistically significant. Excluding Jackson

County and St. Louis City, these range from a high of 71.4% (MSA 0–10%) to just 27.3% (MSA 10–30%). Overall, MSA counties with a jury pool that is 0–10% nonwhite had the lowest capital trial rate (25.0%) and the highest jury-rejection rate (71.4%), which resulted in the lowest capital-conviction rate (1.4%). In contrast, MSA counties with a jury pool that is 10–30% nonwhite had the highest capital-trial rate (52.4%) and the lowest jury-rejection rate (27.3%), resulting in a 6.2% capital-conviction rate. This final pattern in death sentences conclusively demonstrates prosecutors and jurors from different groups of counties are making different decisions.

B. Racial Disparity

The analysis of racial disparities demonstrates significant differences at each decision point between cases with black versus white defendants and between cases with black versus white victims. Tables 4.3(A) through 4.3(C) present detailed results of the racial disparities associated with the process of deciding which defendants are sentenced to death. Table 4.3(A) focuses on the defendant's race as a fault line for disparities. Several noteworthy facts emerge from the results. First, all four decision points exhibit statistically significant disparities when comparing black versus white defendants; although adding other-race defendants decreases the power of the test sufficiently that overall, the differences across all races are not necessarily statistically significant. With 7.7% of black defendants facing a capital charge, they are about a third as likely to do so as white defendants, 21.2% of whom face a capital charge at some point during the prosecution. The rates at which prosecutors took capital charges to trial also vary significantly in the opposite direction: white defendants are two-thirds as likely to face a capital trial after capital charges are filed than black defendants. Thus, many more white defendants face death penalty charges, but charges for these white defendants are more likely to be dropped. The result between these two opposing effects is not a wash; instead, there is a statistically significant difference of 6.6% capital trial rate for white defendants versus 4.1% capital trial rate for black defendants. Exacerbating the impact of this disparity on death sentences is the fact that juries rejected capital charges more often for black defendants (52.2% versus 40%). Overall, because of the higher original filing rate and the slightly higher jury sentencing rate, white defendants are twice as likely to be sentenced to death as black defendants.

Table 4.3(A):
Capital Charging and Death Sentences, Race of Defendant

	Prosecutor Filed Capital Charge *** (1)	Prosecutor Pursued Capital Trial * (2)	Jury Rejected Capital Charge at Trial NS† (3)	Death Sentences After Capital Trial NS† (4)	Total Death Sentences NS† (5)
White Defendant (122 Cases)	21.2% (122)	31.2% (80)	40.0% (25)	60.0% (25)	4.0% (122)
Black Defendant (116 Cases)	7.7% (116)	53.5% (43)	52.2% (23)	47.8% (23)	2.0% (116)
Other-race Defendant (9 Cases)	10.1% (9)	50.0% (4)	100% (2)	0% (2)	0 (9)
Total (247 Cases)	13.0% (247)	39.4% (127)	48% (50)	52% (50)	2.7% (247)

† Note that while the overall racial pattern is not statistically significant—or only marginally so—the difference between white victims and black victims is highly statistically significant (p-value < 0.001); the inclusion of other-race defendants significantly lowers the power of the test.

Table 4.3(B) presents the data for the capital charging process broken out by the race of the victim. The race-of-victim analysis is similar to the race-of-defendant analysis, demonstrating significant differences in initial capital charging rates and smaller differences in the prosecution after this point. Prosecutors are less than half as likely to file a capital charge in cases that involve black victims (7.0% of the time) compared to cases that involve white victims (18.5% of the time). As with the race-of-defendant analysis, prosecutors are less likely to pursue a capital trial initially in cases with white victims, but jurors are more likely to sentence the defendant to death in these cases. These two effects counter-balance each other, leaving the relative percentage of death sentences about the same as the relative percentage of capital charges: just over two to one, with cases involving white victims imposing a death sentence 4.0% of the time, while cases involving black victims have a death sentence imposed 1.4% of the time.

Table 4.3(B);
Capital Charging and Death Sentences, Race of Victim(s)

	Prosecutor Filed Capital Charge *** (1)	Prosecutor Pursued Capital Trial NS† (2)	Jury Rejected Capital Charge at Trial + (3)	Death Sentences After Capital Trial +† (4)	Total Death Sentences +† (5)
White Victim(s) (149 Cases)	18.5% (149)	34.7% (92)	37.5% (32)	62.5% (32)	4.0% (149)
Black Victim(s) (89 Cases)	7.0% (89)	51.6% (31)	62.5% (16)	37.5% (16)	1.4% (89)
Other-race Victim(s) (9 Cases)	10.1% (9)	50.0% (4)	100% (2)	0% (2)	0 (9)
Total (247 Cases)	13.0% (247)	39.4% (127)	48% (50)	52% (50)	2.7% (247)

Race-of-defendant and race-of-victim disparities are generally strongly correlated because most homicides are intra-racial. Missouri is no exception, with over 80% of homicides involving defendants and victims of the same race. Table 4.3(C) presents the interaction of these two variables. Here, almost all of the decision points demonstrate statistically significant disparities. First, with respect to the prosecutor's decision to file a capital charge, white defendants who kill white victims have the highest chance of facing a capital charge (21.6%). The risk of facing a capital charge is only about 60% as high if the victim of a white defendant is black. Black defendants have an even lower risk. Following the pattern for white defendants, the risk of a capital charge is almost 50% higher for black defendants who killed white victims.

Variations in the rates at which prosecutors decided to pursue a capital trial are not statistically significant. However, the rate at which juries imposed death sentences at trial demonstrates significant racial disparities. If one disregards the single case where a white defendant faced a capital trial after killing a black victim, it is clear that black defendants who kill white victims are treated the most harshly, with a 75% chance of a death sentence after capital trial. This is more than twice as large as the 33.3% chance of a death sentence for black defendants with black victims. White defendants face a 60.9% chance of a death sentence after the capital trial if the victim was white. Overall, death sentence rates increase by a factor of five between the lowest probability of receiving a death sentence (1.2% for black defendants with black victims) and the highest probability (6.2% for white defendants with black victims). Interestingly, cross-race cases are treated more harshly than intra-race cases; defendants in cross-race cases receive death sentences in 4.9% of the cases, while defendants in intra-race cases receive a death sentence in only 2.8% of the cases. This result is only marginally significant, perhaps because of the small number of cross-race cases (thirty-five total).

Unfortunately, it is impossible to tell whether this finding would persist with a larger number of cross-race cases.

Table 4.3(C):
Capital Charging and Death Sentences
Race of Defendant and Race of Victim Combined

	Prosecutor Filed Capital Charge *** (1)	Prosecutor Pursued Capital Trial NS (2)	Jury Rejected Capital Charge at Trial *** (3)	Death Sentences After Capital Trial *** (4)	Total Death Sentences * (5)
White Defendant, White Victim (115 Cases)	21.6% (115)	30.3% (76)	39.1% (23)	60.9% (23)	4.0% (115)
White Defendant, Black Victim (4 Cases)	12.4% (4)	50% (2)	0% (1)	100% (1)	6.2% (4)
Black Defendant, White Victim (31 Cases)	10.4% (31)	57.1% (14)	25.0% (8)	75.0% (8)	4.5% (31)
Black Defendant, Black Victim (84 Cases)	6.9% (84)	51.7% (29)	66.7% (15)	33.3% (15)	1.2% (84)
Other Combinations (13 Cases)	10.8% (13)	50% (6)	100% (3)	0% (3)	0% (13)
Total (247 Cases)	13.0% (247)	39.4% (127)	48% (50)	52% (50)	2.7% (247)

The most robust racial difference in capital charging is the difference across racial lines in intra-race cases. Homicides with white defendants and white victims are treated significantly more harshly than homicides with black defendants and black victims. This may be the product of geography—prosecutors in areas with large black populations are less likely to seek the death penalty, and juries from these locations are less likely to impose the death penalty.[118] The next

118. We take no specific position on causality in this study; that is, we do not directly test whether geographic differences in charging patterns create the racial disparities found, or whether racial bias in decision-making is the cause of the disparities. It is important to note, however, that there are rural areas of Missouri that have a high percentage of black residents; the racial disparities are not simply a difference between urban and rural areas. In addition, there are myriad reasons why different prosecutors make different decisions: they may have different case loads, types of homicide cases, and budgetary pressures that can affect decisions. The underlying point, however, is that the

Section turns to this question, investigating the interplay between race and geography.

C. Interactions Between Variables

Geography provides a more robust explanation for the disparities in capital prosecution than race does; all of the racial disparities are statistically insignificant when controlling for geography. In addition, aside from the important exception of Jackson County, the results suggest that differences in jury decision-making explain a significant portion of the final geographic disparities in death sentencing rates. Table 4.4 presents the results of several logistic regressions, with the dependent variable of each regression being a decision point in Figure 4.1, and the independent variables being geography (as measured by both MSA and jury pool) and race (including both race-of-defendant and race-of-victim). As with Table 3.4, the values presented in Table 4.4 are the odds ratio of the variable listed, as compared with the baseline.

Despite the fact that geography is a stronger explanation than race in death penalty prosecution, cases involving white defendants with black victims, which were a small percentage of the sample, produced results inconsistent with this supremacy. In all of those cases, the defendants who went to trial received a death sentence. However, there were only four such cases in the sample, and only one that went to trial, so there is no statistically significant evidence of a disparity between these cases and others. Similarly, no cases received a death sentence if either the defendant or the victim was other-race, although this result is not statistically significant because so few cases involved those facts.

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decisions made, for whatever reasons, affected black defendants differently than white defendants, and families of white victims differently than families of black victims.

