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## **CAPITAL PUNISHMENT IN ILLINOIS IN THE AFTERMATH OF THE RYAN COMMUTATIONS: REFORMS, ECONOMIC REALITIES, AND A NEW SALIENCY FOR ISSUES OF COST**

**LEIGH B. BIENEN\***

Perhaps most telling is the view of Professor Joseph Hoffman, someone who has devoted enormous time and energy to death penalty reform, spearheading death penalty reform efforts in both Illinois and Indiana and serving as Co-Chair and Reporter for the Massachusetts Governor's Council on Capital Punishment. Hoffman served as a member of an advisory group to discuss an earlier draft of this paper, and he strongly expressed the view that seeking reform of capital punishment in the political realm is futile. This is a striking position to take by one who is not morally opposed to the death penalty and who has worked on numerous reform projects. But Hoffman cited as grounds for his change of heart the example of Illinois, in which there were confirmed wrongful convictions in capital cases, a sympathetic Governor, and a bi-partisan reform commission, but still strong resistance in the state legislature to reforms specifically targeted at capital punishment. In short, serious concerns about efficacy in the political realm militate against the undertaking of a new reform effort by the Institute. . . .<sup>1</sup>

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*This Article is dedicated to Neil Alan Weiner, distinguished homicide researcher, coauthor with Marvin Wolfgang and many others, and my longtime collaborator and friend. At the time of his untimely death in 2009, Neil Alan Weiner was Research Director at the Vera Institute of Justice, New York, New York.*

<sup>1</sup> CAROL S. STEIKER & JORDAN M. STEIKER, REPORT TO THE ALI CONCERNING CAPITAL PUNISHMENT 5 (2008), available at [http://www.ali.org/doc/Capital\\_Punishment\\_web.pdf](http://www.ali.org/doc/Capital_Punishment_web.pdf) (Annex B).

Note: The Northwestern University Law School Capital Crimes Database of all first-degree murders in Illinois, 2003–2009 [hereinafter NULSCCD] will be posted on the Northwestern University School of Law website, along with all data received by the author in response to FOIA requests to the Illinois State Treasurer and other sources on the expenditures and appropriations of the Capital Litigation Trust Fund.

## I. INTRODUCTION

When I first came to Illinois from New Jersey in 1995, nothing suggested change was coming in the pattern or practice of capital punishment in Illinois. There were more than 160 people on death row in Illinois.<sup>2</sup> By contrast, in 1996 New Jersey had twelve people on death row.<sup>3</sup> The New Jersey Office of the Public Defender had a strong statewide administrative structure and a centralized budget. The New Jersey Department of the Public Advocate spent millions of dollars for defense attorneys to challenge every aspect of every death sentence imposed after reenactment in 1982.<sup>4</sup> The public defenders then brought each death sentence to the extraordinarily conscientious New Jersey Supreme Court for constitutional review and proportionality analysis.<sup>5</sup> Capital practice in Illinois had none of these institutionalized traditions.

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<sup>2</sup> The Illinois death row population in 1996 was 164. Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice?"*, 87 J. CRIM. L. & CRIMINOLOGY 130, 169 tbl.2 (1996).

<sup>3</sup> *Id.* at 166 tbl.1. New Jersey reenacted capital punishment in 1982, and it was not until 1992 that the New Jersey Supreme Court found that a particular death sentence met the stringent requirements of judicially-mandated proportionality review. *See State v. Marshall*, 613 A.2d 1059 (N.J. 1992). *See generally infra* Part IV.D.

<sup>4</sup> *See* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 36 (1988) (describing the methodology and results of the extensive research project begun at the New Jersey Office of the Public Defender and later taken over by the Supreme Court of New Jersey).

<sup>5</sup> Bienen, *supra* note 2, at 139–40. Proportionality review was one of the reforms instituted “[s]o that death sentences would no longer be cruel and unusual in the same way that being struck by lightning is cruel and unusual,” along with a structure of aggravating

Nor was there any state court or institution in Illinois that would have been inclined to or capable of undertaking the kind of comprehensive system-wide review and analysis of capital case processing such as that conducted by the New Jersey Supreme Court under the rubric of proportionality review. The Illinois Supreme Court was unreceptive to constitutional challenges to the statute or to the system.<sup>6</sup> Since the 1970s the court has consistently refused to consider constitutional challenges to the application of the statute based upon evidence of racial or geographic disparities in death penalty prosecutions and sentencing.<sup>7</sup> There were brief moments, first in 1979 and then again in 1984, when the constitutionality of capital punishment was a live issue before the Illinois Supreme Court and federal courts in Illinois.<sup>8</sup> However, since that time the Illinois Supreme Court has indicated in numerous opinions and through other institutional

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and mitigating factors to guide the sentencing decision. *Id.* A court conducts proportionality review by “comparing the death sentence on appeal with similar cases throughout the state” to ensure that the defendant is not being disproportionately punished. *Id.* “Heightened judicial scrutiny at the appellate level, with the inclusion of proportionality review, has since been viewed by some justices as fundamental to the constitutionality of the death penalty itself.” *Id.* The Supreme Court of New Jersey was exceptional in, immediately after reenactment, declaring its intention to review patterns and discrepancies introduced by prosecutorial charging practices, irrespective of their origin and whether caused by differences in charging patterns, sentences, or other factors. *See State v. Koedatich*, 548 A.2d 939 (N.J. 1988); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases*, 54 ALB. L. REV. 709, 732–35 (1990) [hereinafter Bienen, *Reimposition of Capital Punishment*]. Additionally, in *State v. Marshall*, 613 A.2d 1059 (N.J. 1992), and *State v. Ramseur*, 524 A.2d 188 (N.J. 1987), the court considered as axiomatic that it had the authority and duty to review county prosecutors’ charging decisions in the selection of cases for capital prosecution.

<sup>6</sup> *See, e.g., People v. Erickson*, 641 N.E.2d 455, 459 (Ill. 1994) (dismissing defendant’s claim of ineffective assistance of counsel at the sentencing phase of his trial).

<sup>7</sup> *See People v. Lewis*, 473 N.E.2d 901, 914 (Ill. 1984), stating:

The defendant’s argument for proportionality review must also fail. The Illinois Constitution, the death penalty statute, and the Supreme Court Rule 603 all provide for direct appeal to this court of any conviction for which the death penalty has been imposed. The entire court record is available to the reviewing court for examination, thus disclosing the evidence which motivated the imposition of the death sentence. This court has consistently found that these review procedures sufficiently protect against the arbitrary imposition of capital punishment. (citations omitted).

<sup>8</sup> *See People v. Silagy*, 461 N.E.2d 415, 433–34 (Ill. 1984) (Simon, J., dissenting) (noting that four of the seven sitting justices have said and continue to adhere to the view that the Illinois death penalty statute is unconstitutional because it allows prosecutors too much discretion in charging decisions); *Lewis*, 430 N.E.2d at 1363–85 (Ill. 1981) (concurring and dissenting opinions from six of the seven justices explaining their views on the constitutionality of the Illinois death penalty statute); *People ex rel. Carey v. Cousins*, 397 N.E.2d 809 (Ill. 1979) (holding Illinois death penalty statute constitutional over vigorous dissent of three of seven justices); *see also* Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 LAW & CONTEMP. PROBS. 193 (1998).

signals that it is uninterested in any system-wide challenge to the capital punishment system.<sup>9</sup>

In 1984, the United States Supreme Court ruled that statewide proportionality review was not required in order to comply with the Fourteenth and Eighth Amendments to the United States Constitution.<sup>10</sup> Since then the Illinois Supreme Court has repeatedly declared that it need not and would not in the future use proportionality review to conduct a systematic statewide analysis of the patterns in the application of the death penalty arising from the fact that the 102 elected county state's attorneys each individually select cases for capital prosecution.<sup>11</sup> The state high court has regularly affirmed death sentences, and has expressed the view that the scope of its review would be purely procedural.<sup>12</sup> However, an external study of Illinois death sentences found that as of 1995, 40% of the death

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<sup>9</sup> There has never been the institutional will or the leadership within the Illinois criminal justice system for an enterprise such as the comprehensive analysis of capital case processing undertaken by the Supreme Court of New Jersey under the leadership of Chief Justice Robert Wilentz in the 1980s and 1990s. After his death, the character of that court changed significantly. See Leigh B. Bienen, *Not Wiser After 35 Years of Contemplating the Death Penalty*, 42 *STUD. L., POL. & SOC'Y* 91 (2008). For a description of how a change in supreme court justices can influence outcomes of death penalty litigation positively, see Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 *J. CRIM. L. & CRIMINOLOGY* 381, 389–391 (2005) (discussing how a change in justices affected the outcome in *People v. Lewis*) and Bienen, *supra* note 2.

<sup>10</sup> *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984).

<sup>11</sup> See *People v. King*, 488 N.E.2d 949 (Ill. 1986); see also *ex rel. Carey*, 397 N.E.2d 809 (Ill. 1979). The Illinois Supreme Court will on occasion conduct intra-case proportionality review, that is, compare the death sentence under review with the sentences received by codefendants in the same case. See, e.g., *People v. Byron*, 647 N.E.2d 946, 957–58 (Ill. 1995). See generally Warden, *supra* note 9.

<sup>12</sup> See *Erickson*, 641 N.E.2d at 455. In her dissent, Judge McMorroU noted:

Illinois once had a well-publicized reputation for having devised post-conviction requirements that created a “procedural labyrinth . . . made up entirely of blind alleys” that effectively insulated the court from ruling on the merits of a defendant’s constitutional challenges to his criminal conviction and sentence. Our Post-Conviction Hearing Act was adopted in 1949 to overcome these shortcomings. Unfortunately, the majority’s decision harkens back to this earlier era, when technical rules of procedure were manipulated in order to avoid or preclude substantive review of the criminal defendant’s constitutional arguments.

*Id.* at 468 (McMorrow, J., dissenting) (internal citations omitted).

The purpose of the Fundamental Justice Act, enacted in 2003, was to give the Illinois Supreme Court authority to review death sentences on grounds of fairness. 720 *ILL. COMP. STAT. ANN.* 5/9-1(i) (West Supp. 2010); see *infra* Appendix A, no. 14, p. 5. The court has not yet overturned a single death sentence on the basis of the new amendment since its enactment.

sentences that reached the stage of federal habeas corpus under the former, more permissive federal rules were remanded for retrial or resentencing.<sup>13</sup>

In 1995, capital punishment was firmly entrenched in Illinois and appeared impregnable. Public support for the death penalty was high.<sup>14</sup> No strong legal institutions or powerful political constituencies challenged it. The 102 elected county prosecutors, the state legislators, the attorney general, and the Governor all were strong supporters, and Illinois had begun conducting executions.<sup>15</sup> No court or legal authority in the jurisdiction seemed likely to interfere with the steady accumulation of death sentences coming up from the county prosecutions or the inevitability of future executions. Capital cases continued to be prosecuted; death sentences were imposed in the trial courts and affirmed on appeal; although the appeals took a while, executions had begun, and the prospect was only of more impending executions.<sup>16</sup> Given the breadth and number of the aggravating factors in the Illinois death penalty statute,<sup>17</sup> it seemed in 1995 as if there was always a capital case being zealously investigated and prosecuted, or an execution on deck. Nothing seemed poised to interfere with that progression.

By the year 2000, however, everything had changed. In 1999, Governor George Ryan had been elected, though he was at that time a supporter of capital punishment. As a legislator, Governor Ryan had voted for the reenactment of the death penalty, and in March of 1999, soon after taking office, he presided over an execution.<sup>18</sup> However, accumulating

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<sup>13</sup> Warden, *supra* note 9, at 381–82 (“A landmark study found that forty-three percent of Illinois death penalty cases had been reversed on direct appeal or at the post-conviction stage as of 1995. Of the cases that graduated to the federal habeas corpus stage, the study found forty percent had been remanded for retrial or re-sentencing.”).

<sup>14</sup> Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It’s Getting Personal*, 83 CORNELL L. REV. 1448, 1448 (1998) (“In 1994, when Professor Phoebe Ellsworth and I published a review of research on death penalty attitudes in the United States, we began by noting that ‘support for the death penalty [is] at a near record high.’ That finding, like most of the others we reported, has not changed. . . .”) (footnotes omitted).

<sup>15</sup> Warden, *supra* note 9, at 382 (noting that 12 of the 289 individuals sentenced to death in Illinois after *Furman* had been executed).