Table 4.4:
Capital Charging and Death Sentences
Interaction Between Geography and Race

	Prosecutor Filed Capital Charge R^2=0.13 (1)	Prosecutor Pursued Capital Trial R^2=0.05 (2)	Jury Rejected Capital Charge at Trial R^2=0.28 (3)	Death Sentences After Capital Charge R^2=0.28 (4)	Total Death Sentences R^2=0.14 (5)
Baseline: MSA with 10–30% nonwhite jury pool; White Defendant, White Victim	1	1	1	1	1
White Defendant, Black Victim (4 Cases)	1.5	2.7	0[119]	∞[120]	17.4
Black Defendant, White Victim (27 Cases)	0.9	2.7	0.8	1.2	3.7
Black Defendant, Black Victim (76 Cases)	0.6	2.2	4.6	0.2	0.6
Other Racial Combos. (13 Cases)	0.5	2.6	∞[120]	0[120]	0[120]
SL City (262 Cases)	0.5	0.7	28.5*	0.04*	0.04*
Jackson County (228 Cases)	0.06***	2.7	∞[120]	0[120]	0[120]
MSA, 0–10% nonwhite (146 Cases)	0.9	0.4	28.4+	0.04+	0.1*
Rural, 5–30% nonwhite (146 Cases)	2.0	0.7	1.1	0.9	1.3
Rural, 0–5% nonwhite (136 Cases)	1.4	0.9	2.4	0.4	0.8

119. *See supra* note 115.

All of the statistically significant disparities are based upon geography: independent county prosecutors make systematically different decisions. The decision-making in Jackson County and St. Louis City creates disparities in both outcomes and process. The odds that a defendant in Jackson County faces a capital charge are sixteen times less (0.06 times more) than the odds for a baseline case. No death sentences were imposed in Jackson County during the period of the study. Prosecutors in St. Louis City are slightly less likely to file capital charges and pursue capital trials than prosecutors in the baseline case. However, juries reject capital charges in St. Louis City at very high rates, after controlling for race. A defendant from St. Louis City facing a capital trial has odds 28.5 times higher than the baseline of receiving a sentence less than death at trial. Overall, this translates into a much smaller risk of a death sentence in St. Louis City—the odds of receiving a death sentence (out of all intentional homicides) are twenty-five times smaller than the odds of receiving a death sentence in a baseline county. Cases from MSA counties with small minority jury pools (0–10%) also demonstrate this pattern: charging and trial practices are similar to other counties, but juries reject capital charges at a rate 28.4 times greater than the baseline rate. This is consistent with the findings in Table 4.2(C), which suggests that MSA counties with small minority jury pools, or very large minority jury pools (Jackson and St. Louis City) impose death sentences less frequently than other counties in Missouri.

In summary, geographic disparities endure after controlling for race-of-defendant and race-of-victim, while race effects are no longer present, meaning that geography is a more robust explanation of the capital decision-making process than race. Except for the charging decisions of Jackson County, the results suggest that differences in jury decision-making, rather than prosecutorial decision-making, explain a significant portion of the final geographic disparities in death sentencing rates. Even more than with the analysis of M1 charging patterns, geographic disparities are troubling. Here, the difference in sentence is literally life or death. Significant arbitrariness in charging and sentencing is unacceptable, particularly where the difference is, often, just a couple of miles. Absent other significant concerns,[120] such small differences should not determine such an important decision as that between life and death. Our analysis demonstrates that the large racial disparities found in Part IV.B are a product in significant measure of the geographic disparities. Curtailing the vast discretion that prosecutors have in charging and plea-bargaining decisions may limit this geographic arbitrariness. In doing so, it would also likely reduce the racial disparity in charging and sentencing outcomes, as these disparities come from the disparate geographic decision-making. In Part V, we outline several policy issues that arise from this study, and provide some potential decisions that the Missouri legislature could make to narrow prosecutorial discretion.

120. The primary concern that may trump the geographic concern is federalism, when investigating inter-state disparities. *See supra* notes 16–21 and accompanying text.

V. POLICY IMPLICATIONS

Over the past few decades, numerous countries throughout the world have abolished capital punishment. Despite this global trend, there is broad public support for continued use of capital punishment in the United States.[121] In light of that public support, we assume that Missouri, like other states in the United States, will retain the death penalty as the ultimate criminal sanction for the foreseeable future.[122] However, as the U.S. Supreme Court has stated, the Eighth Amendment requires that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[123]

The preceding analysis finds significant and enduring geographic variation in the prosecution of homicides and imposition of the death penalty in Missouri. This geographic variation combines with racial patterns in housing to create a disparate impact on the basis of race as well. Thus, black defendants who kill black victims are less likely to receive the death penalty than either black or white defendants who kill white victims. Such disparate impacts on different communities create a serious issue regarding whether the death penalty is perceived as fair and highlight the policy choices that allow this geographic and racial disparity to remain.

Our study demonstrates that the primary underlying policy issue is the breadth of prosecutorial discretion.[124] Prosecutors in Missouri prosecuted about 800 death-eligible homicides between January 1997 and December 2001. Only about fifty of those cases led to capital trials. The current statute does not provide sufficient criteria to guide prosecutors in selecting the fifty capital trials from the 800 death-eligible cases. Without clear statutory criteria to guide them, prosecutors in different counties may exercise their discretion in very different ways. In Jackson County, prosecutors held capital trials in fewer than one-half of 1% of the intentional-homicide cases they prosecuted, while in Boone, Jasper, and Pemiscot counties, prosecutors took capital charges to trial in more than 15% of their cases. The differences in the crimes committed in Jackson County versus Boone County may have warranted treating the defendants in these cases differently. Conversely, the crimes may have been similar enough that the different treatment is a geographic lottery of sorts. Our study does not investigate the causal link between geography and differences in homicide prosecution. But the disparities themselves

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121. Over two-thirds of Americans support the death penalty. *See* Lydia Saad, *Americans Hold Firm to Support for Death Penalty*, GALLUP, Nov. 18, 2008, http://www.gallup.com/poll/111931/Americans-Hold-Firm-Support-Death-Penalty.aspx; Death Penalty Info. Ctr., Nat'l Polls and Studies, Harris Interactive Poll, 3/08, *available at* http://www.deathpenaltyinfo.org/article.php?did=2163#308poll.

122. New Jersey recently became the first state to abolish the death penalty in over fifty years.

123. Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

124. There is evidence that the jury also exacerbates the disparities in sentencing outcomes in capital cases. *See supra* Part IV.B. But very few cases reach the jury. *See infra* Figure 2.2.

suggest that the legislature is implicitly making policy choices regarding the appropriate degree and type of variation in prosecution across different regions. Specifically, the legislature is implicitly voicing its acceptance of large differences in prosecution decisions across counties. More troubling, the legislature is implicitly accepting the racial variation in prosecution that is a corollary to this regional variation. This Section explores these policy implications further, providing some suggested legislative changes.

The following policy decisions are designed primarily to reduce disparities across counties in the implementation of capital punishment by limiting the class of death-eligible offenses. Our expectation is that racial disparities would also be reduced by narrowing prosecutorial discretion.[125]

1. Moratorium and Further Study

This study raises questions about whether capital punishment in Missouri is implemented fairly, and the present study has exposed issues that are sufficiently serious to warrant a legislatively imposed moratorium while a further study is being conducted. This study focuses on several decision points in which the vast discretion the legislature provides prosecutors allows significant racial and geographic disparities in homicide prosecution. Given the limitations we faced in collecting and analyzing data about the implementation of capital punishment in Missouri,[126] we recognize that the Missouri legislature may be hesitant to adopt statutory reforms without first commissioning a state-sponsored study to obtain more comprehensive data and perform a causal analysis. We support the idea that there should be a state-sponsored study of capital punishment in Missouri. A more comprehensive study could provide more detail about the specific effects of certain policies and link those details to specific reforms.

2. Introduce a District Attorney System in Missouri

In order to reduce the geographic inconsistency in death penalty prosecution, the Missouri legislature could adopt a district attorney system in which the state would be divided into forty-five prosecutorial districts with the same boundaries as the forty-five judicial districts. Currently, Missouri is divided into 115 counties, each with its own chief prosecutor. This creates 115 independent decision-makers in Missouri, each of whom is free to follow her own conscience on the issue of capital punishment. This is a relatively large number compared to states that impose the death penalty with relative frequency.[127] Other things being

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125. It is possible that the crimes that different racial groups commit will still be treated differently because of differences in the underlying conduct. In the extreme, if the statute covered conduct that was significantly more prevalent in some communities, this may force a reexamination of what defines the most morally culpable behavior.

126. *See infra* Appendix II.

127. Two of the other leading death penalty states have a larger number of independent decision-makers: Texas has 155 and Virginia has 120. However, most of the other leading death penalty states have fewer independent prosecutors. There are eighty-eight in Ohio, sixty-seven in Pennsylvania, fifty-eight in California (the most populous state), forty-eight in Georgia, forty-one in Alabama, thirty-nine in North Carolina, twenty-

equal, a larger number of independent decision-makers increases the risk of geographic disparities across prosecutorial districts. Although Missouri has 115 counties, Missouri's judicial system is divided into forty-five judicial districts, most of which encompass two or more counties.[128] One way to curtail geographic variation would therefore be to lower the number of regions that have separate decision-making power.

3. Amend the Statutory Definition of Deliberation

Revision of the statutory definition of "deliberation" to require evidence of advance planning or a preconceived design before the killing occurs would significantly reduce prosecutorial discretion regarding capital punishment. At present, Missouri defines the term "deliberation" to mean "cool reflection for any length of time no matter how brief."[129] Under this definition, there is no meaningful distinction between M1, which is death-eligible, and "knowing" M2, which is not death-eligible.[130] This study suggests that the lack of a clear dividing line between M1 and M2 contributes significantly to the geographic variation in homicide charging and outcomes. The Missouri legislature may want to revisit its homicide definitions in light of this new information. We estimate that at least 84% of all cases in the comprehensive database are M1-eligible under the current statute. In contrast, we estimate that only 36% of those cases would be M1-eligible under our revised definition of "deliberation."[131]

4. Proportionality Review

For every case that results in a death verdict, state law requires the Missouri Supreme Court to consider "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases."[132] In practice, the Court conducts this proportionality review by comparing death cases to other death cases.[133] This study explicitly compares capital and noncapital cases, and suggests by example that this type of comparison would be a more meaningful way for the Court to conduct a proportionality review. The Missouri Supreme Court could modify its practice in this regard, or the legislature could amend the statute to

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seven in Oklahoma and only twenty in Florida (the fourth most populous state). PERRY, *supra* note 20, at 11.

128. Political factors are the impetus behind choosing this particular number of districts. Division into forty-five districts allows the large cities to manage their own case loads independently, while providing savings across less populous counties. A more significant change would be to centralize the decision-making process for capital cases by introducing a state-wide committee to review charging decisions. This would be similar to the federal system for death penalty prosecution, which requires the Attorney General to approve the decision to seek the death penalty in all federal homicide cases. *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) 18, 23 (2000).

129. MO. REV. STAT. § 565.002(3) (2008).

130. *See infra* Appendix I.

131. *See supra* notes 91–92 and accompanying text.

132. § 565.035.3(3).

133. *See infra* Appendix I.

require comparison of death cases to nondeath cases. This would allow a more comprehensive review of death-eligible cases.

The remaining policy decisions specifically focus on the broad statutory aggravators for capital charges. Due to the sheer number of aggravators, and the breadth of certain aggravators, this study demonstrates that one or more statutory aggravating factors are present in approximately 90% of all M1-eligible cases.[134] Modifying the number and breadth of these statutory aggravating factors would reduce discretion in capital-punishment cases. The statutory definition of aggravating factors implicates basic values, expressed through the legislature's decision to include (or exclude) certain homicides from the category of death-eligible offenses. The broad language of these aggravators leaves the important discussion of what crimes should be death-eligible to prosecutors, with the potential for quite different answers across jurisdictions. These inter-jurisdictional differences, in turn, allow for significant variation in death penalty charging and sentencing across Missouri. The suggestions below would limit the variation in death penalty charging and sentencing specifically. Even the process of debating these changes would return the discussion of what homicides deserve the death penalty to the legislative branch.

5. Eliminate or Limit the "Wantonly Vile" Aggravator

The Missouri legislature could either eliminate "wantonly vile" as an aggravator, or limit its application to cases that involve torture. This aggravator is present in more than 90% of the M1-eligible cases, and therefore may not satisfy the *Zant v. Stephens* requirement that aggravators must genuinely narrow the class of death-eligible offenses. If the Missouri legislature did not wish to entirely eliminate this aggravator, it could adopt the federal definition of "torture," which is codified in 18 U.S.C. § 2340 as a precondition for the application of this aggravator.[135]

6. Limit the Scope of the "Felony Murder" Aggravator

The Missouri legislature could narrow the scope of the "felony murder" aggravator to apply only to rape–murder cases. In contrast, as currently drafted, this aggravator is present in more than 50% of the M1-eligible cases because it covers all murders committed in conjunction with a robbery, burglary, or drug crime. A slightly broader version would cover murders committed in conjunction with kidnapping and/or sodomy.

7. Limit the Scope of the "For Money" Aggravator

The legislature could narrow the scope of the "for money" aggravator so that it applies only to murder-for-hire cases; it would therefore apply both to the person who pays and to the person who receives money for the commission of a

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134. *See supra* Tables 2.1, 2.2.

135. Under the federal definition, an act does not qualify as "torture" unless it is "committed by a person acting under the color of law." 18 U.S.C. § 2340(1) (2006). In the context of murder prosecutions, this requirement is illogical. Thus, the change would adopt the federal definition without the "color of law" requirement.

murder. The breadth of this aggravator as currently drafted is primarily attributable to the fact that it covers all murders committed in conjunction with a theft offense, and therefore applies in about 45% of the M1-eligible cases. A slightly broader version would include cases where the defendant kills a relative to obtain an inheritance or insurance benefits.

8. Limit the Scope of the "Killing Witness" Aggravator

The legislature could narrow the scope of the "killing witness" aggravator so that it applies only in cases where the victim was a subpoenaed or potential witness in a criminal case where charges had already been filed. The breadth of this aggravator stems from the Missouri Supreme Court's interpretation that the statute applies whenever "the murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution." Thus, the current interpretation of this aggravator allows essentially all murders occurring with another crime to be charged, because the victims of the nonhomicide crime were witnesses to this secondary crime. As currently interpreted, this aggravator is present in about 48% of the M1-eligible cases.

9. Eliminate the "Avoiding Arrest" Aggravator

The Missouri legislature could eliminate the "avoiding arrest" aggravator. Because there is virtually a complete overlap between the cases covered by this aggravator and the cases covered by the "killing witness" aggravator, there would be no need to retain this as a separate aggravator.[136] Moreover, the cases of greatest concern could be covered by two more specific aggravators: the "escaped custody" or "concealing drug crime" aggravators. As currently drafted, this aggravator is quite broad, applying in about 48% of the M1-eligible cases.

10. Eliminate the "Agent or Employee" Aggravator

The Missouri legislature could eliminate the "agent or employee" aggravator. The cases of greatest concern covered by this aggravator are the murder-for-hire cases, which are also covered by the "for money" aggravator. This aggravator also applies to other cases that involve concerted action among two or more co-defendants; but if the legislature found that the fact of concerted action, without more, did not justify imposition of capital punishment, this aggravator would be unnecessary. This broad aggravator is currently present in about 41% of the M1-eligible cases.

11. Limit the Scope of the "Prior Record" Aggravator

The scope of the "prior record" aggravator could be narrowed by limiting its applicability to those defendants with prior M1 convictions. As currently drafted, this aggravator applies not only to a person who has been convicted of M1; it also applies to anyone "who has one or more serious assaultive criminal convictions."[137] The Missouri Supreme Court has construed this factor broadly to

136. *See supra* notes 82–85 and accompanying text (discussing overlap between the "avoiding arrest" and "killing witness" aggravators).

137. MO. REV. STAT. § 565.032.2(1) (2008).

apply even to a defendant with a prior conviction for second-degree assault.[138] Overall, this aggravator applied to at least 19% of the M1-eligible cases.[139]

CONCLUSION

The analysis of intentional-homicide cases in Missouri demonstrates that Missouri law fails to narrow the class of death-eligible homicides as required under *Zant v. Stephens*. The Missouri statute eliminates fewer than 10% of M1-eligible homicides overall which corresponds to fewer than 25% of all intentional homicides. Prosecutorial discretion, then, defines which defendants face the death penalty and which defendants do not, which defendants face LWOP, and which face, at a maximum, life with the possibility of parole. Prosecutors apply their discretion in vastly different ways, leading to large geographic disparities in the rates of M1 and death penalty prosecutions and convictions. In combination with racial housing patterns, these disparities also create or exacerbate large racial disparities in prosecution of capital offenses.

By creating a structure that facilitates these disparities in outcomes, the legislature has implicitly condoned the geographic lottery that this system at least appears to create. While this Article does not analyze whether the disparities amount to intentional discrimination—that is, whether the disparities are caused by geography or race, instead of a by-product of other decisions—the appearance of a geographic lottery and racial discrimination remains troubling. The policy changes outlined in Part V provide a starting point for narrowing prosecutorial discretion in Missouri in order to reduce the geographic disparities documented in this study and comply with the Constitution's requirement that capital-punishment statutes be narrowly drafted to include only the worst homicides committed.

APPENDIX I: LAW AND PRACTICE IN MISSOURI

This Appendix summarizes Missouri law governing the implementation of capital punishment and provides comparisons to other key death penalty states to give the reader an impression of the ways in which Missouri is both typical and atypical. The discussion focuses on the ways in which Missouri law both narrows and broadens the scope of prosecutorial discretion in comparison to other states.

A. Classification of Homicide as Murder

There are now thirty-six death penalty jurisdictions in the United States, including thirty-five states and the federal government.[140] Twenty-three of those

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138. *See* State v. Kinder, 942 S.W.2d 313, 339 (Mo. 1997).

139. The data do not contain complete prior record information, and so this is a lower bound of the percentage of cases that are covered by this aggravator.

140. The thirty-six jurisdictions that allow the death penalty are: Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, and the federal government. *See* Death Penalty Info. Ctr., FACTS ABOUT THE DEATH PENALTY (2009), *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Apr. 10, 2009). After the time period of this study, New York's

thirty-six jurisdictions separate murder into two degrees.[141] In contrast, thirteen of those jurisdictions have only one degree of murder.[142] Missouri, like most states, divides murder into first-degree and second-degree murder.

Among the death penalty states with two degrees of murder, there is a split between those that require serious reflection before an intentional murder will be raised to first-degree murder,[143] and those which hold that "premeditation," and/or "deliberation" may take place immediately before or simultaneous with the formation of the intent to kill, i.e., in a "twinkling of an eye."[144] Missouri is a "twinkling of an eye" state. "Deliberation" is the key criterion in the Missouri statute that separates first-degree murder from "knowing" second-degree murder.[145] "Deliberation" is defined as "cool reflection for any length of time no matter how brief."[146] As the following analysis demonstrates, under Missouri case law the "deliberation" requirement is satisfied in almost every case involving "knowing" second-degree murder. Thus, the only real difference between first-degree murder and "knowing" second-degree murder is the severity of the punishment.

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highest court held the death penalty unconstitutional, People v. LaValle, 3 N.Y.3d 88 (2004), and New Jersey and New Mexico repealed the death penalty. H.B. 285, 49th Leg., 1st Reg. Sess. (N.M. 2009) (effective July 1, 2009); S.B. 171, 212th Leg., 2nd Reg. Sess. (N.J. 2007) (effective Dec. 17, 2007).