<sup>16</sup> States that abolished capital punishment, such as New Jersey, New York, and New Mexico, either had not reinstated executions or had only executed volunteers prior to abolition. See *State by State Information Database*, DEATH PENALTY INFORMATION CENTER, [http://www.deathpenaltyinfo.org/state\\_by\\_state#](http://www.deathpenaltyinfo.org/state_by_state#) (last visited Oct. 9, 2010) [hereinafter DPIC *State by State*]. Once a state begins executions, it is unlikely it will abolish the death penalty. It is almost as if the state decisionmakers feel it would be unfair to those already executed to declare the system unconstitutional once someone has been executed under it.

<sup>17</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 1993 & West Supp. 2010)

<sup>18</sup> See Warden, *supra* note 9, at 406 (describing Ryan’s role in the Korkoraleis execution).

egregious evidence of many wrongfully convicted persons on death row in Illinois led Governor Ryan to impose unilaterally a moratorium on executions in the state as of January 2000.<sup>19</sup> Illinois was the first state to impose such a moratorium, but since 2000, several other states have done so.<sup>20</sup>

Then the legislature established the Capital Litigation Trust Fund in 1999, effective in 2000. This fund was created partly in response to the highly publicized exonerations and the large number of innocent people found on death row in Illinois.<sup>21</sup> By 1999, thirteen death row inmates had been exonerated by independent investigations of the facts supporting their convictions, including revelations that their confessions were coerced, and DNA tests had identified others as the actual murderers.<sup>22</sup> Next, in 2000 Governor Ryan appointed a high profile Governor's Commission on Capital Punishment (Governor's Commission or Commission). The Commission was composed of respected members of the bar with a variety of backgrounds and perspectives, and reported its findings in April 2002.<sup>23</sup> In January 2003, Governor Ryan responded most dramatically to these findings by taking the unprecedented, historic step of commuting 161 capital sentences in one fell swoop, emptying the Illinois death row.<sup>24</sup>

These actions were completely contrary to the seemingly unshakable and widespread support for the current system of capital punishment in the state legislature, in the courts, and throughout other legal institutions in the

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<sup>19</sup> See Lawrence C. Marshall, *Walter C. Reckless Memorial Lecture: The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 579 (2004). Explaining Ryan's motivation, Marshall stated:

Governor Ryan . . . understood that the system's error rate in determining guilt has implications not only on the accuracy of convictions, but also on the trustworthiness of capital sentences. If a system had proven itself so flawed at answering the relatively easy, objective question of whether a defendant committed a crime, how could that system possibly be trusted with the far more complicated question of whether someone who has been convicted should be sentenced to death? . . . Governor Ryan understood that even if all 171 Illinois death row inmates were, in fact guilty, that did not mean that the broken system's decision that they should die was one worthy of trust.

<sup>20</sup> For an up-to-date list of the status of the death penalty in various states, consult DPIC *State by State*, *supra* note 16.

<sup>21</sup> Barbara J. Hayler, *Moratorium and Reform: Illinois's Efforts to Make the Death Penalty Process 'Fair, Just and Accurate'*, 29 JUST. SYS. J. 423, 424 (2008) (documenting the passage of the Capital Crimes Litigation Act following the exoneration of Anthony Porter).

<sup>22</sup> Warden, *supra* note 9, at 399–407.

<sup>23</sup> ILL. GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE COMMISSION ON CAPITAL PUNISHMENT, (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html) [hereinafter ILL. 2002 GOVERNOR'S COMM'N REPORT].

<sup>24</sup> One hundred fifty inmates were sentenced to life in prison without parole, three were sentenced to forty years in prison, and four were pardoned outright. *Id.* at 382 n.6.

state. The 2000 moratorium on executions and the 2003 commutations were without state or national precedent, and introduced an entirely new dynamic into the state capital punishment system.<sup>25</sup> Both events had enormous repercussions in Illinois and elsewhere. Other states also found innocent people on death row and declared moratoriums on executions in what became a cascading, national phenomenon.<sup>26</sup> At the same time, some state courts imposed a statewide moratorium on executions while state and federal litigation over the constitutionality of lethal injection as a mode of execution was pending.<sup>27</sup> This called to an immediate halt executions in the state without waiting for action by the legislature or the governor. Soon the death penalty had been put on hold by courts throughout the country.<sup>28</sup>

The cost of the death penalty has recently become a salient issue nationally because many states are in budget crisis, including Illinois, which has one of the largest budget deficits in the country.<sup>29</sup> Illinois has never conducted a systematic study of the cost of the death penalty. The 2002 Governor's Commission focused on and found significant racial and geographic disparities in the operation of the Illinois capital punishment system, but did not address the issue of cost.<sup>30</sup> Indeed, until recently,

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<sup>25</sup> Marshall, *supra* note 19, at 573 (stating that the U.S. criminal justice system is in "the midst of a revolution," created by "the advent of forensic DNA testing and hundreds of post-conviction exonerations"). Ironically, public opinion supported both the continuance of capital punishment and the moratorium. The public apparently approved of having a death penalty but not of executing anyone. See Warden, *supra* note 9, at 406.

<sup>26</sup> See Austin Sarat, *Introduction: Is the Death Penalty Dying?*, 42 *STUD. L., POL. & SOC'Y* 1 (2008). In some states, litigation challenging lethal injection was the occasion for the declaration of a de facto moratorium on executions, thus relieving the governor of the state from having to take unpopular political action. *Id.*

<sup>27</sup> Deborah W. Denno, *The Lethal Injection Debate: Law and Science*, 35 *FORDHAM URB. L.J.* 701, 703 (2008); see also The Honorable Jeremy Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal-Injection Litigation*, 35 *FORDHAM URB. L.J.* 735 (2008). See generally *Symposium: The Lethal Injection Debate: Law and Science*, 35 *FORDHAM URB. L.J.* 701 (2008) [hereinafter *Lethal Injection Symposium*]. Also note that because a moratorium on executions had already been imposed in 2000, Illinois did not have a lethal injection challenge pending in the courts.

<sup>28</sup> See Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 *FORDHAM URB. L.J.* 763, 775–79 (2008).

<sup>29</sup> Mary Williams Walsh, *Eight States Have Shortchanged Pensions, Study Finds*, N.Y. TIMES, Feb. 18, 2010, at B3. A major contributor to these budget shortfalls is the drastic underfunding of pension plans. *Id.* (describing the \$54 billion gap in Illinois between the cost of benefits promised to retirees over the next thirty years and the amount of money actually set aside).

<sup>30</sup> The Illinois 2002 Governor's Commission report contained an appendix by Pierce and Radelet, finding evidence of racial discrimination in the application of the death penalty in Illinois. See GLENN L. PIERCE & MICHAEL L. RADELET, RACE, REGION, AND DEATH SENTENCING IN ILLINOIS 1988–1997 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/technical\\_appendix/section\\_1/a\\_race\\_region\\_death.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/technical_appendix/section_1/a_race_region_death.pdf). Subsequently, this



discussions of cost were not considered relevant to the issue of the reenactment or maintenance of the death penalty, and some continue to hold the view that the higher cost of sentencing someone to death should not be a factor for legislators or prosecutors to consider.<sup>31</sup> Yet at a time when state governments are not meeting their most basic obligations, how can the state's policy of maintaining capital punishment alone be immune to considerations of cost and relative value?

This Article references systematic cost studies from other states and reports how other states have addressed the issue of cost.<sup>32</sup> There is no reason to think that the capital punishment system in Illinois is unique or different. What other state studies have documented empirically is also observed in Illinois:

- large trial and appellate costs associated with the prosecution and appeal of capital cases, followed by capital retrials; delays in the carrying out of death sentences, with new and repeated challenges to the procedures for imposing the death penalty continually brought forward in the federal and state courts;<sup>33</sup>
- additional corrections costs associated with maintaining a special segregated death row, with its own legally mandated requirements for security and access to legal counsel, increased costs associated with long pretrial incarcerations, and special training and personnel required for staff during capital trials and after the imposition of the death penalty;<sup>34</sup>

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research was published in Glenn L. Pierce & Michael L. Radelet, *Race, Region and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39 (2002).

<sup>31</sup> See N.J. DEATH PENALTY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMM'N REPORT 80–81 (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf) (Russo, dissenting) [hereinafter NEW JERSEY REPORT]. Russo's dissent states:

The financial costs of capital punishment have been used both to justify and criticize the death penalty. I have heard many justify the death penalty on the grounds that the State should not have to spend thousands of dollars per year to maintain a convicted killer for the rest of his life. Conversely, the argument has often been made that trial and appellate costs that result from fair enforcement of capital punishment make it too expensive. Both of these arguments are utter and sheer nonsense. If the death penalty is wrong, it is wrong; if it is not wrong, it is not wrong. It doesn't matter what it costs. The taking of a human life is something far too important to be influenced either way by costs.

<sup>32</sup> See *infra* Part IV.

<sup>33</sup> See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (Gerald Uelmen ed., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> [hereinafter CALIFORNIA REPORT] (discussed *infra* Part IV.C).

<sup>34</sup> *Id.* at 141–42; Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 523–24 (2009).

- large payments to judges, court personnel, defense lawyers, state's attorneys, and appellate lawyers on both sides to comply with the complicated and demanding requirements of capital trials and their direct and collateral appeals;<sup>35</sup>
- arbitrary patterns in the selection of cases for capital prosecution and the imposition of the death penalty within the state, wide county disparities in policies and implementation, and vast differences in how capital punishment is prosecuted between states and within individual states;<sup>36</sup>
- a decline in the number of murders unrelated to the imposition of the death penalty,<sup>37</sup> a decline in the number of death sentences imposed, and a decline in the number of state executions during the period 2000–2009, along with an increase in the time to execution for those states which do carry out executions;<sup>38</sup> and
- a large number and proportion of exonerations relative to the number of persons sentenced to death, executed, or both, calling into question the effectiveness of the death penalty as a deterrent, as an example of rational punishment, or as an imposition of a just result.<sup>39</sup>

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<sup>35</sup> See generally ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23.

<sup>36</sup> See *infra* Part II.C for discussion of sentencing disparities; see also James S. Leibman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1659 (2006).

<sup>37</sup> Between 1995 and 2005, the murder rate fell over by 30% nationwide (8.2 to 5.5 per 100,000) and by over 40% in Illinois (10.3 to 6.0 per 100,000). U.S. CENSUS BUREAU, 2010 STATISTICAL ABSTRACT tbl.301 (2010), available at <http://www.census.gov/compendia/statab/2010edition.html> (Homicide Trends: 1980 to 2005); U.S. Bureau of Justice Statistics, Crime—State Level: State-by-State and National Trends, <http://bjs.ojp.usdoj.gov/dataonline/Search/Crime/State/StatebyState.cfm> (select “State by State and national trends” table; then select “Illinois” under “Choose one or more States” and “Violent crime rates” under “Choose one or more variable groups”; then press “Get Table” button”).

<sup>38</sup> Denno, *supra* note 27, at 710; see Theodore Eisenberg & Sheri Lynn Johnson, *The Transformation of Capital Punishment*, Rosenthal Lecture at Northwestern University School of Law (Sept. 14, 2010) (on file with author).

<sup>39</sup> See Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 173 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 1998).

On balance, deterrence hypotheses for capital punishment have fared quite poorly. Considering severity, comparative studies consistently showed a pattern of higher or similar levels of homicide in death penalty compared to abolitionist jurisdictions. . . .

. . . [M]ost criminologists seem convinced that capital punishment is not a more effective deterrent for murder than imprisonment. In fact, the American Society of Criminology, the

Some of these developments are chronicled here for Illinois, particularly the documented costs and the current and recurrent patterns and practices in capital case prosecution and sentencing since the establishment of the Capital Litigation Trust Fund and the passage of the 2003 reforms.<sup>40</sup> The legal changes introduced by the Illinois legislature, the Illinois Supreme Court, police, prosecutors, and many other state agencies and principals were part of a complicated, serious effort to reform a state criminal justice system correctly perceived to be flawed.<sup>41</sup>

The states are not alone in reassessing the cost and effectiveness of current capital punishment systems. The American Law Institute (ALI), the institution charged with monitoring developing case law and the overall efficacy of criminal code provisions, has recently completed a national review of the effectiveness of the death penalty in the states.<sup>42</sup> As a result, the ALI removed the death penalty provisions from its highly influential Model Penal Code in October 2009.<sup>43</sup> This is momentous, as the Model Penal Code statutory formulations provided the theoretical foundation for almost all state statutes when state legislatures reenacted capital punishment after *Furman v. Georgia* and *Gregg v. Georgia*.<sup>44</sup> This means that the ALI has now repudiated the elaborate provisions for statutory aggravating and

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largest professional association of criminologists in the U.S., passed a resolution in 1989 condemning the death penalty for a variety of reasons, including its lack of utility as a deterrent to murder. This consensus may in part account for the fact that only a few capital punishment and deterrence analyses have appeared in the professional literature in the last few years. In short, for many criminologists, the capital punishment and deterrence question is a dead issue.

*Id.* at 173 (internal citations omitted).

<sup>40</sup> See *infra* Part II.C.

<sup>41</sup> For a description of the Illinois reforms, see John Cullerton, Kirk Dillard & Peter G. Baroni, *Capital Punishment Reform in Illinois—A Model for the Nation*, J. DUPAGE COUNTY BAR ASS'N (April 2004), <http://www.dcba.org/brief/aprissue/2004/art10404.htm>; *infra* Part II.B.

<sup>42</sup> See AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 1 (2009) [hereinafter ALI COUNCIL REPORT].

<sup>43</sup> Am. Law Inst., Message from ALI Director Lance Liebman (2009), [http://www.ali.org/\\_news/10232009.htm](http://www.ali.org/_news/10232009.htm).

<sup>44</sup> Bienen, *supra* note 2, at 139.

So that death sentences would no longer be “cruel and unusual in the same way that being struck by lightning is cruel and unusual,” the revised capital punishment statutes which followed *Gregg* introduced a structure of aggravating and mitigating factors intended to guide the discretion of the sentencer. In *Gregg* the Court held that the infirmities of the former capital punishment schemes had been addressed by Georgia’s revised statute. The Georgia statute restructured the decision to impose the death sentence by requiring the jury to make specific factual findings as to the presence or absence of statutorily defined aggravating and mitigating factors.

*Id.* (footnotes omitted); see *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238 (1972).

mitigating circumstances that introduced a weighing process for jury decisionmaking that almost all death penalty jurisdictions have followed since the time of reenactment.<sup>45</sup> These exact provisions were instituted in Illinois.<sup>46</sup> However, the state death penalty statutes based on these provisions, including Illinois's, remain in effect.

In Illinois, the discovery of so many innocent people on death row, followed by the dramatic commutations and the emptying of a large death row, spurred the passage of a number of legislative and procedural reforms to capital punishment practice in Illinois and the establishment of the Committee to Study the Reform of the Death Penalty in 2004. Now in 2010, for the first time in decades, the abolition of the death penalty and the establishment of a permanent moratorium on capital prosecutions and executions have become possibilities in Illinois.<sup>47</sup> This Article will provide an overview of the changes and developments in capital case prosecutions in Illinois after the Ryan commutations, summarize some of the findings and recommendations of the 2002 Governor's Commission and the Capital Punishment Reform Study Committee (CPRSC or Committee), and present new data on patterns in capital charging and sentencing in Illinois. I hope this information will help to inform the present debate over maintaining the death penalty, in Illinois and elsewhere.

This Article is not a cost study, but it does present a substantial amount of existing data on costs and expenses related to capital punishment in Illinois between 2000 and 2009.<sup>48</sup> In the absence of a statewide, systematic

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<sup>45</sup> MODEL PENAL CODE § 210.6 (1962) (withdrawn 2010); STEIKER & STEIKER, *supra* note 1, at 2–3; *see* Bienen, *supra* note 2, at 139–40:

In *Gregg* the Court held that the infirmities of the former capital punishment schemes had been addressed by Georgia's revised statute. . . . *Gregg* and its companion cases upholding the revised capital statutes sent a clear signal to the state legislatures: enact a capital punishment statute resembling the Georgia statute, including a provision for proportionality review, and that statute [sic] will be upheld by the Court.

*See also id.* at 140 n.33 (“The majority of the 12 states whose mandatory capital punishment schemes were declared unconstitutional in 1976 responded by enacting statutes similar to the Georgia statute upheld in *Gregg*.”).

<sup>46</sup> ILL. REV. STAT., ch. 38, pt. 9–1 (1977).

<sup>47</sup> There is currently a bill in committee at the Illinois legislature to abolish the death penalty. Death Penalty Abolition, H.B. 5687, 96th Gen. Assemb., Reg. Sess. (Ill. 2010); *see also* Lawrence C. Marshall, Gideon's *Paradox*, 73 *FORDHAM L. REV.* 955, 964–65 (2005) (describing a “shift in momentum” in favor of abolition prompted by a series of exonerations around the country during the late 1990s).

<sup>48</sup> *See infra* tbls. 1–7; NULSCCD, *supra* note 1. These are data from the Illinois state treasurer and the Cook County treasurer given to the author of this Article in response to a Freedom of Information Act request in 2010; *see also* Death Penalty Costs, S. Res. 297, 95th Leg., Reg. Sess. (Ill. 2009). This resolution calls for a cost study of capital punishment conducted by the Illinois Criminal Justice Authority.

cost study, this Article aggregates data from various sources, most importantly the state and county expenditures on capital punishment from the recently established Capital Litigation Trust Fund, and from other state funding sources.<sup>49</sup> New data on some part of the cost of wrongful convictions in Illinois are also included because those exonerated have proceeded to successfully sue the state and counties for their wrongful convictions.<sup>50</sup>

While the cost data reported here are incomplete and do not purport to be comprehensive, when considered together, the information presented here does tell us that Illinois would have saved tens of millions of dollars a year if at the time of the imposition of the moratorium in 2000, it simply had abolished capital punishment. In this present time of budget crisis, the legislature and other state authorities need to reexamine the purpose and value of the capital punishment system.

## II. THE ILLINOIS CAPITAL PUNISHMENT SYSTEM

### A. BACKGROUND

The Illinois capital punishment system is similar to those in effect in the majority of states with a death penalty. A defendant is “death-eligible” if he is charged with a first-degree murder that includes at least one of the twenty-one “special circumstances,” or enumerated statutory aggravating factors.<sup>51</sup> If a county state’s attorney decides that one or more of these circumstances exist and then decides to prosecute the case as a capital case, the state’s attorney will file a “notice of intent” to seek the death penalty.<sup>52</sup> If the state’s attorney does not withdraw the notice of intent prior to trial (which has been estimated to occur in about 60% of the cases in Illinois)<sup>53</sup> and the defendant does not opt for a bench trial, the case will be tried before a special “death-qualified” jury.<sup>54</sup> Death-qualified juries must be composed of jurors who would be willing to impose the death penalty. These specially qualified jurors are selected according to a set of complicated

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<sup>49</sup> See *infra* Part II.C.

<sup>50</sup> See *infra* Part III.C.

<sup>51</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 1993 & West Supp. 2010).

<sup>52</sup> *Id.* at 5/9-1(d). The Guidelines for State’s Attorneys included in Appendix A describe the criteria and principles which the state’s attorneys have adopted as descriptive of their decisionmaking process at this first stage.

<sup>53</sup> CAPITAL PUNISHMENT REFORM STUDY COMM., FINAL REPORT 90 (2010) [hereinafter CPRSC FINAL REPORT] available at <http://www.icjia.state.il.us/public/pdf/dpsrc/CPRSC-Sixth and Final Report.pdf>. This may be done as part of a plea agreement or for a variety of other reasons.

<sup>54</sup> *Id.* at 16.

procedural standards first announced in *Witherspoon v. Illinois*.<sup>55</sup> After the death-qualified capital jury is seated, the case proceeds to capital trial.

If the state's attorney intends to prosecute a murder as a capital case, he must file a notice of intent to do so within 120 days of arraignment.<sup>56</sup> The notice must include a reference to the specific aggravating factors that will be the basis of the capital prosecution.<sup>57</sup> Under the present practice, however, the statutory time limit of 120 days from arraignment for the filing of a notice of intent is routinely waived by the defense or ignored by both parties.<sup>58</sup> If the defense does not waive the time limitation, a state's attorney who is on the fence may be more likely to declare the case capital in order to meet the deadline and preserve the option, whereas additional time for the decision might make it less likely that the case would be declared capital.

It is also relevant that as soon as the case is declared capital, the defense counsel must immediately begin preparation for a penalty phase trial and begin to develop mitigating evidence. Thus, it may be in the interest of the public defender *not* to object to the waiving of the time

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<sup>55</sup> Death qualification of jurors has generated an enormous amount of literature and litigation. Its foundation was laid in *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), in which the Supreme Court decided that general objections to, or religious scruples against, the death penalty do not disqualify prospective jurors from service in a capital case. For a small part of the extensive literature on *Witherspoon* and the effect of death qualification, see Samuel R. Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984); see also William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1484–86 (1998); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 450–54 (1998).

<sup>56</sup> ILL. SUP. CT. R. 416(c). Prior to the establishment of this rule, the notice of intent could be filed any time prior to the beginning of the capital trial. If the notice of intent was not filed until late in the proceedings, the defense was often unable to prepare for the possibility of a capital trial and unprepared at the time of trial.

<sup>57</sup> *Id.* The notice shall specify any and all of the twenty-one statutory aggravating factors the state intends to prove at the penalty phase of the capital trial. *Id.*

<sup>58</sup> In public testimony at the hearings conducted by the Capital Punishment Reform Study Committee, both defense counsel and state's attorneys testified that the 120-day filing requirement was routinely waived by the defense.

A trial judge said that, in deciding whether or not to serve a capital punishment notice, there are often strong budgetary and public relations incentives for elected State's Attorneys to take advantage of the availability of funds from the CLTF, rather than using county funds to pay the expenses of first degree murder cases. Another judge said this pressure exists in almost all downstate counties. One of our own knowledgeable Committee members, who is involved in capital trials, said he suspected, although he could not prove, that some State's Attorneys from sparsely populated downstate counties filed Notices of Intent to seek the death penalty in order to avoid having the costs paid with county funds.

CPRSC FINAL REPORT, *supra* note 53, at 98.

limitation. An extension of time beyond the 120 days allows more time for negotiation over a plea bargain as to either sentence or charge. Plea bargaining to drop the capital charge occurs routinely.<sup>59</sup> If the purpose of the 120-day time limit was to restrain the use of charge bargaining over the capital charge in potentially capital cases, then waiving the time requirement obviates that purpose.

Assuming the notice of intent is filed and not dropped, the case proceeds to capital trial. In the first phase of the capital trial, the guilt phase, the prosecution must prove beyond a reasonable doubt to the trial court judge or to the death-qualified jury that the defendant is guilty of first-degree murder, as well as the other offenses in the indictment.<sup>60</sup> The trial court jury does not address the statutory aggravating or mitigating factors at the guilt phase. The indictment must specify the crime of first-degree murder and that the defendant committed the homicidal act or hired another to do so.<sup>61</sup> If the jury does not acquit but also does not find the defendant guilty of death eligible first-degree murder, then the death-qualified jury is dismissed and the trial judge simply sentences the defendant in accordance with the law governing terms and sentences in noncapital cases.<sup>62</sup>

If the jury finds the defendant guilty of death-eligible murder, the capital trial proceeds to the next stage, the penalty phase. The death-qualified jury or the trial court judge then must first decide as a matter of fact whether the state has proven the existence of one or more of the statutory aggravating factors before weighing them against statutory mitigating factors presented by the defense.<sup>63</sup> Both the defense and the

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<sup>59</sup> *Id.* at 124.

<sup>60</sup> See 720 ILL. COMP. STAT. ANN. 5/9-1 (West 1993 & West Supp. 2010). For example, if a defendant is indicted for first-degree murder and armed robbery, the prosecutor at the guilt phase must prove beyond a reasonable doubt that the defendant committed the murder with the requisite intent and by his own conduct (or paid another), and that the defendant is guilty of the robbery or other felony predicate.

<sup>61</sup> Non-slayer participants in felony murder are not eligible for capital prosecution in Illinois. *Id.* at 5/9-1(b)(6)(a)(i). “The majority of states with capital punishment statutes have some version of the felony aggravating factor as one of the criteria for the imposition of the death penalty.” Bienen, *supra* note 5, at 727 (1991) (annotating state statutory provisions enumerating the felony factor).

<sup>62</sup> See 720 ILL. COMP. STAT. ANN. 5/9-1(g).