141. Jurisdictions that divide murder into two degrees are: Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Kansas, Maryland, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, Wyoming, and the federal system.

142. Jurisdictions with one degree of murder are: Alabama, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Montana, Oregon, South Carolina, Texas, and Utah.

143. *See* ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2008), State v. Thompson, 65 P.3d 420, 424 (Ariz. 2003); CAL. PENAL CODE § 189 (West 2008), People v. Anderson, 447 P.2d 942, 945 (Cal. 1968); COLO. REV. STAT. § 18-3-102(1)(a) (2004), Key v. People, 715 P.2d 319, 321 (Colo. 1986); FLA. STAT. § 782.04(1)(a)(1) (2008), Dupree v. State, 615 So.2d 713, 715 (Fla. Dist. Ct. App. 1993); IDAHO CODE ANN. § 18-4001–18-4003 (2008), State v. Sheahan, 77 P.3d 956, 970 (Idaho 2003); KAN. STAT. ANN. § 21-3401(a) (2007), State v. White, 950 P.2d 1316, 1325 (Kan. 1997); MD. CODE ANN., CRIM. LAW § 2-201(a) (West 2007), Bryant v. State, 900 A.2d 227, 238–39 (Md. 2006); NEB. REV. STAT. § 28-303A (2008), State v. Batiste, 437 N.W.2d 125, 132 (Neb. 1989); N.C. GEN. STAT. § 14–17 (2008); State v. Myers, 305 S.E.2d 506, 509 (N.C. 1983); OHIO REV. CODE ANN. § 2903.01 (West 2008); TENN. CODE ANN. § 39-13-202(d) (2008); WASH. REV. CODE § 9A.32.030(1)(a), 32.020(1)(a) (2008); WYO. STAT. ANN. § 6-2-101 (a) (2008), Bouwkamp v. State, 833 P.2d 486, 493–94 (Wyo. 1992).

144. For other "twinkling of an eye" states, see, for example, NEV. REV. STAT. § 200.030(1) (2007), Schoels v. State, 966 P.2d 735, 738 (Nev. 1998); 18 PA. CONS. STATS. ANN. § 2502(a) (West 2008), Commonwealth v. Carroll, 194 A.2d 911, 916 (Pa. 1963); S.D. CODIFIED LAWS § 22-16-5 (2008); VA. CODE ANN. § 18.2-32 (2008), Weeks v. Commonwealth, 450 S.E.2d 379, 390 (Va. 1994).

145. Missouri classifies a homicide as first-degree murder if a defendant "knowingly causes the death of another person after deliberation upon the matter." MO. REV. STAT. § 565.020.1 (2008). A defendant who knowingly causes the death of another person without "deliberation" is guilty of second-degree murder. *Id.* § 565.021.1(1).

146. *Id.* § 565.002(3).

Under Missouri law, "a person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter."[147] There are only two permissible punishments for first-degree murder in Missouri: the death penalty, or life imprisonment without eligibility for probation or parole.[148] The crime of second-degree murder includes both felony murder and homicides where the perpetrator acted "with the purpose of causing serious physical injury to another person."[149] Additionally, any homicide where the defendant "knowingly causes the death of another person" qualifies as second-degree murder.[150] The punishment for second-degree murder is much lighter than it is for first-degree murder. Second-degree murder is punishable as a Class A felony[151] by ten to thirty years imprisonment, or by life imprisonment with eligibility for parole.[152]

The statutory definition of murder in Missouri narrows the class of death-eligible offenses in two significant respects. First, most states classify some forms of reckless homicide as murder, thereby making at least some reckless homicides death-eligible. In contrast, Missouri classifies all reckless homicides as manslaughter, not murder.[153] Because manslaughter is not a death-eligible crime, the legislative decision to classify all reckless homicides as manslaughter narrows the class of death-eligible offenses, and thereby narrows the scope of prosecutorial discretion.

Second, most states that divide murder into degrees classify felony murder as first-degree murder,[154] thereby making at least some felony murders death-eligible (even if the defendant did not intend to kill the victim).[155] Missouri,

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147. *Id.* § 565.020.1.
148. *Id.* § 565.020.2.
149. *Id.* § 565.021.1(1).
150. *Id.*
151. *Id.* § 565.021.2.
152. *Id.* § 558.011.1(1).
153. *See id.* § 565.024.1(1). In addition to Missouri, there are nine other death penalty states that classify reckless homicide as manslaughter, not murder. *See* ALA. CODE § 13A-6-2(a)(2) (2006); CONN. GEN. STAT. § 53a-54a (2007); GA. CODE ANN. § 16-5-1 (2008); IND. CODE 35-42-1-5 (2008); KY. REV. STAT. ANN. § 507.050 (West 2008); LA. REV. STAT. ANN. § 14-31(A)(2) (2008); MONT. CODE ANN. § 45-5-102(1) (2007); OR. REV. STAT. § 163.115(1)(a) (2008).
154. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1105(2) (2008); CAL. PENAL CODE § 189 (West 2008); COLO. REV. STAT. § 18-3-102(1)(a) (2004); FLA. STAT. § 782.04 (1)(a)(2) (2008); IDAHO CODE ANN. § 18-4003(d) (2008); KAN. STAT. ANN. § 21-3401(1)(b) (2008); MD. CODE ANN., CRIM. LAW, § 2-201(a)(4) (West 2008); NEB. REV. STAT. § 28-303A(2) (2008); NEV. REV. STAT. § 200.030(1)(b) (2008); N.C. GEN. STAT. §§ 14-17 (2008); OKLA. STAT. tit. 21, § 701.7(B) (2008); S.D. CODIFIED LAWS § 22-16-4(2) (2008); TENN. CODE ANN. § 39-13-202(a)(2) (2008); VA. CODE ANN. §§ 18.2-32 (2008); WASH. REV. CODE § 9A.32.030(1)(c) (2008); WYO. STAT. ANN. § 6-2-101 (a) (2008). In addition to Missouri, at least three other death penalty states categorize felony murder as second-degree murder. *See* DEL. CODE ANN. tit. 11, § 635(2) (2004); LA. REV. STAT. ANN. § 14:30.1(A)(2) (2008); 18 PA. CONS. STAT. ANN. § 2502(b) (West 2008).
155. Historically, any death ensuing from the commission of one of the "big five" crimes (robbery, burglary, rape, arson, and kidnapping) was automatically first-degree capital murder, without more. The majority of capital jurisdictions still recognize deaths

however, classifies felony murder as second-degree, not first-degree murder.[156] Consequently, felony murder is not death-eligible in Missouri unless the prosecutor can prove that the defendant killed the victim "knowingly . . . after deliberation upon the matter."[157] The legislative decision to classify felony murder as second-degree murder also narrows the class of death-eligible offenses, and narrows the scope of prosecutorial discretion.

Under Missouri case law, evidence of "deliberation" is usually deduced from the circumstantial evidence of a culprit's actions.[158] It is sufficient "deliberation" if the intent to kill is formulated before the lethal blow is struck.[159] There need not be any "brooding" over the act for an appreciable time before the defendant commences the fatal attack.[160] Missouri courts have consistently held that "deliberation" may be found in cases involving firearms if the intent to kill develops as the trigger is being pulled. In stabbings and other cases, deliberation may be based on the fact that the defendant had to approach the victim before attacking.[161] The fact that the defendant armed himself with a deadly weapon before a confrontation has often been sufficient evidence of "deliberation."[162] Other instantaneous means of preparation for the deadly assault may be deemed sufficient.[163] First-degree murder convictions are typically upheld in cases involving "a prolonged struggle, multiple wounds, or repeated blows."[164] This

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during the commission of the "big five" crimes as potentially capital murder, whether they have one or two degrees of murder. However, for defendants convicted of murder on a felony-murder theory, the Eighth Amendment restricts application of the death penalty to (a) individuals who killed or intended to kill, or (b) individuals who were a major participant in the crime and manifested extreme recklessness. *See* Tison v. Arizona, 481 U.S. 137, 151–52 (1987); Enmund v. Florida, 458 U.S. 782, 800–01 (1982).

156. Missouri provides for second-degree murder "when another person is killed as a result of the perpetration or attempted perpetration" of any felony or the flight therefrom. MO. REV. STAT. § 565.021(1)(2) (2008).

157. *Id.* § 565.020.1.

158. The Missouri Supreme Court has held that repeatedly listening to a rap song that glorified killing could be introduced as circumstantial evidence of "deliberation." State v. Tisius, 92 S.W.3d 751, 761 (Mo. 2002).

159. The Missouri Supreme Court has stated that "in order to convict [a defendant of first-degree murder], there must be some evidence that defendant made a decision to kill the victims prior to the murder" as long as the defendant "coolly deliberated on the deaths for some amount of time, however short." State v. Gray, 887 S.W.2d 369, 376–77 (Mo. 1994).

160. State v. Feltrop, 803 S.W.2d 1, 11 (Mo. 1991) (citing State v. Ingram, 607 S.W.2d 438, 443 (Mo. 1980)).

161. State v. Clemmons, 753 S.W.2d 901, 906 (Mo. 1988) (taking "a few steps" toward the victim is sufficient).

162. State v. Stacy, 913 S.W.2d 384, 386–87 (Mo. Ct. App. 1996).

163. State v. Mallett, 732 S.W.2d 527, 532–33 (Mo. 1987) (slipping out of handcuffs to attack police officers).

164. State v. Ervin, 979 S.W.2d 149, 159 (Mo. 1998) (defendant bashed in the head of the victim several times and then threw him into a fire); State v. Clark, 913 S.W.2d 399, 404 (Mo. Ct. App. 1996) (firing of three shots used as additional evidence of deliberation); *Stacy*, 913 S.W.2d at 386 (fourteen stab wounds).

holds true even where the initial attack may have been the result of provocation.[165] Chasing or following the victim for some distance has sufficed to uphold a verdict of "deliberation."[166] The Missouri courts have routinely upheld findings of "deliberation" if the method of killing intrinsically requires more time to consummate, such as by poisoning, strangulation, suffocation, drowning, or severe beating or stomping.[167] The fact that a defendant could have halted an attack, yet persisted, has also been held to be evidence of "deliberation."[168]

Evidence of the defendant's conduct after an attack has been used to uphold the trier of fact's finding of "deliberation." Examples of this are the failure of the defendant to attempt to save the life of his wounded victim,[169] or the hiding or disposal of the body of the victim.[170] Even flight and disposing of the weapon has been deemed to be evidence of "deliberation."[171] Tying up the victim to prevent seeking aid is also evidence of "deliberation."[172]

The lack of any meaningful distinction between "knowingly causing death" and "deliberation" has been challenged on due process grounds in the higher courts of the state, but to no avail.[173] The result is that all intentional homicides based on feelings of revenge or carried out in connection with some other unlawful purpose can be qualified as having been committed "with deliberation upon the matter." The jury may return a verdict of first-degree murder, thereby opening up the possibility of a death sentence, as long as there is insufficient evidence of "violent passion suddenly aroused by some provocation"[174] to justify a verdict of voluntary manslaughter. Thus, under

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165. In *State v. Santillan*, the defendant twice shot the victim, who was dating the defendant's girlfriend. 948 S.W.2d 574, 577 (Mo. 1997). While such evidence was sufficient for a jury to find "deliberation," it was error not to give a second-degree murder instruction. *Id.*

166. In *State v. Hatfield*, a conviction of first-degree murder following a court trial was affirmed where two men had a disagreement in a tavern and agreed to take their differences outside. 465 S.W.2d 468, 470–71 (Mo. 1971). As they were leaving one broke a beer bottle against the doorsill and pursued the other up the alley, inflicting fatal wounds with the broken bottle. *Id.* Only seconds elapsed between the time the defendant armed himself and the infliction of the fatal wound, and the defendant was obviously in an agitated state. *Id.*

167. *See, e.g.*, State v. Parkus, 753 S.W.2d 881, 884–85 (Mo. 1988) (choking); State v. Antwine, 743 S.W.2d 51, 72 (Mo. 1988) (stomping to death).

168. *Ervin*, 979 S.W.2d at 159. In *State v. Davis*, 107 S.W.3d 410, 414–15 (Mo. Ct. App. 2003), the defendant stole a woman's car but, her child was left attached to a seatbelt and dragging along the road as defendant made his get-away; defendant kept driving, though he was repeatedly told that the child was being dragged.

169. *See, e.g.*, State v. Feltrop, 803 S.W.2d 1, 12 (Mo. 1991).

170. Though, admittedly, such evidence can also be consistent with a cover-up or a second-degree murder. *Santillan*, 948 S.W.2d at 575–76.

171. State v. Tisius, 92 S.W.3d 751, 764 (Mo. 2002).

172. *See* State v. Stacy, 913 S.W.2d 384, 387 (Mo. Ct. App. 1996).

173. *See* State v. Strong, 142 S.W.3d 702, 716 (Mo. 2004); State v. Middleton, 998 S.W.2d 520, 524 (Mo. 1999); State v. Rousan, 961 S.W.2d 831, 851–52 (Mo. 1998).

174. State v. Anderson, 384 S.W.2d 591, 608 (Mo. 1964); State v. Dickson, 691 S.W.2d 334, 339 (Mo. Ct. App. 1985).

Missouri law, prosecutors, judges, and juries have virtually unlimited discretion to choose between first- and second-degree murder in all cases where an intent to kill is present.

In contrast to Missouri, several states that divide murder into degrees require a more precise distinction between the mental states required for noncapital second-degree murder and a potentially capital finding of first-degree murder. One of the foremost states in this respect is California, which has interpreted its murder statute to require something more than mere pre-existing intent to kill to constitute "premeditation and deliberation." The seminal case involved a brutal killing of the ten-year-old daughter of the defendant's girlfriend, committed when the defendant had been drinking, in which the defendant stabbed her sixty times.[175] Missouri courts would have upheld a first-degree "deliberate" murder conviction without problem in such a case. The California Supreme Court, on the other hand, held that the mere fact of the brutality of a killing and the infliction of multiple injuries would not itself be sufficient to prove "premeditation and deliberation."[176] It noted that "the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill."[177] The California Supreme Court then listed three categories of evidence which could support a finding of first-degree murder: (1) planning activity—facts regarding the defendant's behavior prior to the killing which might indicate a design to take life; (2) facts about the defendant's prior relationship or behavior with the victim which might indicate a motive to kill; and (3) evidence regarding the nature or manner of the killing which indicates a deliberate intention to kill according to a preconceived design.[178]

The District of Columbia courts also require more than a mere intent to kill for a murder to rise to the first degree. The Court of Appeals has stated:

> To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder. At common law there were no degrees of murder. If the accused had no overwhelming provocation to kill, he was equally guilty whether he carried out his murderous intent at once or after mature reflection. Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The

175. People v. Anderson, 447 P.2d 942, 945 (Cal. 1968).
176. *Id.* at 947.
177. *Id.* at 948.
178. *Id.* at 949.

> deliberate killer is guilty of first degree murder; the impulsive killer is not.[179]

In accord with the California approach, the District of Columbia has held that even sordid, over-determined violent killings do not rise to murder in the first degree if they were committed "compulsively, in the heat of passion, or in an orgy of frenzied activity."[180]

The California approach laid out in *Anderson* has also been adopted in Wyoming[181] and West Virginia.[182] The Arizona Supreme Court also recently cleared up the muddled difference between first- and second-degree murder by distancing itself from an interpretation of "premeditation" that allowed a first-degree murder charge upon a mere pre-existing intent to kill and that did not require any actual proof of reflection. It held that "[l]aws must provide explicit standards for those charged with enforcing them and may not impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."[183]

In sum, if an intent to kill develops rashly as a result of motives insufficient to reduce a crime to voluntary manslaughter, Missouri calls such homicides "deliberate." Thus, numerous homicides that would be classified as noncapital second-degree murder in California and other states are classified as first-degree murder in Missouri, and are potentially death-eligible.

B. Statutory Aggravating Factors

A defendant convicted of first-degree murder in Missouri is not eligible for capital punishment unless the prosecution proves one or more statutory aggravating factors beyond a reasonable doubt.[184] The Missouri Penal Code lists seventeen statutory aggravating factors. This Article uses the following abbreviations to refer to the seventeen statutory aggravators: prior record,[185] multiple homicide,[186] hazardous device,[187] for money,[188] public official,[189] agent or

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179. Bullock v. United States, 122 F.2d 213, 213–14 (D.C. Cir. 1941).

180. Hall v. United States, 454 A.2d 314, 317 (D.C. 1982).

181. Neither the excessive brutality of a killing nor the striking of repeated blows with a weapon is sufficient to establish premeditation. Bouwkamp v. State, 833 P.2d 486, 493–95 (Wyo. 1992).

182. State v. Guthrie, 461 S.E.2d 163, 180–81 (W. Va. 1995). The court held that the old "twinkling of an eye" instructions were "confusing, if not meaningless." *Id.*

183. State v. Thompson, 65 P.3d 420, 424, 429 (Ariz. 2003).

184. MO. REV. STAT. § 565.030.4 (2008).

185. *Id.* § 565.032.2(1) ("The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.").

186. *Id.* § 565.032.2(2) ("The murder in the first degree was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide[.]").

187. *Id.* § 565.032.2(3) ("The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person[.]").

employee,[190] wantonly vile,[191] peace officer,[192] escaped custody,[193] avoiding arrest,[194] felony murder,[195] killing witness,[196] corrections officer,[197] hijacking,[198] concealing drug crime,[199] other drug crime,[200] and gang activity.[201]

The number and breadth of statutory aggravators in Missouri tends to expand the class of death-eligible offenses, thereby broadening the scope of prosecutorial discretion. With seventeen statutory aggravating factors, Missouri ranks eighth among the thirty-five death penalty states in terms of the number of

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188. *Id.* § 565.032.2(4) ("The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another[.]").

189. *Id.* § 565.032.2(5) ("The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty[.]").

190. *Id.* § 565.032.2(6) ("The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person[.]").

191. *Id.* § 565.032.2(7) ("The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind[.]").

192. *Id.* § 565.032.2(8) ("The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty[.]").

193. *Id.* § 565.032.2(9) ("The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement[.]").

194. *Id.* § 565.032.2(10) ("The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another[.]").

195. *Id.* § 565.032.2(11) ("The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo[.]").

196. *Id.* § 565.032.2(12) ("The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness[.]").

197. *Id.* § 565.032.2(13) ("The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility[.]").

198. *Id.* § 565.032.2(14) ("The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance[.]").

199. *Id.* § 565.032.2(15) ("The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo[.]").

200. *Id.* § 565.032.2(16) ("The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo[.]").

201. *Id.* § 565.032.2(17) ("The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421[.]").

statutory aggravators.[202] In general, states with a greater number of statutory aggravators give prosecutors more discretion to decide which cases should be charged as capital cases. The sheer number of aggravators is only part of the story, though, because states vary widely in the breadth of individual aggravators. It is not necessary for the purposes of this study to compare the breadth of statutory aggravators in different states.