<sup>63</sup> ILL. 2002 GOVERNOR’S COMM’N REPORT, *supra* note 23, at 138. The state’s attorney may then present evidence of nonstatutory aggravating factors at the penalty phase:

The establishment of nonstatutory aggravating factors is neither necessary nor sufficient to authorize imposition of the death penalty. Nonstatutory aggravating factors may be considered by the jury in selecting an appropriate sentence once a defendant is found eligible for the death penalty, but they are not, and cannot be, used to determine that eligibility, as the Supreme Court has explained: “[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death

prosecution may present any evidence at the penalty phase that is reliable and relevant.<sup>64</sup> The prosecution has the burden of proving beyond a reasonable doubt the factual basis for one or more statutory aggravating factors.<sup>65</sup> After the factual finding of the existence of one or more statutory aggravating factors, the prosecution may introduce evidence of nonstatutory aggravating factors, and the defense may present evidence of mitigating factors, under this reduced standard of admissibility. The reason for the relaxation of the evidence rules at this stage of the penalty phase is so that the defense and the prosecution may present evidence of mitigation and aggravation that might not meet the ordinary rules of admissibility, e.g. testimony of relatives about events in his childhood, educational experience, or other relevant mitigating evidence, and for the prosecution to present additional aggravating evidence that might not have been admissible at the guilt phase.<sup>66</sup>

The penalty-phase jury finds the factors and the judge sentences based upon the jury's findings. If the death-qualified jury unanimously determines that there is at least one aggravating factor and no mitigating factors present, or the trial court judge makes such a determination, the trial court judge is required to sentence the defendant to death.<sup>67</sup> If the unanimous jury or the judge decides the statutory aggravating factors outweigh the statutory mitigating factors found, the judge is required to sentence the defendant to death.<sup>68</sup> However, if in a jury trial, one or more jurors conclude that death is not the appropriate sentence, the trial judge is required to sentence the defendant to a term of imprisonment pursuant to requirements of the sentencing statutes.<sup>69</sup>

If the trial court judge imposes a death sentence, an execution date is set, and the appeal of the capital sentence bypasses the intermediate appellate division and goes directly to the Illinois Supreme Court.<sup>70</sup> The

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penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.

United States v. Fields, 483 F.3d 313, 325 (5th Cir. 2007) (quoting *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

<sup>64</sup> In Illinois and elsewhere the rules for the admissibility of evidence at the penalty phase of a capital case are typically relaxed for both the defense and the prosecution. The only requirement for admissibility is that the evidence be relevant and reliable. *See, e.g., People v. Banks*, No. 103933, 2010 WL 572105, at \*20 (Ill. Feb. 19, 2010).

<sup>65</sup> *See* ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23, at 137–38.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 152.

<sup>68</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(g) (West 1993 & West Supp. 2010).

<sup>69</sup> *Id.*

<sup>70</sup> ILL. CONST. art. VI, § 4(b); ILL. SUP. CT. R. 603.



Illinois Supreme Court may overturn the death sentence “if the court finds that the death sentence is fundamentally unjust as applied to the particular case . . . [and] shall issue a written opinion explaining this finding.”<sup>71</sup> This is a new rule. Previously, some Illinois Supreme Court precedent implied the court may have considered its jurisdiction to be limited to procedural matters.<sup>72</sup> If the Illinois Supreme Court sets aside the death sentence, it may remand the case to the trial court for another capital trial, or in some circumstances the Illinois Supreme Court may hold that the defendant may not be re-prosecuted capitally.<sup>73</sup> If the Illinois Supreme Court upholds the death sentence, a series of postconviction appeals will be made to both state and federal courts.<sup>74</sup> As an appeal of last resort, the person sentenced to death may appeal for a commutation from the Governor.<sup>75</sup>

Under the Illinois capital punishment statute, a large percentage of the first-degree murders committed in Illinois are technically eligible to be prosecuted as capital cases.<sup>76</sup> The Illinois capital punishment statute contains twenty-one statutory aggravating factors that qualify a murder for capital prosecution.<sup>77</sup> These factors are unusually expansive, creating a large pool of potentially death-eligible cases throughout the state.<sup>78</sup> The most important and most frequently charged factor is the felony statutory aggravating factor, which renders death-eligible the actor who causes the death of the murdered individual with intent during the course of a felony that is an inherently violent crime, or during *the attempt to commit an inherently violent crime*.<sup>79</sup> Although the 2002 Governor’s Commission Report recommended narrowing the scope of the felony factor, the

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<sup>71</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(i).

<sup>72</sup> Cullerton et al., *supra* note 41. Under its authority to set aside or modify death sentences on the grounds of the violation of state or federal constitutional principles, the court always could set aside death sentences.

<sup>73</sup> See e.g., *People v. Morris*, 848 N.E.2d 1000, 1002 (2004) (prohibiting state from seeking death penalty when retrying defendant whose conviction was reversed after his original sentence had been commuted from death to life in prison).

<sup>74</sup> ILL. 2002 GOVERNOR’S COMM’N REPORT, *supra* note 23, at 165–66.

<sup>75</sup> ILL. CONST. art. V, § 12. It was under the Governor’s clemency powers that Governor George Ryan commuted the death sentences in 2003. See also NULSCCD, *supra* note 1 (Notices of Intent).

<sup>76</sup> ILL. 2002 GOVERNOR’S COMM’N REPORT, *supra* note 23, at 66.

<sup>77</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 1993 & West Supp. 2010).

<sup>78</sup> This issue of the over-inclusiveness of the Illinois statutory aggravating factors was addressed, but not effectively changed, by the 2003 reforms. The Governor’s Commission unanimously recommended that the Illinois statute be revised to reduce the list of eligibility factors (then numbering twenty) that qualify a defendant for capital punishment. See ILL. 2002 GOVERNOR’S COMM’N REPORT, *supra* note 23, at 67–73.

<sup>79</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(b)(6) (emphasis added).

legislature has not been willing to strictly limit or remove it.<sup>80</sup> When considered together, several other imprecise or expansive statutory aggravating factors could be used to characterize the circumstances of almost any first-degree murder.<sup>81</sup> Since few first-degree murders are ineligible for capital prosecution, the discretion of county state's attorneys to declare a case capital is of paramount importance.

## B. THE REFORM AND ITS AFTERMATH

### 1. *The Impetus for Reform*

Illinois became the symbol for all that was wrong with the death penalty in America when, in a series of cascading revelations beginning in the late 1990s, more than a dozen persons on death row were discovered to be innocent of the crimes for which they had been convicted and sentenced to death.<sup>82</sup> These death sentences had been upheld through all state and federal stages of direct and collateral review. These cases, which were widely publicized in Illinois and elsewhere, involved false and coerced confessions, faulty eyewitness identifications, and cases in which the evidence of the defendants' guilt was primarily established through the testimony of jailhouse informants.<sup>83</sup> The Illinois Supreme Court had even

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<sup>80</sup> The 2002 Governor's Commission Report was highly critical of the overuse of the felony factor, and came close to recommending its elimination. A majority of the members recommended a list of five factors that excluded the felony factor, while a minority recommended the same five factors plus retaining the felony factor. ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23 at 73–74. Neither position, majority nor minority, was accepted by the general assembly. Instead, the statute relating to homicides committed during the course of a felony was rewritten to reduce the former list of fifteen predicate felonies to nine, and a twenty-first eligibility factor was added, involving homicides committed in the course of an offense of terrorism. 720 ILL. COMP. STAT. ANN. 5/9-1(b)(21).

<sup>81</sup> The other very broad statutory aggravating factors include: "the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result . . ." 720 ILL. COMP. STAT. ANN. 5/9-1(b)(11); "the murder was committed as a result of the intentional discharge of a firearm by the defendant from a motor vehicle and the victim was not present within the motor vehicle," 720 ILL. COMP. STAT. ANN. 5/9-1(b)(15); and "the murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986." 720 ILL. COMP. STAT. ANN. 5/9-1(b)(19).

<sup>82</sup> See Marshall, *supra* note 19, at 577–79; Warden, *supra* note 9, at 411–26.

<sup>83</sup> The lead up to the reforms and the establishment of the Ryan Commission are described in SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 16–46 (2003). They are also described in Marshall, *supra* note 19; and Warden, *supra* note 9; see also Michael P. Toomin, *Capital Punishment Reform and the Illinois Supreme Court: At the Forefront of Change*, 92 ILL. B.J. 642 (2004).

upheld the death sentences imposed by a trial judge who had been accepting bribes regularly during the time of the capital trials before him.<sup>84</sup>

Most dramatic was the exoneration of Anthony Porter, who, although innocent of the murder for which he was sentenced to die, came within days of being executed.<sup>85</sup> His and similar wrongful convictions were only discovered after extensive and longstanding investigations by journalists, lawyers, students, volunteers, and many others.<sup>86</sup> Many of those whose convictions were overturned or commuted later sued the county, the City of Chicago, or the state for their wrongful convictions.<sup>87</sup>

Governor Ryan's 2000 moratorium on executions was the first statewide moratorium on executions in the country. It provoked considerable comment, not all of it favorable.<sup>88</sup> Moratoria in other states quickly followed.<sup>89</sup> At the same time, litigation regarding the constitutionality of lethal injection was gaining traction, and several states implemented moratoria on executions until this issue was settled.<sup>90</sup> The history of the Governor's moratorium, the commutations, and other aspects of the reform movement in Illinois has been chronicled elsewhere.<sup>91</sup> This

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<sup>84</sup> For a discussion of this series of cases, see Bienen, *supra* note 8, at 212. The Illinois Supreme Court upheld the death sentences imposed by Judge Maloney even though the petitioners argued the judge "came down hard" in cases where he was not bribed in order to avoid what proved to be an accurate suspicion that he was "on the take." Indeed, this behavior was confirmed in the evidence presented during his trial and conviction. During the time when he was accepting bribes, Judge Maloney imposed eight death sentences. A divided Seventh Circuit Court of Appeals refused to overturn these death sentences, but they were later reversed by the United States Supreme Court essentially adopting the stinging dissent. *Bracy v. Gramley*, 81 F.3d 684, 696 (7th Cir. 1996), *rev'd*, 520 U.S. 899 (1997). Then, and only then, did the Illinois Supreme Court overturn these death sentences, although the State continued to argue even after the United States Supreme Court opinion that the defendants had waived their right to attack their convictions on due process grounds. *People v. Hawkins*, 690 N.E.2d 999, 1004 (Ill. 1998).

<sup>85</sup> The story of the commutations has been chronicled elsewhere. See Marshall, *supra* note 19; Sarat, *supra* note 26; Warden, *supra* note 9.

<sup>86</sup> Warden, *supra* note 9, at 410.

<sup>87</sup> The monetary awards to date from those lawsuits for those sentenced to death are presented in Table 7, *infra* p. 1364.

<sup>88</sup> Austin Sarat, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J. CRIM. L. 273, 273 (2005) (describing how death penalty supporters "demonized Ryan" while, among death penalty opponents, "Ryan became an instant hero, and his decision became a signal moment in the evolution of new abolitionist politics"). The moratorium has continued to be controversial.

<sup>89</sup> States with a current moratorium on executions include Illinois, New Mexico, Arkansas, Nevada, North Carolina, California, Maryland, Kentucky, and Nebraska. *The Death Penalty in Flux*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/death-penalty-flux> (last visited March 17, 2010).

<sup>90</sup> For a history of the lethal injection litigation, see Denno, *supra* note 27.

<sup>91</sup> See TUROW, *supra* note 83; Sarat, *supra* note 26; Warden, *supra* note 9.

section will focus on the effects of the reforms that followed the moratorium in 2000 and the Ryan commutations in 2003, including the work of the Capital Punishment Reform Study Committee and the practical effects of the Capital Litigation Trust Fund on capital prosecutions in Illinois.

## *2. The Specifics of the Illinois Capital Punishment Reforms*

What are commonly referred to as the Illinois Capital Punishment Reforms of 2003 were enacted in several different legal forms (and some before 2003) and institutionalized in various governmental bodies and agencies. They included: the Governor's unilateral moratorium on executions (in 2000) (discussed in Part I above); the establishment of the Capital Litigation Trust Fund by the legislature within the Illinois Treasury (effective 2000) (discussed in Part II.B.3 below); the establishment of the Capital Punishment Reform Study Committee by the legislature in 2003); rule changes put in place by the Illinois Supreme Court (recommended by the Report of the Special Supreme Court Committee on Capital Cases in 1999, adopted by the Illinois Supreme Court in 2001); changes to police procedures and practices (recommended by the 2002 Governor's Commission and other sources, adopted piecemeal at various times and in various forms); and other miscellaneous recommendations regarding police and court procedures.<sup>92</sup> Some recommendations that have not been adopted seem trivial and would require little effort, such as the recommendation that a copy of all notices of intent filed be sent to the Illinois Supreme Court. Yet this would actually have a profound effect upon the ability of researchers, and practitioners, to track the interpretation of the death penalty statute throughout the state over time.