C. Voluntary Manslaughter

In Missouri, the crime of voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder, except that the death was caused "under the influence of sudden passion arising from adequate cause."[203] "Sudden passion" is defined as "passion directly caused by and arising out of provocation by the victim or another acting with the victim, which passion arises at the time of the offense and is not solely the result of former provocation."[204] The offense must have been committed in sudden passion, and not after there has been time for the passion to cool.[205]

"Adequate cause" is "cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control."[206] To be "adequate," the provocation must be of a nature calculated to inflame the passions of the ordinary, reasonably temperate person. There must be a sudden, unexpected encounter or provocation tending to excite the passion beyond control. "Passion may be rage, anger, or terror, but it must be so extreme that . . . the action is being directed by passion, not reason."[207] Words alone, no matter how opprobrious or insulting, are not sufficient to show adequate provocation.[208]

Over the past few decades, many states, influenced by the Model Penal Code, have broadened the category of homicides that qualify as voluntary

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202. *See supra* note 41.

203. MO. REV. STAT. § 565.023 (2008); State v. Redmond, 937 S.W.2d 205, 208 (Mo. 1996).

204. MO. REV. STAT. § 565.002(7).

205. State v. Fears, 803 S.W.2d 605, 609 (Mo. 1991). In states that follow the Model Penal Code, there is no "cooling time" restriction. Hence, even in cases where there has been a substantial lapse of time between the provocation and the killing, a defendant may still be eligible for a voluntary manslaughter instruction. *See* MODEL PENAL CODE § 210.3(1)(b) (2008). *See also* MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 375–76 (2002); People v. Casassa, 404 N.E.2d 1310, 1314 (N.Y. 1980).

206. MO. REV. STAT. § 565.002(1).

207. *Fears*, 803 S.W.2d at 609 (quoting State v. Simmons, 751 S.W.2d 85, 91 (Mo. Ct. App. 1988).

208. State v. Redmond, 937 S.W.2d 205, 208 (Mo. 1996); State v. Starr, 38 Mo. 270, 277 (1866). Beginning with *Maher v. People*, 10 Mich. 212 (1862), some states began departing from the common-law tenet that "mere words" could never amount to adequate provocation. *See also* Commonwealth v. Berry, 336 A.2d 262 (Pa. 1975); People v. Valentine, 169 P.2d 1, 11–15 (Ca. 1946). *Cf.* WAYNE R. LAFAVE, CRIMINAL LAW 708–09 (3d ed. 2000).

manslaughter.[209] In Missouri, though, the traditional common-law rules still apply. Consequently, some homicides that would be classified as voluntary manslaughter in states influenced by the Model Penal Code are classified as murder in Missouri. Insofar as Missouri law narrows the class of defendants who are eligible to have their offense reduced from murder to voluntary manslaughter, the law expands the class of death-eligible defendants, thereby broadening the scope of prosecutorial discretion in choosing which cases merit capital punishment.

D. Inadmissibility of Intoxication Evidence

In Missouri, evidentiary rules related to intoxication also have the effect of broadening the class of death-eligible offenses. The majority of jurisdictions in the United States allow evidence of voluntary intoxication to negate the "premeditation and deliberation" required to constitute first-degree murder, and even the intent to kill necessary for a finding of murder in the second-degree.[210] In contrast, Missouri law makes evidence of voluntary intoxication inadmissible in the jury's determination of the defendant's mental state.[211] Although the U.S. Supreme Court has ruled that a similar Montana statute does not violate due process,[212] the law does reduce the types of evidence a Missouri jury may consider in determining whether to find the defendant guilty of first-degree murder. Thus, homicides committed by intoxicated defendants, which might yield a verdict of second-degree murder or voluntary manslaughter in other states, might well yield a conviction for first-degree murder in Missouri, thereby making the crime potentially death-eligible.[213] Thus, the legislative decision to exclude evidence of voluntary intoxication effectively broadens the scope of prosecutorial discretion in choosing which crimes merit capital punishment.

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209. The Model Penal Code classifies as manslaughter a "homicide which would otherwise be murder" when "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(b) (2008). At least fourteen states have adopted this definition, which does not require provocation, may be triggered by "mere words," and is not necessarily invalidated by "cooling time." SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 418–19 (7th ed. 2001).

210. *See, e.g.*, CAL. PENAL CODE § 22(1) (2008); People v. Hood, 462 P.2d 370, 374 (Cal. 1969); Terry v. State, 465 N.E.2d 1085, 1087–88 (Ind. 1984); Roberts v. People, 19 Mich. 401 (1870); Commonwealth v. Graves, 334 A.2d 661, 662–64 (Pa. 1975). *See generally* LAFAVE, *supra* note 208, at 412–16.

211. MO. REV. STAT. § 562.076.3 (2008) (providing that "[e]vidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense").

212. Montana v. Egelhoff, 518 U.S. 37, 56 (1996).

213. There are approximately ten other states that, like Missouri, preclude defendants from introducing evidence of voluntary intoxication. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 870 (7th ed. 2001). *See* LAFAVE, *supra* note 208, at 414.

E. Proportionality Review

For each death sentence that reaches the Missouri Supreme Court on direct review, the court is required to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant."[214] For the purpose of facilitating this review, the statute provides for an "assistant to the Supreme Court" who shall accumulate "the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed" and "provide the court with whatever extracted information the court desires with respect thereto," in order to assess proportionality.[215]

Missouri's proportionality statute mirrors that of the State of Georgia.[216] In the wake of the U.S. Supreme Court's decision in *Gregg v. Georgia*,[217] Missouri was one of twenty-six states that adopted a requirement of proportionality review modeled on the Georgia statute.[218] After the U.S. Supreme Court decided that proportionality review was not required by the Eighth Amendment,[219] nine states repealed their proportionality review statutes, and several others abandoned the practice.[220] At present, seventeen of the thirty-five states that allow capital punishment maintain a statutory requirement for proportionality review.[221]

In conducting proportionality review, the Missouri Supreme Court considers all cases in which a capital charge was submitted to the jury, but does

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214. MO. REV. STAT. § 565.035.3(3) (2008).

215. *Id.* § 565.035.6.

216. Under the Georgia scheme, the Supreme Court is required in every case to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." GA. CODE ANN. § 17-10-35(c)(3) (2008). If the court affirms the death sentence, it is to include in its decision reference to similar cases that it has taken into consideration. *Id.* § 17-10-35(e). The court is required to maintain records of all capital felony cases in which the death penalty was imposed since 1970. *Id.* § 17-10-3.

217. 428 U.S. 153 (1976).

218. Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 790 (2004).

219. Pulley v. Harris, 465 U.S. 37, 50–51 (1984).

220. Kaufman-Osborn, *supra* note 218, at 791–96. For a list of the states that no longer conduct proportionality review, see State v. Bland, 958 S.W.2d 651, 663 n.11 (Tenn. 1997).

221. *See* ALA. CODE § 13A-5-53(b)(3) (2006); DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (2008); GA. CODE ANN. § 17-10-35(c)(3) (2008); KY. REV. STAT. ANN. § 532.075(3)(c) (West 2007); LA. CODE CRIM. PROC. ANN. art. 905.9.1(1)(c) (2008); MISS. CODE ANN. § 99-19-105(3)(c) (1999); MO. ANN. STAT. § 565.035.3(3) (West 2008); MONT. CODE ANN. § 46-18-310(1)(c) (2007); NEB. REV. STAT. § 29-2521.03 (2008); N.H. REV. STAT. ANN. § 630:5(XI)(c) (2008); N.C. GEN. STAT. § 15A-2000(d)(2) (2008); OHIO REV. CODE. ANN. § 2929.05(A) (West 1999); S.C. CODE ANN. § 16-3-25(c)(3) (2008); S.D. CODIFIED LAWS § 23A-27A-12(3) (2008); TENN. CODE ANN. § 39-13-206(c)(1)(D) (2008); VA. CODE ANN. § 17.1-313(c)(2) (2008); and WASH. REV. CODE § 10.95.130(2)(b) (2008).

not consider other death-eligible cases.[222] The issue for the court is not whether the death sentence is appropriate for the particular individual, but whether any defendant in similar circumstances should be eligible for the death sentence.[223] Only when the case, "taken as a whole, is plainly lacking [in] circumstances consistent with those in similar cases where a death penalty has been imposed" will resentencing be ordered by the Supreme Court.[224] If there are no prior similar cases on record, the Supreme Court will make an independent judgment as to whether the imposition of the death sentence is wanton or freakish under the facts of the case.[225] Accomplices' "plea agreements and convictions for crimes other than first-degree murder are not . . . considered in the proportionality review of a death sentence."[226]

In theory, the statutory requirement for proportionality review is designed to narrow the class of death-eligible offenses and narrow the scope of prosecutorial discretion. In practice, though, proportionality review does not actually have that effect because the Missouri Supreme Court's review is largely perfunctory. In fact, the Missouri Supreme Court has reversed only one death sentence as "disproportionate."[227] In a second case, the Court set aside the "death sentence based on a combination of comparative weakness of evidence and favorable evidence of the defendant's background."[228] Missouri's record of proportionality review is fairly typical. Of the state high court "decisions in capital cases rendered between 1975 and April 1996, only fifty-five death sentences were vacated on the ground of disproportionality, while 1376 death sentences were affirmed."[229]

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222. State v. Lashley, 667 S.W.2d 712, 716 (Mo. 1984); State v. Mercer, 618 S.W.2d 1, 10 (Mo. 1981) (cited in 32 ROBERT H. DIERKER, MISSOURI PRACTICE SERIES, MISSOURI CRIMINAL LAW § 57.10 (2d ed. 2007)). Missouri's approach to proportionality review is followed by seven other states, which also review cases that go to a penalty hearing along with those that result in a capital judgment. Eight states take the narrower approach and only consider death judgments. Finally, three states consider all death-eligible cases.

223. State v. Leisure, 749 S.W.2d 366, 383 (Mo. 1988).

224. State v. Nunley, 923 S.W.2d 911, 926 (en banc) (Mo. 1996) (quoting State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (en banc)); *see also* DIERKER, *supra* note 222, § 57.10.