The patchwork nature of the reforms is confusing; nonetheless, several overarching features are noteworthy. Although the well-regarded 2002 Governor's Commission made eighty-five recommendations, very few of them were enacted or put into effect.<sup>93</sup> Most importantly, the Commission recommended that the Illinois Supreme Court conduct proportionality

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<sup>92</sup> For a description of these reforms, see Cullerton et al., *supra* note 41; Hayler, *supra* note 21; Toomin, *supra* note 83; Warden, *supra* note 9.

<sup>93</sup> The Commission's Report contained eighty-five recommendations, none of which were adopted by the 2002 general assembly. The Ryan commutations took place in January 2003. During the 2003 general assembly, a number of the Commission recommendations were enacted and signed into law by then-Governor Rod Blagojevich. For a detailed description of the work of the Commission by one of its members, see TUROW, *supra* note 83, at 25–32, 63–102. Thomas Sullivan was the Co-Chair of the 2002 Governor's Commission and later the Chair of the Capital Punishment Reform Study Committee.

review, and establish a statewide capital crimes database.<sup>94</sup> The court and the legislature have consistently refused to adopt these recommendations.<sup>95</sup> Some of the reforms that were adopted, however, include:

- Requirements for the electronic recording of custodial interrogations of suspects in homicide investigations;
- Changes in recommended procedures for police lineups;
- Recommendations for the processing of DNA evidence and defense accessibility to that evidence;
- Requirements for a pretrial hearing on the reliability of evidence proffered by a jailhouse informant;
- The recommendation that state's attorneys establish guidelines for the prosecution of capital cases;<sup>96</sup>
- The establishment of training programs for prosecutors, defense attorneys, and judges;
- A provision authorizing the Illinois Supreme Court to overturn a death sentence if the court finds the death sentence is fundamentally unjust as applied to the particular case;<sup>97</sup> and
- The establishment of the Capital Punishment Reform Study Committee (CPRSC).

The mandate of the CPRSC was to study and report to the general assembly regarding:

The impact of reforms on the issue of uniformity and proportionality in the application of the death penalty including, but not limited to, the tracking of data related to whether the reforms have eliminated the statistically significant differences in sentencing related to the geographic location of the homicide and the race of the victim found by the Governor's Commission on capital punishment in its report issued April 15, 2002.<sup>98</sup>

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<sup>94</sup> ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23, at 166–68.

<sup>95</sup> Comparative proportionality review in death cases is not required by the United States Constitution, and has never been a feature of the review of capital sentencing under the Illinois constitution. *People v. Thompson*, 853 N.E. 2d 378, 404–05 (Ill. 2006). A statewide capital crimes database was authorized, but not funded, by the Illinois Capital Crimes Database Act in 2007. 20 ILL. COMP. STAT. ANN. 3930/7.6.

<sup>96</sup> See *infra* Appendix A and Part II.E.

<sup>97</sup> 720 ILL. COMP. STAT. ANN. 5/9-1(i) (West 1993 & West Supp. 2010). That provision has never been acted upon or invoked by the Illinois Supreme Court, according to the attorney general's office. Nor, some have argued, did the Illinois Supreme Court need any such authorization to overturn a death sentence in the interests of justice or procedural due process. See Bienen, *supra* note 8, at 197–207.

<sup>98</sup> 20 ILL. COMP. STAT. ANN. 3929/2(b)(1) (West 1993 & West Supp. 2010). The CPRSC formalized its purpose in the following language:

A majority of the Committee members concluded that their function under the enabling statute is to evaluate the impact of the reforms to the Illinois capital punishment system enacted by the

The CPRSC collected data and commissioned surveys of police, prosecutors, judges, administrators and other criminal justice personnel.<sup>99</sup> It addressed issues of proportionality and county-by-county disparities as part of its mandate to study the effect of the Ryan reforms on the previous finding of statistically significant differences in sentencing related to the location of the murder, geographical differences based upon where the homicide took place and was prosecuted, and the race of the victim. The CPRSC's own commissioned research found that although geographic and county disparities had been reduced by the reforms, they were not eliminated.<sup>100</sup>

### 3. *The History of the Capital Litigation Trust Fund and Its Impact*

The Capital Litigation Trust Fund (CLTF) was created in 1999, effective January 1, 2000, to promote fairness in the defense and prosecution of death penalty cases.<sup>101</sup> This bipartisan legislation was approved overwhelmingly after thirteen persons had their death sentences overturned. Although the passage of the reform legislation was spurred by publicity surrounding wrongful convictions and inadequate representation by the defense in some capital cases, the CLTF was set up from its inception to provide funds to county state's attorneys as well as to public defenders in the trial regions and in Cook County.<sup>102</sup> In some states, such

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93rd General Assembly against the backdrop of the reforms that have been implemented by the judiciary and other government agencies, as well as other reforms proposed by the Governor's Commission which may be necessary or advisable to adopt in order to make fully effective the reforms already adopted.

CPRSC FINAL REPORT, *supra* note 53, at 4. For a description of the work of the CPRSC, its structure, compliance with the open meetings act, etc., see *id.* at 4–8.

<sup>99</sup> The author of this Article was the Chair of Subcommittee 2, with the authority to study proportionality review and geographic disparity. This subcommittee took upon itself the task of beginning to create a database of first-degree murders throughout the state from 2003–2008. The results of this research and its methodology will be made public on the Northwestern University School of Law library website. Survey research and data compilation for the Committee, reproduced in Appendix B *infra*, was conducted by Dr. David Olson and his colleagues at Loyola University. *Id.* at 9.

<sup>100</sup> See *infra* Part II.D (discussion of Tables A–F); see also CPRSC FINAL REPORT, *supra* note 53, at 108–09.

<sup>101</sup> Capital Crimes Litigation Act, 725 ILL. COMP. STAT. ANN. 5/124 (West 1993).

<sup>102</sup> The CLTF also allocates money to the Appellate Office of the Attorney General and the Appellate Office of the Public Defender, as well as to appointed defense attorneys from the private bar. CPRSC FINAL REPORT, *supra* note 53, at 84. Attorneys from the private bar represent indigent capital defendants at a set hourly rate of reimbursement when there is a conflict of interest for the public defender, e.g. the public defender is representing a codefendant in the same crime, or when the Office of the Public Defender is unable to represent the indigent defendant for another reason. Federal funding for the Capital Resource Center within the Office of the Public Defender ceased in Fiscal Year 1996.

as North Carolina, additional funds for capital cases have been allocated only for the defense.<sup>103</sup> In Illinois, the purpose of the CLTF from the beginning was to grant funds to county prosecutors and to the attorney general, as well to public defenders, and to appointed counsel for the defense of capital cases.

Prior to the enactment of the CLTF, some counties may not have had the economic resources to prosecute a capital case.<sup>104</sup> In the current economic crisis in Illinois, that may again be the circumstance. The establishment of the CLTF removed much of the financial burden from the counties in Illinois at least for a brief period of time. Even with the assistance of funds from the CLTF, however, the state will not reimburse the county for all of the costs of a capital case. The salaries of state's attorneys and staff public defenders may not be subject to reimbursement by the CLTF, although the state's attorney's office may charge the expenses of investigators and support staff, proportionate to the amount of work they do on capital cases, to the CLTF.<sup>105</sup>

One purpose of enacting the CLTF was to provide competent counsel for the defense and prosecution of capital cases, especially in rural areas or in less populated counties.<sup>106</sup> Assigned defense counsel in the counties, especially in rural counties, may have worried that taking on the defense of a capital case would dominate or even destroy their practices. That concern

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MICHAEL J. PELLETIER, OFFICE OF THE STATE APPELLATE DEFENDER, ANNUAL REPORT: FISCAL YEAR 2009, Part III.F, *available at* <http://www.state.il.us/Defender/ar09.html>.

<sup>103</sup> Indigent Defense Services Act of 2000, N.C. GEN. STAT. § 7A-498 (2009).

<sup>104</sup> In New Jersey, for example, there was a period after the reenactment of capital punishment when no capital cases were prosecuted in Essex County (the county which includes Newark) although there were at least fifteen felony murders during the relevant time period where there was a factual basis for seeking the death penalty. *See* Bienen, *supra* note 2, at 199 n.250.

<sup>105</sup> The Cook County state's attorney used the CLTF to pay for attorney training; other general expenses, such as computer expenses and indirect costs; \$8,914,685.66 in payroll expenses; and expenditures to send attorneys to capital punishment conferences. Letter from Paul A. Castiglione, Exec. Assistant State's Attorney for Policy, Office of the State's Attorney, Cook County Illinois, to Leigh Bienen, Re: FOIA Request (July 20, 2010) (on file with author). For example, the state's attorneys charged the state for the payment of fees to mitigation experts and DNA testing. *See* Capital Litigation Trust Fund, Reports of Expenditures (on file with the *Journal of Criminal Law and Criminology*).

<sup>106</sup> House Debate, 91st Gen. Assemb., Reg. Session, at 19 (Ill. May 21, 1999), *available at* <http://www.ilga.gov/house/transcripts/htrans91/t052199.pdf> (statement of Representative Durkin):

[P]rosecutors in downstate on a number of occasions have not been able to proceed with capital punishment cases, because they've stated that it will bankrupt the county, cause these are very expensive and these are very long trials. So, I think what we're doing is that we are going to allow money for both sides. It's equal funding.

was not unrealistic. A capital case with its many motions and extensive preparations can swamp a small town law office. Yet the reported pattern of capital prosecutions in the rural areas, according to research reported to the CPRSC, was paradoxical. Namely, more capital cases, proportionately and absolutely, were prosecuted before the reforms, including before the establishment of the CLTF, than after the reforms.<sup>107</sup> We may once again revert to a situation in which some rural counties cannot afford to prosecute or defend capital cases because of the legislature's current budget crisis.<sup>108</sup> The counties have already been affected by the state delaying payment of allocated funds to the counties.

The allocation of funds from the CLTF is made from an annual appropriation made by the legislature to the CLTF. From the outset, funds were separately set aside for allocation to Cook County, which regularly accounts for more than 60% of the murders in the state.<sup>109</sup> Until the enactment of a statute in 2010, the Illinois treasurer had no authority to question the request for funds.<sup>110</sup> His job was simply to disburse the money that had been appropriated, which was done in response to specific requests for funds for individual cases from judges in the counties. The mechanism was that the trial court judge approved the request from the public defender or appointed attorneys.

The distribution of murders across the state also plays some role in determining how much money each county receives from the CLTF. However, outside of Cook County and one or two other urban areas with a large number of murders, there is a surprising lack of correlation between the number of murders in the county, the average number of murders per capita in the county, and the disbursement of funds from the CLTF to that county. Many counties in Illinois receive no funding because they have no murders, or no death-eligible murders, or choose not to prosecute their death-eligible murders as capital cases. Other counties regularly have

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<sup>107</sup> See *infra* Part II.D (discussion of Tables A–F).

<sup>108</sup> This is not an unrealistic concern. In some states, public defenders have declared that they do not have the economic resources to defend capital cases. The recent across the board cuts to the salaries of public defenders and state's attorneys will increase the financial strain on these officials. See Tony Arnold, *Cook County Attorneys Running Out of Money to Try Death Penalty Cases*, CHI. PUB. RADIO (May 18, 2010) <http://www.chicagopublicradio.org/Content.aspx?audioID=42045>. Nor is this situation unique to Illinois. The New York public defenders are being sued by indigent defendants because they cannot provide assistance due to lack of money. William Glaberson, *Court Rules That Suit on Public Defender System Can Proceed*, N.Y. TIMES, May 7, 2010, at A20.

<sup>109</sup> According to the state police, Cook County had 584 murders in 2008 and 522 murders in 2007. CRIME IN ILLINOIS 2008 ANNUAL UNIFORM CRIME REPORT 53 (2009) [hereinafter CRIME IN ILLINOIS], available at <http://www.isp.state.il.us/crime/cii2008.cfm>.

<sup>110</sup> 725 ILL. COMP. STAT. ANN. 124/10(d) (West 1993 & West Supp. 2010).



several death-eligible murders per year, but prosecute some as capital and others as non-capital, and some urban jurisdictions have dozens of death-eligible murders every year and relatively few capital prosecutions.<sup>111</sup> How CLTF funds have been spent and to whom they have been allocated are set out in Tables 1–6, below. The patterns are not what might be expected.