225. State v. Ramsey, 864 S.W.2d 320, 328 (Mo. 1993); *see also* DIERKER, *supra* note 222, § 57.10.

226. State v. Edwards, 116 S.W.3d 511, 549 (Mo. 2003) (quoting State v. Clay, 975 S.W.2d 121, 146 (Mo. 1998)); DIERKER, supra note 222, § 57.10.

227. State v. McIlvoy, 629 S.W.2d 333, 342 (Mo. 1982). In that case, the Court appears to have been strongly influenced by the defendant's conduct in voluntarily surrendering to authorities. DIERKER, *supra* note 222, § 57.10.

228. DIERKER, *supra* note 222, § 57.10; State v. Chaney, 967 S.W.2d 47, 60 (Mo. 1998). The Court concentrated for the first time on the "strength of the evidence" and went beyond its mere sufficiency. *Id.*

229. Kaufman-Osborn, *supra* note 218, at 792 (citing Donald H. Wallace & Jonathan R. Sorenson, *Comparative Proportionality Review: A Nationwide Examination of Reversed Death Sentences*, 22 AM. J. CRIM. JUST. 13, 35 (1997)).

APPENDIX II: METHODOLOGY AND RESEARCH DESIGN

A. Creation of the Comprehensive Database

Data in the comprehensive database is derived almost exclusively from records contained in county courthouses. There are 115 counties in Missouri, each with its own courthouse, its own records, and its own record-keeping system. Most of the collection of court documents for creation of the comprehensive database was completed in 2003. At that time, many county courthouses were not computerized and most of the counties that did maintain electronic records did not have an ability to search their databases electronically to identify all of the homicide cases in a given time period.

We relied primarily on a list provided by the Office of State Courts Administrator (OSCA) to identify cases for inclusion in the comprehensive database.[230] In fall 2002, OSCA provided us a list of all the cases in Missouri with an initial charging date between January 1, 1997 and December 31, 2001 where the defendant was charged with either murder or voluntary manslaughter and the defendant was convicted of a homicide offense. OSCA refused to provide information about cases that were dismissed, or that resulted in nonguilty verdicts, because that information is confidential.[231] We verified and augmented the OSCA list by asking county clerks to double-check the information provided by OSCA. Most of the clerks said that they had no way of knowing whether the OSCA information was complete. A few clerks identified some cases that met our parameters that had been inadvertently omitted from the OSCA list. Thus, it is likely that the comprehensive database excludes a small number of intentional-homicide cases within the time frame of this study that were inadvertently omitted from the OSCA list, and that county clerks were unable to identify. Even so, we are confident that the comprehensive database contains the vast majority of cases that satisfy our criteria for inclusion in the database.[232]

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230. In 1994, the Missouri legislature appropriated funds to develop a statewide court automation system. *See* MO. REV. STAT. § 476.055 (2008). Missouri Supreme Court Rules provide that the "office of state courts administrator will operate the court automation central computer sites." MO. SUP. CT. OPERATING R. 1.03. The Rules also require all state courts to "report case information to the Office of State Courts Administrator." MO. SUP. CT. OPERATING R. 4.28. Thus, insofar as state courts comply with their reporting obligations, and insofar as OSCA manages the court automation system effectively, OSCA should have records of all the criminal cases prosecuted in Missouri since about the mid-1990s.

231. OSCA also refused to provide the names of defendants; all cases were identified only by case numbers. Every case that involved a change of venue was double-counted. If venue changed twice, the case was triple-counted. Thus, in the early stages, we devoted substantial effort to eliminating double- and triple-counting problems.

232. There are several factors that support this conclusion. First, OSCA has a statutory mandate to collect information about all the criminal cases prosecuted in Missouri. *See supra* note 215 and accompanying text. County clerks report relevant information to OSCA on a regular basis. OSCA has established procedures for recording the information obtained from county clerks in its database. Undoubtedly, there are data entry and other

After obtaining the list of cases from OSCA, we sent law students to county courthouses to review courthouse records. The goal was to obtain a limited set of information about every case in the comprehensive database.[233] To obtain the relevant information, we created a data-collection form. We also prepared detailed instructions for students about how to complete the data-collection form. Ultimately, students visited eighty-three of the 115 county courthouses in Missouri. There were nine counties that did not have any murder or voluntary-manslaughter cases in the time frame under study. There were also twenty-three counties that had one or two M2 or VM cases, but no M1 cases. County clerks sent us documentation for the cases from those counties, but students did not visit the courthouses to review records.[234]

1. Problems of Inclusion and Exclusion

We included cases on the basis of initial charging date (rather than, for example, disposition dates or crime dates). Specifically, we included cases where the first indictment or information was filed between January 1, 1997 and

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errors that affect the accuracy of OSCA's data. However, OSCA's procedures provide safeguards to minimize such errors.

One county that has an exceptionally good computerized case-management system is Pulaski County. In the early phases of data collection, we were able to check the accuracy and completeness of the OSCA data for Pulaski County by comparing the OSCA data to Pulaski's own data. (The clerk in Pulaski County had records of about twenty-five cases, most of which were transferred to Pulaski on change-of-venue motions. The cases that originated in other counties do not count as "Pulaski cases" in our final tabulation.) This process revealed that cases charged as "capital murder," rather than "first-degree murder," were inadvertently omitted from the data initially provided by OSCA. OSCA then corrected that omission by providing an additional list of cases charged as "capital murder." In the end, we identified only ten cases that were omitted from the final OSCA list, suggesting that the list was substantially complete.

233. For every case in the comprehensive database, we collected copies of the following documents: a docket sheet (if available); the initial indictment or information; any amended indictment or information; the sentence and judgment form; the plea agreement (if the case resulted in a guilty plea); the verdict form (if the case went to trial); and the notice of aggravating circumstances (for cases where the prosecutor sought death). For cases initially charged as M2 or VM, students merely reviewed enough of the file to confirm that there was no M1 charge, collect the relevant documents, and complete the data-collection form. For cases initially charged as M1, students reviewed the entire file to determine whether there was any evidence that the prosecutor sought the death penalty at any time during the process. In addition to the documents noted above, they collected additional documentation that provided evidence that the prosecutor did, or did not, seek the death penalty (e.g., pretrial motions opposing capital punishment, jury instructions, etc.) The information recorded on the data-collection forms was entered into an electronic database—that is, the comprehensive database.

234. The primary reason for sending students to visit county courthouses was so that students could review the entire file for every case initially charged as M1 to obtain documentation necessary to determine whether a case should be classified as a "capital charge." For cases initially charged as M2 or VM, there was no need to review the entire file because those cases are all "noncapital cases." Therefore, if a county did not report any M1 cases, there was no need for students to visit the courthouse.

December 31, 2001.[235] Cases charged before Dec. 31, 2001 are included even if there was no final disposition until several years later.[236] Cases initially charged as murder or voluntary manslaughter are included, even if the defendant was ultimately convicted of a lesser offense, such as involuntary manslaughter. Cases in which charges were dismissed, and those that resulted in not-guilty verdicts, are excluded from the database, both because the individuals were not demonstrably guilty, and because the records are not publicly available.[237]

2. Counting Issues

For the purpose of counting cases, the unit of analysis is a "defendant-crime," except as provided below. Because we focus on the initial charging decisions of prosecutors, a single initial charging decision by a specific prosecutor against a single defendant for a specific crime generally counts as one case. Consistent with this counting rubric, if a prosecution was initiated in County *X* and there was a change of venue to County *Y*, we count that as one case (one initial charge), not two cases.[238] If two or more co-defendants were charged with the same crime, we count the case against each co-defendant as a separate case. If one defendant committed a series of homicides in separate incidents, each incident is counted separately. If one defendant was charged with multiple homicides in a single incident, we count that as one case. There are a few cases in which the defendant was charged with murder in an indictment filed after January 1, 1997, the defendant's conviction was reversed on appeal, and the prosecutor filed a writ of habeas corpus *ad prosequendum* before December 31, 2001. These cases are

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235. There are fifteen cases included in the comprehensive database where the initial indictment or information was filed before January 1, 1997, the defendant's conviction was reversed on appeal, and prosecutors filed a writ of habeas corpus *ad prosequendum* to initiate a new prosecution between January 1, 1997 and December 31, 2001. The rationale for including these cases is that we are studying prosecutorial charging decisions in a given time frame. Because the decision to file a writ of habeas corpus *ad prosequendum* is essentially a new charging decision, we count the filing of such a writ as the initiation of a new case if it is filed within our time frame.

236. In September 2006, we deleted four cases from the comprehensive database that had still not reached a final disposition. In one such case, the attorneys were still debating whether the defendant was competent to stand trial. In another case, the defendant absconded and was never found. At the same time, we also deleted two cases where the clerk was never able to locate the file.

237. Because we are investigating the charging decisions of prosecutors, excluding the subset of defendants who are found not guilty could potentially introduce some bias in our estimates. Having been found not guilty suggests that the prosecutor's charging decision was more aggressive in these cases.

238. Under Missouri law, in every criminal case triable by a jury, the defendant is entitled to an automatic change of venue if the initial charges are filed in a county with a population of 75,000 or fewer. MO. SUP. CT. R. CRIM. P. 32.03(a). Thus, most of the cases initiated in small counties were transferred to other counties before trial. Overall, 161 out of 1046 cases in the comprehensive database changed venue at least once.

counted as two cases because they involve two independent charging decisions by a prosecutor.[239]

3. Division into Capital Charges and Noncapital Cases

In general, when a prosecutor in Missouri decides to seek the death penalty, he or she files a "notice of aggravating circumstances." For our purposes, every case in which the prosecutor filed a notice of aggravating circumstances counts as a capital charge, even if the prosecutor later agreed to a plea bargain that provided for a lesser sentence. Moreover, a case counts as a capital charge if the defendant pled guilty to first-degree murder and accepted a sentence of life without parole, even if there was no notice of aggravating circumstances in the file.[240] Additionally, there are a few cases in the database for which there was no notice of aggravating circumstances in the file, but there was other documentation indicating that the prosecutor sought the death penalty. Examples of such other documentation include entries on docket sheets, jury instructions, and defense motions to preclude the application of capital punishment. A case counts as a capital charge if such other documentation shows clearly that the prosecutor sought capital punishment at some time during the process.[241]

B. Creation of the Detailed Database

After compiling the comprehensive database, we selected a "detailed database" of cases to study in greater detail. The initial detailed database included 129 capital charges,[242] plus 130 noncapital cases that were selected at random from the comprehensive database, for a total initial sample size of 259 cases. Because the goal was to perform detailed analysis of cases in the detailed database, we ultimately eliminated eighteen defendants from the detailed database about whom we were unable to obtain sufficient information, including eight capital charges and ten noncapital cases. We also added six more capital charges that we

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239. The comprehensive database includes eight cases that are "double-counted" in this way. There is no optimal way to deal with these cases. They are not two truly independent cases. However, if these cases were treated as one case, it would present a problem whether to count the initial decision or a subsequent decision. For example, if the death penalty was originally sought, but not sought in the second trial, did the defendant face a death trial? Our decision to treat the cases as two separate cases is also consistent with our treatment of other cases involving separate trials outside our time period.

240. We assume that a defendant would not plead guilty to first-degree murder and accept a sentence of life without parole unless the prosecution had at least threatened to seek the death penalty. However, in three cases where the defendant pled guilty to first-degree murder and accepted a sentence of life without parole, there is affirmative evidence that the prosecution did not seek the death penalty. Those cases are not counted as capital charges.

241. The final detailed database includes 127 capital charges. Our files contain a notice of aggravating circumstances for 108 of those cases.

242. The final comprehensive database includes 133 capital charges. However, data collection for the comprehensive database was incomplete at the time the detailed database was created. At that time, we had identified only 129 cases as capital charges. All 129 cases that were identified as capital charges at that time were initially included in the detailed database.

discovered after the initial creation of the detailed database. Hence, the final detailed database consists of 247 cases, including 127 capital charges and 120 noncapital cases.

We sought information about these 247 cases from six different sources: (1) the court records that had been collected for creation of the comprehensive database; (2) a web-based database called "Case.net," which provides access to the Missouri State Courts Automated Case Management System;[243] (3) published appellate opinions; (4) newspaper articles; (5) criminal-history information obtained from the FBI; and (6) police reports obtained from the state and local law-enforcement agencies that investigated the homicides.

For the vast majority of cases in the detailed database, the police reports provide the most detailed factual information about the case. There were two reasons why we decided to rely primarily on police reports, rather than trial transcripts, to obtain detailed factual information about the cases. First, and most importantly, relying solely on those cases that went to trial would introduce significant bias in the sample, since fewer than half of the cases in the detailed database actually went to trial.[244] Second, we were operating on a limited budget, and it was less expensive to collect police reports for all the detailed database cases than it would have been to obtain trial transcripts for the subset of cases that went to trial.

Collection of police reports was generally a two-step process. First, we contacted county prosecutors to find out which law-enforcement agency maintained the investigative file for each case. (Some files are held by county sheriffs, some by city police departments, and some by the Missouri State Highway Patrol.) Second, we contacted the law-enforcement agencies directly to obtain copies of the investigative reports.[245] Cooperation from prosecutors and law-enforcement officials was uneven. Some were eager to provide the requested information. Others were reluctant to do so, despite the fact that police investigative reports are classified as public records under the Missouri Sunshine Act after a case becomes "inactive."[246]

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243. Case.net data is available at http://www.courts.mo.gov/casenet/base/welcome.do. Case.net does not provide information about the underlying facts of homicide cases, but it does provide basic information about the judicial process, such as charging and sentencing information. To access information on Case.net, one must have a case number or the defendant's name (or both).

244. The final detailed database of 247 cases includes 137 cases resolved by guilty pleas, 17 cases decided by bench trials, and 93 cases decided by jury trials.

245. The level of detail contained in police investigative reports varies widely. Some reports consist of hundreds of pages of documentation. Others include only about a dozen pages. There is no standard format for these reports, and there do not appear to be any guidelines specifying the type of information to be included.

246. The Sunshine Act distinguishes among "arrest reports," "incident reports," and "investigative reports." MO. REV. STAT. § 610.100.1 (2008). All incident reports and arrest reports are public records. *Id.* § 610.100.2. However, to obtain detailed factual information about a case, it is necessary to procure the investigative report. Investigative reports are initially closed; they become open records once an investigation is no longer active. Guyer v. City of Kirkwood, 38 S.W.3d 412, 413–14 (Mo. 2001) (en banc). An

We were unable to collect police reports for some cases that remained "active" as of fall 2006, when we halted data-collection efforts. We were also unable to collect police reports for some inactive cases because the relevant public officials refused to provide the requested information.[247] Ultimately, we eliminated eighteen cases from the detailed database due to inadequate information, resulting in a final sample of 247 cases. We successfully obtained police reports for most of those 247 cases. The final detailed database includes forty-eight defendants for whom we never obtained police reports; we retained those cases because we were able to obtain sufficient information from appellate opinions and other sources to merit inclusion in the detailed database.

We created two different data-entry forms for the detailed database cases. The main data-entry form is a thirteen-page form. We provided a detailed set of written instructions to assist students in completing the form. For each case in the detailed database, a law student reviewed the police reports, court documents and appellate opinions, and completed the data-entry form on that basis. If the review of those documents left key questions unanswered, students used Case.net to provide supplemental information about the judicial process, and newspaper articles to provide supplemental information about the underlying facts. After students completed the data-entry forms, a law professor reviewed the forms and raised questions about issues that were unclear. Students modified the forms on that basis. Then, after the revisions were complete, other research assistants entered the data from those forms into an electronic database. This data was linked with the criminal-history records of defendants, provided by the FBI.

We created a separate data-entry form for the detailed database cases to provide specific information about aggravating circumstances. The Missouri death penalty statute has seventeen aggravating circumstances.[248] The "aggravator form" lists the seventeen statutory aggravators. Law students reviewed the case files and completed one aggravator form for each case in the detailed database. For every case, students provided one of three possible answers for each aggravator: (1) the prosecutor actually charged this aggravator; (2) the prosecutor could have charged this aggravator, but did not; or (3) there is insufficient evidence to support this aggravator.[249] Before students completed any of the aggravator forms, one student reviewed Missouri Supreme Court decisions interpreting the aggravating factors and provided a summary of relevant case law that served as guidance for the students who completed the aggravator forms. Students completed aggravator

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investigation is active until "the convictions of all persons convicted on the basis of the information contained in the investigative report" are final, either "by exhaustion of or expiration of all rights of appeal of such persons." § 610.100.1(3)(c).

247. In other states, where researchers have been given a legislative mandate to conduct similar studies, it appears that public officials have been very forthcoming in providing researchers all available data. Obviously, the refusal of some Missouri officials to provide requested information affects the reliability of conclusions that can be drawn on the basis of the data collected.

248. MO. REV. STAT. § 565.032 (2008).

249. A prosecutor "could have charged" an aggravator if he or she could make a good-faith, reasonable argument in support of a decision to charge that aggravator in a particular case.

forms for the capital charges before they completed forms for the noncapital cases. Once they completed review of the capital charges, we used that information to summarize the actual charging practices of prosecutors in cases where prosecutors charged aggravators. The summary of charging practices provided additional guidance to students in evaluating which aggravators prosecutors "could have charged" in the noncapital cases.

Students provided a narrative summary of each case at the end of the aggravator form. A law professor reviewed every aggravator form for completeness and accuracy by comparing the entries for individual aggravators to the summary at the end of the form. For two of the seventeen statutory aggravators, the process involved one additional step. The "prior record" aggravator relates to the defendant's prior criminal record. A law professor modified the student responses for that aggravator based upon a review of the criminal-history information that we obtained from the FBI. The "wantonly vile" aggravator is the broadest and vaguest statutory aggravating factor; it applies to any murder that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."[250] For every case in which prosecutors did not charge that aggravator, a law professor reviewed the narrative summary and made an independent determination as to whether the prosecutor could have charged the "wantonly vile" aggravator in that case. Once this analysis was completed, all of the data from the aggravator forms was electronically recorded.

C. Analytical Methodology

To provide measures of geographic disparities, we analyzed the complete universe of cases in the comprehensive database because, for every case in the comprehensive database, the database contains information about the county of origin and the decisions made in each stage of the decision process. To provide measures of racial disparities, we derive estimates from the detailed database because information about race of victims and race of defendants is available only for cases in the detailed database. Those estimates are based on a weighted average that accounts for the sampling method we employed. The detailed database includes all capital charges (probability of inclusion = 100%) and 130 randomly selected noncapital cases (14.2% of 915 cases).[251] We weight by the inverse of the probability of inclusion in the detailed database (so called "probability weights"), where cases are weighted to represent the equivalent number of cases in the universe of cases. Thus, capital charges are weighted one (each capital charge in the detailed database represents one capital charge in the universe of cases) and noncapital cases are weighted 7.09 (each noncapital case in the detailed database represents about 7.09 noncapital cases in the universe of cases). We also control

250. § 565.032.2(7). The Missouri Supreme Court has adopted an expansive interpretation of this aggravator, making it potentially applicable to almost every murder. *See supra* notes 74–77 and accompanying text.

251. As noted above, the final detailed database includes only 120 noncapital cases because we eliminated several cases due to inadequate information. However, at the time we initially selected the detailed database, we randomly selected 130 noncapital cases from a universe of 915 noncapital cases. We used those figures to determine the proper weighting for a weighted average.

for the finite size of the universe of cases in determining standard errors and test statistics. We use the same weighted averaging method in Parts IV and V.

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