### C. COUNTY DISPARITIES IN THE PROSECUTION OF CAPITAL CASES

The unusual structure of the Illinois criminal justice system contributes to anomalous patterns in the prosecution of capital cases in Illinois. There are 102 counties in Illinois, each with the authority to bring criminal indictments and the independent discretion to decide whether to charge a murder as a death-eligible offense.<sup>112</sup> Each of the 102 counties has its own elected state's attorney. Although the 2002 Governor's Commission recommended the establishment of a statewide panel to review statewide patterns in capital case charging, that reform was not enacted.<sup>113</sup> The recommendation has been endorsed again in 2010 by the Committee to Study the Reform of the Death Penalty.<sup>114</sup> Some have even argued that it would be unconstitutional under the state constitution for any superior authority to review the decision to declare a case capital.<sup>115</sup>

Each of the 102 individual state's attorneys is elected every four years solely by the electorate in his or her county, and each now has the independent, allegedly unreviewable authority to designate for capital prosecution any or all or none of the death-eligible cases in his or her

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<sup>111</sup> See *infra* Table 2.

<sup>112</sup> ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23, at 16.

<sup>113</sup> *Id.* at 84. The 2002 Governor's Commission recommended that the review committee be composed of the attorney general or designee, the state's attorney of Cook County or designee, a state's attorney from another county chosen by lot, the president of the Illinois State's Attorneys Association, and a retired judge, preferably with experience in criminal law, to be appointed by the Governor. *Id.*

<sup>114</sup> CPRSC FINAL REPORT, *supra* note 53, at 79–80.

<sup>115</sup> See ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23, at 86–87. Addressing this argument, the 2002 Governor's Commission report stated:

The recommended statutory review procedure will not give rise to constitutional problems. While the office of State's Attorney is created by the Illinois Constitution, the powers and duties exercised by the State's Attorneys are defined by statute. See 55 ILL. COMP. STAT. 5/3-9. . . .

. . .

In view of the fact that the prosecutor's authority to seek the death penalty in the first instance is derived from the statute creating the entire sentencing scheme, a statutory amendment reducing the breadth of prosecutorial discretion would comport with the Illinois Constitution and decisional law.

*Id.*

jurisdiction.<sup>116</sup> There is at present no central, institutionalized review system in place to ensure that the charging of capital murder across the state is uniform or even consistent under the laws of the state across the 102 county jurisdictions. As a result, there are significant county-by-county disparities in the prosecution of capital cases.

Table 1 is a summary for the State of Illinois of the following for the period 2000–2009: the number of murders; the number of capital prosecutions; the amount of money appropriated to the Capital Litigation Trust Fund; the number of death sentences imposed; the number of exonerations; and the amount of state payments in cases of wrongful convictions. The information is separately reported for Cook County and all other counties for years 2000–2009. Cook County accounted for approximately three-quarters of all murders, with a significantly higher murder rate than the rest of the state. The largest number of those murders in Cook County took place in the City of Chicago.<sup>117</sup>

It is noteworthy that while Cook County has the largest number of murders, as well as the highest murder rate and the largest absolute number of capital prosecutions, Cook County does not have the highest rate of

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<sup>116</sup> While the decision to declare a case capital may be within the exclusive jurisdiction of the individual state's attorney for that county, the Illinois Supreme Court and the attorney general of the state have the power to review the constitutionality of patterns and practices across the state as a whole. Indeed, their mandate to enforce the laws requires them to do so. While the Office of the State's Attorney is created by the state constitution, the powers and duties exercised by the state's attorney are defined by statute. *See* 55 ILL. COMP. STAT. ANN. 5/3-9005 (West 1993 & 2010 Supp.). The legislature and the Illinois Supreme Court have the authority and the duty to interpret and review the application of state statutes. The legislature can amend or remove statutory aggravating factors, or even to repeal the entire capital punishment system. It is also axiomatic that the state's attorney's duty is to comply with statutory law and to act in accordance with the constitution of the state and of the United States. *Id.*

<sup>117</sup> The second most populous county in the United States, Cook County includes over 5.29 million residents, making up 41% of the population of Illinois. *See* CRIME IN ILLINOIS *supra* note 109 at 53–60. Cook County encompasses the City of Chicago along with an additional 128 municipalities, the largest of which include the suburbs of Evanston, Schaumburg, Skokie, and Arlington Heights. *About Cook County*, COOKCOUNTYGOV.COM (2010) [http://www.cookcountygov.com/portal/server.pt/community/government/226/about\\_cook\\_county](http://www.cookcountygov.com/portal/server.pt/community/government/226/about_cook_county). Of Cook County residents, 66.8% are white, 25.6% are black, 23.2% are Hispanic or Latino, and 5.8% are Asian. *Id.*

The homicide rate for the state as a whole in 2008 was 6.1 murders per 100,000 people. In total, this comes to 790 murders committed in Illinois; 73.9%, or 584, of those murders took place in Cook County, a homicide rate of 11.0 murders per 100,000 residents. *See* CRIME IN ILLINOIS, *supra* note 109, at 53–60. Of those murders committed in Cook County, 510, 87.3% took place within Chicago's city limits, while the remaining 74 murders, comprising 12.7%, occurred in the surrounding suburbs. *Id.* at 10–18, 53–60.

**Table 1**

*SUMMARY TABLE: MURDERS, CAPITAL PROSECUTIONS, CAPITAL LITIGATION  
TRUST FUND APPROPRIATIONS, AND STATE PAYMENTS FOR WRONGFUL  
CONVICTIONS 2000–2009*

	Cook County	All Other Illinois Counties	Totals
	(Col. 1)	(Col. 2)	(Col. 3) (Col. 1 + Col. 2)
Murders <sup>118</sup>	6,272	2,131	8,403
Capital Prosecutions <sup>119</sup>	294	213	507
Amount Appropriated to CLTF	\$71,941,100	\$37,718,000	\$109,659,100
Death Sentences Imposed	6	11 <sup>120</sup>	17
Exonerations in Death Cases <sup>121</sup>	13	5	18
State Payments for Wrongful Convictions <sup>122</sup>	\$55,777,650	\$9,195,397	\$64,973,047

Source: Illinois State Police; Cook County State's Attorney's Office; Illinois State Treasurer's Office; Northwestern University, Center on Wrongful Convictions, Bluhm Legal Clinic.

<sup>118</sup> 2009 figures are pending, and at present unavailable. The figures recorded for 2008 are projected as estimates for 2009.

<sup>119</sup> For Cook County, the source is the Cook County State's Attorney's Office. The figure includes 2009, and the first six months of 2010. For all other counties, the source is number of cases to which disbursements were made from the Capital Litigation Trust Fund.

<sup>120</sup> This figure includes the death sentences imposed on Brian Nelson and Laurence Lovejoy, whose sentences were subsequently overturned by the Supreme Court of Illinois.

<sup>121</sup> This figure represents the total number of exonerations in Cook County and in all other Illinois counties, including those for convictions prior to the year 2000.

<sup>122</sup> This figure includes the exonerees' court of claims awards, settlement awards, and legal fees accrued by defendant counties, cities, or both named in post-exoneration federal civil rights suits brought by exonerated persons as plaintiffs. It excludes any awards or fees accrued in 2010. For details, see *infra* Table 7 (State Expenditures on Wrongful Convictions).

declaring murders death-eligible (calculated by dividing the number of murders by the number of capital prosecutions). Nor does Cook County account for the largest proportion of death sentences or the largest number of death sentences imposed over the period 2000–2009.<sup>123</sup> Table 1 shows that there were some 500 cases which the state’s attorneys noticed for capital prosecution.<sup>124</sup> These cases resulted in the imposition of seventeen death sentences. The Capital Litigation Trust Fund appropriated more than \$109 million for the prosecution of these cases, with Cook County receiving less than three-quarters of the money appropriated. Cook County accounted for about 70% of all murders.<sup>125</sup> Cook County had the largest number of exonerations in capital cases, and also the largest awards in cases of wrongful convictions. Details for these figures are reported in Tables 2–7.

Table 2 shows the number of murders by county for the years 2000–2008, the per capita murder rate, the number of capital cases prosecuted, and the number of death sentences imposed (excluding Cook County), ranking counties by those with the highest number of murders.<sup>126</sup> The number of capital prosecutions was calculated by totaling the number of individual cases funded by the CLTF by county. This figure is not an estimate or a projection, but a count of distinctly identified cases individually funded by the CLTF.<sup>127</sup> To the extent that counties served notices of intent to seek the death penalty and neither the defense nor the state’s attorney asked for funds from the CLTF, those cases were excluded. The total of capital prosecutions reported would then be an undercount, although funds would be expected to be sought from the CLTF if a case

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<sup>123</sup> Please note that in this discussion, some tables are for the period 2000–2010, some are for the period 2000–2009, and other tables are organized by fiscal year. The time period used for each table was determined by the time period for the corresponding data received from the Illinois state treasurer, the Cook County treasurer, or the Illinois State Crime Reports.

<sup>124</sup> The number of capital prosecutions is a total of the distinct case numbers in each individual county to which the CLTF granted funds. This allows for a tabulation of the number of cases by year and county. Cook County detailed data by case were not available for the entire period. *See* Capital Litigation Trust Fund, Reports of Expenditures (on file with the *Journal of Criminal Law and Criminology*).

<sup>125</sup> This does not include the appropriations for 2010.

<sup>126</sup> Table 2 includes capital prosecutions during 2009 and 2010 and results in Cook County accounting for 53.5% of all capital prosecutions.

<sup>127</sup> In other words, this is not a prosecutor’s or defense attorney’s recollection of how many capital cases were prosecuted in the county, it is a record of how many individual cases the CLTF funded.

**Table 2**  
*Murders, Capital Prosecutions, and Death Sentences Imposed by County,  
 by Incidence of Murder (Excluding Cook County), 2000–2008*<sup>128</sup>

County	Total No. of Murders	Average Annual No. of Murders	Average Annual Murders Per Capita <sup>129</sup>	No. of Capital Cases Prosecuted <sup>130</sup>	No. of Death Sentences Imposed
	(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5)
St. Clair	311	34.6	13.36	17	1
Winnebago	176	19.6	6.81	2	0
Kane	154	17.3	3.94	14	0
Will	152	16.9	2.92	8	1
Peoria	130	14.4	7.9	4	0
Lake	100	11.1	1.63	13	0
Madison	100	11.1	4.24	18	0
Sangamon	79	8.8	4.59	3	0
DuPage	78	8.7	0.93	21	2
Macon	71	7.9	7.07	14	0

<sup>128</sup> The data for 2000–2008 includes the first year of the Capital Litigation Trust Fund and the last year for which county and state data for murders were available from the Illinois State Police.

<sup>129</sup> Per 100,000 persons.

<sup>130</sup> Column 4 includes capital cases that had been certified as death-eligible prior to the year 2000 and were pending during the date universe displayed. The numbers of capital prosecutions for each county are the total number of cases, by case number, receiving funds from the Capital Litigation Trust Fund, as reported by the Illinois state treasurer for the years 2000–2008. Co-defendants prosecuted under the same case number were counted as one case.

**Table 2**  
(Continued)

County	Total No. of Murders	Average Annual No. of Murders	Average Annual Murders Per Capita <sup>129</sup>	No. of Capital Cases Prosecuted <sup>130</sup>	No. of Death Sentences Imposed
	(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5)
Statewide (excluding Cook County)	1925	213.9	2.9	210	10 <sup>131</sup>
Cook County	5688	632	11.5	271 <sup>132</sup>	6

Source: Illinois State Police Uniform Crime Reports; Illinois State Treasurer's Office; Supreme Court of Illinois.

was declared capital after 2000. There is little reason to think this is a significant undercount of the number of capital prosecutions in the state during the period.

St. Clair County has the second highest absolute number of murders after Cook County and the highest murder rate in the state.<sup>133</sup> St. Clair has

<sup>131</sup> This figure includes the death sentences imposed on Brian Nelson and Laurence Lovejoy, whose sentences were subsequently overturned by the Supreme Court of Illinois. The Supreme Court of Illinois ordered Brian Nelson to be re-sentenced to a penalty other than death. *People v. Nelson*, 922 N.E.2d 1056 (2009). It overturned Laurence Lovejoy's conviction and sentence and due to trial court error and remanded for a new trial. *People v. Lovejoy*, 919 N.E.2d 843 (2009).

<sup>132</sup> For Cook County, the source is the Cook County State's Attorney's Office. This number includes cases which were certified as death penalty eligible prior to the year 2000 and were pending during the date universe displayed. It excludes capital cases originating during 2009 and 2010.

<sup>133</sup> St. Clair County, Illinois, which includes East St. Louis, is located on the southwestern border of Illinois. The county makes up 1.7% of the state population, with 216,316 residents. U.S. Census Bureau, State and County QuickFacts (2008), <http://quickfacts.census.gov/qfd/index.html> [hereinafter U.S. Census Bureau, State and County QuickFacts 2008] (select "Illinois;" select each county in Illinois and refer to "Metropolitan or Micropolitan Statistical Area"). Of these, 67.5% of St. Clair County residents are white, 29.4% are black, 2.8% are Hispanic or Latino, and 1.2% are Asian. *Id.*

a high murder rate (13.36/100,000) and a large number of cases were death-noticed, but only one death sentence was imposed during the entire period. The total number of murders in other individual counties is significantly lower.

After Cook County, among the counties with the largest number of murders, only DuPage County imposed more than one death sentence during the period 2000–2008.<sup>134</sup> DuPage County accounted for two death sentences in the period.<sup>135</sup> DuPage County has a low average per capita murder rate of 0.93, and a total of seventy-eight murders for the entire period 2000–2008. DuPage County, however, prosecuted twenty-one cases as capital cases, the largest number of any of those counties with a relatively large absolute number of murders during the period 2000–2008.

Madison County, with a per capita murder rate of 4.24, prosecuted eighteen cases as capital cases.<sup>136</sup> Kane County, with a total of 154 murders and an average annual per capital murder rate of 3.94, prosecuted fourteen cases capitally.<sup>137</sup> Macon County prosecuted fourteen cases capitally, with

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In the state as a whole, 79.1% of Illinois residents reported their ethnicity as white, 14.9% reported as black, 15.2% reported as Hispanic or Latino, and 4.3% reported as Asian. *Id.* According to the 2008 Illinois Annual Uniform Crime Report, 35 murders were committed in St. Clair County in that year. CRIME IN ILLINOIS, *supra* note 109, at 162. Of those murders, 16, or 46.7%, were reported by the East St. Louis police department. *Id.* East St. Louis accounts for 13.4% of the total population of St. Clair County. *Id.* at 162–64.

<sup>134</sup> DuPage County, located in the northeast corner of Illinois immediately west of Cook County, had a population of 929,192 in 2008. U.S. Census Bureau, State and County QuickFacts 2008, *supra* note 133. DuPage County makes up a little over 7% of the total population of Illinois. Of the county's residents, 83.8% are white, 4.7% are black, 12.6% are Hispanic or Latino, and 9.9% are Asian. *Id.* For comparison, in the state of Illinois 79.1% of residents are white, 14.9% are black, 15.2% are Hispanic or Latino, and 4.3% are Asian. *Id.* In 2008, six murders were committed in DuPage County, making the homicide rate 0.6 murders for every 100,000 residents. CRIME IN ILLINOIS, *supra* note 109, at 68.

<sup>135</sup> This figure does not include the Brian Dugan death sentence imposed in 2010. For a discussion of the Brian Dugan case, see *infra* note 241 and accompanying text.

<sup>136</sup> Madison County borders St. Clair County to the north and had a population of 267,347 residents in 2008. U.S. Census Bureau, State and County QuickFacts 2008, *supra* note 133. The county makes up approximately 2% of Illinois's total population. *Id.* Within Madison County, 89.6% of people are white, 8.1% are black, 2.2% are Hispanic or Latino, and 0.7% are Asian. *Id.* For a comparison to Illinois' demographical makeup, see *supra* note 133 (providing demographic information for the state of Illinois). The 2008 murder rate in Madison County was 5.6 murders for every 100,000 persons, or 15 murders committed during that year. CRIME IN ILLINOIS, *supra* note 109, at 121.

<sup>137</sup> Bordering DuPage and Cook Counties to the west, Kane County had a population of 501,021, or approximately 4% of the population of Illinois, in 2008. U.S. Census Bureau, State and County QuickFacts 2008, *supra* note 133. U.S. Census data reports from 2008 indicate that 89.6% of people living in Kane County are white, 5.6% are black, 28.6% are Hispanic or Latino, and 3.2% are Asian. *Id.* For a comparison to Illinois' demographical makeup, see *supra* note 133 (providing demographic information for the state of Illinois).

an average per capita murder rate of 7.07.<sup>138</sup> Lake County, with 100 murders during the period, and an average per capita murder rate of 1.63/100,000, prosecuted thirteen murders as capital cases.<sup>139</sup>

In short, the total number of murders during the period and the average annual murder rate do not correlate with the number of capital prosecutions in the county. The counties with the most murders are not the counties most likely to declare a case capital. Nor is this a pattern limited to Illinois. It has been documented in other states as well.<sup>140</sup> Since so few persons were sentenced to death at all, commentary on the rate of death sentences imposed is not warranted.

Noteworthy also is the distribution at the opposite end of the scale: Winnebago County, with 176 murders during the period and an average per capita murder rate of 6.81, prosecuted only two cases capitally. Sangamon County with a total of seventy-nine cases and a murder rate of 4.59 per 100,000, prosecuted three cases capitally. The distribution, once Cook County is excluded, shows that the counties with the largest number of

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Kane County has a homicide rate of one murder for every 100,000 persons and five murders were committed within the county in 2008. *CRIME IN ILLINOIS*, *supra* note 109, at 99.

<sup>138</sup> Macon County is located in central Illinois. In 2008, it had a population of 108,732 and made up 0.8% of Illinois's total population. U.S. Census Bureau, State and County QuickFacts 2008, *supra* note 133. In Macon County, 82.2% of people are white, 14.9% are black, 1.4% are Hispanic or Latino, and 1.0% are Asian. *Id.* For a comparison to Illinois' demographical makeup, see *supra* note 133 (providing demographic information for the state of Illinois). In 2008, nine murders were committed in the county at a rate of 8.3 murders for every 100,000 residents. *CRIME IN ILLINOIS*, *supra* note 109, at 117.

<sup>139</sup> Lake County, which abuts Cook County to the north, had a population of 712,567 in 2009, making up approximately 5.5% of Illinois's total population. U.S. Census Bureau, State and County QuickFacts 2008, *supra* note 133. In Lake County, 85.3% of residents reported their ethnicity as white in 2008, 6.9% reported as black, 19.6% reported as Hispanic or Latino, and 5.8% reported as Asian. *Id.* For a comparison to Illinois' demographical makeup, see *supra* note 133 (providing demographic information for the state of Illinois). The most recent data on crime rates in Lake County recorded ten murders in the county in 2008, a homicide rate of 1.4 murders for every 100,000 residents. *CRIME IN ILLINOIS*, *supra* note 109, at 110.

<sup>140</sup> As in Illinois, all California county district attorneys (prosecutors) can declare a case capital, however, "in almost half the counties, 28 of the 58, no death sentences were imposed during the 1990's, although 1,160 homicides took place in these counties." CALIFORNIA REPORT, *supra* note 33, at 150 n.120. Furthermore:

those counties with the highest death sentencing rates tend to have the highest proportion of non-Hispanic whites in their population, and the lowest population density. The more white and more sparsely populated the county, the higher the death sentencing rate.

*Id.* at 150.



**Table 3**  
*Capital Litigation Trust Fund Expenditures, Individual Counties (Excluding Cook) by Total Amount Disbursed, 2000–2009*

County	Total Amount Disbursed from CLTF	No. of Capital Cases Prosecuted <sup>141</sup>	No. of Death Sentences Imposed <sup>142</sup>	Average Expenditures from CLTF
	Col. 1	Col. 2	Col. 3	Col. 4 (Col. 1/Col. 2)
Jefferson	\$2,599,553.01	2	0	\$1,299,776.51
St. Clair	\$2,066,226.19	17	1	\$121,542.72
DeWitt	\$1,833,270.66	3	0	\$611,090.22
Hancock	\$1,573,305.30	1	1	\$1,573,305.30
Kankakee	\$1,251,631.06	9	0	\$139,070.12
Gallatin	\$1,109,896.87	2	0	\$554,948.44
DuPage	\$1,027,729.41	21	3	\$48,939.50
Macon	\$943,858.64	14	0	\$67,418.47
Sangamon	\$911,876.98	3	0	\$303,958.99
Lawrence	\$836,985.50	2	0	\$418,492.75
Totals	\$14,154,333.62	74	5	N/A
All Other Counties	\$10,760,595.21	139	6	N/A

Sources: Illinois State Treasurer's Office for details of county disbursements; Supreme Court of Illinois for number of death sentences.

<sup>141</sup> This includes capital cases that had been certified as death-penalty-eligible prior to the year 2000 and were pending during the date universe displayed. The numbers of capital prosecutions for each county are the total number of cases, by case number, receiving funds from the Capital Litigation Trust Fund, as reported by the Illinois state treasurer for the years 2000–2009. Co-defendants prosecuted under the same case number were counted as one case.

<sup>142</sup> This includes all death sentences imposed as of December 31, 2009.

murders and the highest murder rates are *not* the most likely to prosecute a murder as a capital murder case.<sup>143</sup>

Of course, these rates do not control for the seriousness or aggravated nature of the murders reported. Only a systematic proportionality review study could do that. However, with such a large number of murders in the state, it is unlikely that all of the serious or aggravated murders would be concentrated only in those counties that have a high propensity to declare a case capital. Indeed Cook County with the most murders, and presumably with the highest number of aggravated murders, has a relatively low rate of declaring cases capital.

Table 3 compares grants to individual counties from the CLTF for the total period that the CLTF has been in operation, ranked by the amount of funds received by individual counties, again excluding Cook County. Once again, the amount of money received by individual counties seems to have little relationship to the murder rate or to the total number of murders, or even to the total number of capital prosecutions. Jefferson County received the largest amount of money after Cook County. Some fraction of this amount is accounted for by the disproportionately large payments to private counsel in a single case, over \$1 million in the Cecil Sutherland case. This case was one of the reasons why the legislature imposed restrictions and a reasonableness requirement on approval of the request for funds from the CLTF.<sup>144</sup> Yet the appointment in that case, which was widely regarded as an abuse of the resources of the fund, did not prevent that same attorney from being appointed again in a capital case, although he had been declared incompetent in another case.<sup>145</sup>

Outside of the ten counties that received the largest amounts from the CLTF, an additional five death sentences were imposed in seventy-four capital prosecutions across the rest of the state. DuPage County did not receive the most money from the CLTF, although it had the most capital prosecutions and the largest number of death sentences imposed (three) in a single county. As Table 3 shows, counties received widely disparate amounts not particularly related to the number of capital prosecutions or

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<sup>143</sup> The counties outside of Cook County accounted for 40% of all capital prosecutions (210/507), although these counties accounted for only 25% of all murders (2131/8403). *See* CRIME IN ILLINOIS, *supra* note 109, at 32–187. If St. Clair and Cook Counties are excepted, all other counties accounted for approximately one-fifth (21.6% (2131-311)/8403) of all murders in the state. *Id.* If St. Clair and Cook Counties are removed from the number of capital prosecutions, then other counties account for 38.6% of all capital prosecutions. *Id.* Without precise data on the number of capital trials by county, it is not possible to know whether St. Clair has a higher rate or number of pleas after notices are filed.

<sup>144</sup> *See* 725 ILL. COMP. STAT. ANN. 124/10 (West 1993 & West Supp. 2010).

<sup>145</sup> CPRSC FINAL REPORT, *supra* note 53, at 110 n.174.

**Table 4**  
*Capital Litigation Trust Fund Appropriations, Fiscal Years 2000–2010*

Fiscal Year <sup>146</sup>	Cook County	Counties Outside of Cook
2000	Appointed Counsel: \$3,457,100 Public Defender: \$812,500 State's Attorney: \$1,095,600  Total: \$5,365,200	Appointed Counsel: \$962,000 Public Defender: \$212,000 State's Attorney: \$500,000  Total: \$1,674,000
2001	Appointed Counsel: \$6,914,200 Public Defender: \$1,625,000 State's Attorney: \$2,191,200  Total: \$10,730,400	Appointed Counsel: \$1,924,000 Public Defender: \$424,000 State's Attorney: \$1,000,000  Total: \$3,348,000
2002	Appointed Counsel: \$6,914,200 Public Defender: \$1,625,000 State's Attorney: \$2,191,200  Total: \$10,730,400	Appointed Counsel: \$1,924,000 Public Defender: \$424,000 State's Attorney: \$1,000,000  Total: \$3,348,000
2003	Appointed Counsel: \$6,914,200 Public Defender: \$1,625,000 State's Attorney: \$2,191,200  Total: \$10,730,400	Appointed Counsel: \$1,924,000 Public Defender: \$424,000 State's Attorney: \$1,000,000  Total: \$3,348,000
2004	Appointed Counsel: \$800,000 Public Defender: \$1,462,500 State's Attorney: \$2,191,200  Total: \$4,453,700	Appointed Counsel: \$3,000,000 Public Defender: \$500,000 State's Attorney: \$1,000,000  Total: \$4,500,000
2005	Appointed Counsel: \$1,200,000 Public Defender: \$1,625,000 State's Attorney: \$2,691,200  Total: \$5,516,200	Appointed Counsel: \$3,000,000 Public Defender: \$500,000 State's Attorney: \$1,000,000  Total: \$4,500,000

<sup>146</sup> Fiscal Years in this instance run from July 1–June 30. Fiscal Year 2000 began July 1, 1999 and ended June 30, 2000. Fiscal Year 2010 began July 1, 2009 and ended June 30, 2010.

**Table 4**  
(Continued)

Fiscal Year <sup>146</sup>	Cook County	Counties Outside of Cook
2006	Appointed Counsel: \$1,200,000 Public Defender: \$1,625,000 State's Attorney: \$2,691,200  Total: \$5,516,200	Appointed Counsel: \$3,000,000 Public Defender: \$500,000 State's Attorney: \$1,000,000  Total: \$4,500,000
2007	Appointed Counsel: \$1,200,000 Public Defender: \$1,625,000 State's Attorney: \$2,691,200  Total: \$5,516,200	Appointed Counsel: \$3,000,000 Public Defender: \$500,000 State's Attorney: \$1,000,000  Total: \$4,500,000
2008	Appointed Counsel: \$2,000,000 Public Defender: \$1,750,000 State's Attorney: \$2,941,200  Total: \$6,691,200	Appointed Counsel: \$3,000,000 Public Defender: \$500,000 State's Attorney: \$1,000,000  Total: \$4,500,000
2009	Appointed Counsel: \$2,000,000 Public Defender: \$1,750,000 State's Attorney: \$2,941,200  Total: \$6,691,200	Appointed Counsel: \$3,000,000 Public Defender: \$500,000 State's Attorney: \$0 <sup>147</sup>  Total: \$3,500,000
2010	Appointed Counsel: \$2,000,000 Public Defender: \$2,750,000 <sup>148</sup> State's Attorney: \$2,941,200  Total: \$7,691,200	Appointed Counsel: \$3,500,000 Public Defender: \$500,000 State's Attorney: \$1,000,000  Total: \$5,000,000
Totals for fiscal years 2000–2010	Appointed Counsel: \$34,599,700 Public Defender: \$18,275,000 State's Attorney: \$26,757,600  Grand Total: \$79,632,300	Appointed Counsel: \$28,234,000 Public Defender: \$4,984,000 State's Attorney: \$9,500,000  Grand Total: \$42,718,000

Source: Illinois State Treasurer's Office.

<sup>147</sup> Governor vetoed appropriation.

<sup>148</sup> The Cook County Public Defender's Office received an additional \$500,000 supplemental—over and above the \$2,250,000 initially appropriated—that had lapsed from Fiscal Year 2009 and became effective in Fiscal Year 2010.

death sentences imposed. After Cook County, Jefferson County, with two capital prosecutions, received the most money from the CLTF. Hancock County, however, received more than \$1.5 million for one case. DeWitt County spent \$1.8 million on three cases, whereas Kankakee spent \$1.25 million on nine capital prosecutions. These stark discrepancies go beyond differences attributable to differences or idiosyncrasies in individual cases.

Table 4 shows the appropriations made to the CLTF by fiscal year, 2000–2010, by receiving agency.<sup>149</sup> In all counties, including Cook County, appointed counsel were appropriated more funds than the public defender. Does this imply that appointed counsel represented more defendants in capital cases than the public defender? Also noteworthy is that the state's attorneys in all counties regularly and consistently were appropriated more money from the CLTF than were the public defenders. Only if all monies for appointed counsel and the public defender are counted together as funding for the defense of capital cases, are the funds for the defense more than the funds received by the state's attorneys. Outside of Cook County, the appropriations for appointed counsel are consistently higher than for the public defender or the state's attorney.<sup>150</sup> The amount of the appropriation may not signify the immediate receipt of that money.<sup>151</sup> There are also sharp discontinuities in these appropriations across various years.<sup>152</sup> Both state's attorneys and public defenders are state employees; both presumably use the funds for the same purposes when they stand off against one another in a capital trial. The public defender cannot receive funds for its salaried attorneys from the CLTF, according to

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<sup>149</sup> The sole source of this data is information from the Illinois state treasurer in the NULSCCD, *supra* note 1.

<sup>150</sup> For example, in Cook County, the appointed counsel and the public defender were appropriated \$2,825,000 and the state's attorney was appropriated \$2,691,200 for Fiscal Year 2006 (FY 2006). STATE OF ILLINOIS OFFICE OF THE COMPTROLLER, ILLINOIS APPROPRIATIONS: FISCAL YEAR 2006 113 (2006), *available at* <http://www.ioc.state.il.us/library/cr.cfm>. Outside of Cook County in FY 2006, the appointed counsel and public defender were appropriated \$3.5 million and the state's attorney \$1.0 million. *Id.* at 113–14.

<sup>151</sup> In 2009 and 2010, money from the CLTF has been significantly delayed. Arnold, *supra* note 108.

<sup>152</sup> *C.f.* STATE OF ILLINOIS OFFICE OF THE COMPTROLLER, ILLINOIS APPROPRIATIONS: FISCAL YEAR 2003 (2003), *available at* <http://www.ioc.state.il.us/library/cr.cfm>; STATE OF ILLINOIS OFFICE OF THE COMPTROLLER, ILLINOIS APPROPRIATIONS: FISCAL YEAR 2004 (2004), *available at* <http://www.ioc.state.il.us/library/cr.cfm> (comparing Fiscal Year 2003 with Fiscal Year 2004, where appropriations for appointed counsel in Cook County decreased from \$6.9 million to \$800,000, and appropriations for appointed counsel outside of Cook increased from \$1,924,000 to \$3,000,000).

the statute.<sup>153</sup> The public defender can only offload the expenses of investigation, the costs of DNA testing, and other similar documented expenses required for capital litigation. When private counsel is appointed, however, all costs, all incidental expenses, all office expenses, overhead, and all hourly fees to the lawyers are charged to the CLTF. Even when the public defender is appointed in a capital case, the public defender does not receive the same remuneration as the appointed counsel, either absolutely or by the hour. This is another kind of systemic inequity, and it pushes cases towards the assignment of counsel, even if this costs the state more money.

The bureaucratic incentive is always to spend money once it is appropriated and available for expenditure. State's attorneys have an economic incentive to declare a case capital if they can offload the expenses of prosecution to the CLTF, even if they cannot charge salaries to the CLTF.<sup>154</sup> Both state's attorneys and public defenders have a bureaucratic and economic incentive to keep the present system going: the CLTF pays for the training of attorneys, as well as for some expenses of litigation, and for expenses that can be segregated out of general expenses for both sides.<sup>155</sup> There may be an unintended incentive to declare a case capital when the CLTF money is actually in the county account in Cook County. Across the state, there may be an economic incentive not to declare cases capital when the transfer of money is delayed by state budgetary cuts, or

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<sup>153</sup> See 725 ILL. COMP. STAT. ANN. 124/15(e) (West 1993 & West Supp. 2010), which provides that moneys in the CLTF shall be expended only: "(3) To pay the compensation of trial attorneys, *other than public defenders or appellate defenders*, who have been appointed by the court to represent defendants who are charged with capital crimes or attorneys . . . ." (emphasis added).

<sup>154</sup> See CPRSC FINAL REPORT, *supra* note 53, at 97–98. The CPRSC has been informed by downstate judges and lawyers that in several downstate counties, state's attorneys served notices of intent to seek capital punishment, and just before trials were to begin, withdrew the notices; it appeared (or was suspected) that the notices were filed for the purpose of transferring the costs of investigation and trial preparation from the local county to the CLTF. The motive for doing this was attributed to economic pressure on prosecutors owing to a shortage of funds in county budgets to pay for the cost of investigation and trial preparation. *Id.*

The Committee was also told that when this occurred, and the notices of intent were withdrawn on the eve of trial, the appointed defense lawyers immediately lost the ability to obtain fees from the CLTF for the preparation for trial or for the trial itself, and instead are required to seek funding from county boards, which often were not receptive to their requests, had inadequate funds to meet the requests, or both. CAPITAL PUNISHMENT REFORM STUDY COMM., FOURTH ANNUAL REPORT 33 (2008), *available at* [http://www.icjia.state.il.us/public/pdf/dpsrc/CPRSC Fourth Annual Report.pdf](http://www.icjia.state.il.us/public/pdf/dpsrc/CPRSC%20Fourth%20Annual%20Report.pdf).

<sup>155</sup> See CPRSC FINAL REPORT, *supra* note 53, at 98 (testimony of trial judge explaining strong budgetary and public relations incentives considered by state's attorneys when deciding whether to serve a capital punishment notice; the pressure is particularly strong in counties other than Cook County).

**Table 5**

*Summary Table: Capital Litigation Trust Fund Appropriations, by Type of Recipient, Fiscal Years 2000–2010*<sup>156</sup>

Recipient	Cook County (Col. 1)	Counties Outside of Cook (Col. 2)	Totals (Col. 3) (Col. 1 + Col. 2)
Appointed Counsel	\$34,599,700	\$28,234,000	\$62,833,700
Public Defender	\$18,275,000	\$4,984,000	\$23,259,000
State's Attorney	\$26,757,600	\$9,500,000	\$36,257,600
Totals:	\$79,632,300	\$42,718,000	\$122,350,300

Source: Illinois State Treasurer's Office.

refusals to release funds, or when state funds are not expected to appear at all, as has happened recently.

Table 5 summarizes all county appropriations from the CLTF, by recipient, for the life of the fund to date, 2000–2010.<sup>157</sup> The total amount appropriated to state's attorneys over the period for prosecuting approximately 500 murders as capital cases, in which seventeen death sentences were imposed, was over \$35 million. Much less, \$23 million, went to public defenders. The bulk of the money from the CLTF, \$63 million, went to appointed counsel, presumably overwhelmingly for trial work. These trial counsel typically do not continue to represent the defendant if a death sentence is imposed, or for other appeals. Since over 500 cases were noticed and seventeen death sentences were imposed, most of that money was spent on cases where the jury or the judge did not find death to be the appropriate sentence. The capital defense unit of the Appellate Office of the Public Defender takes over the appeals of death sentences after the cases have been tried, perhaps expertly, perhaps not, by

<sup>156</sup> Fiscal Years in this instance run from July 1–June 30. Fiscal Year 2000 began July 1, 1999 and ended June 30, 2000. Fiscal Year 2010 began July 1, 2009 and ended June 30, 2010.

<sup>157</sup> The source of this data is the Illinois state treasurer in the NULSCCD, *supra* note 1.

private counsel at the expense of the CLTF.<sup>158</sup>

Whether appointed counsel represent capital defendants more competently or even as well as public defenders is an open question which will only be answered when the final judgments are handed down on effective or ineffective representation many years later. Another important question is whether the assignment of appointed counsel by trial court judges in the county, or even by the assignment judge in the county, is a process without conflict of interest. In Illinois, there is no ethical prohibition against an attorney contributing to the election campaign of a judge before whom he appears.<sup>159</sup> The assignment of private counsel to represent a capital defendant typically represents the award to that attorney of hundreds of thousands of dollars in the direct payment of legal fees, and perhaps more than a million dollars in revenue for that law office.<sup>160</sup> Especially in counties where the judges and the attorneys who try cases are likely to know one another, it would be surprising if the trial counsel assigned did not contribute to judges' election campaigns. There are no objective criteria or guidelines governing the assignment of trial counsel in a capital case. There is no one who asks if the trial court judge assigned counsel appropriately, or upon whose recommendation the judge assigned that attorney.<sup>161</sup>

In Illinois, where judges are elected in partisan elections and attorneys contribute monetarily to the judges' election campaigns, the questions regarding the standards for appointment of trial counsel in capital cases and who appoints should be examined closely. This is another fault line in the present system. A stated purpose of the requirement of the special certification of trial counsel for capital cases was to ensure a minimal level of competency for defense trial counsel, yet the requirement of certification also reduces the list of eligible attorneys to be appointed. It has been

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<sup>158</sup> See, e.g., the case of Robert O. Marshall, discussed *infra* note 204. In the case of Robert Marshall in New Jersey, private trial counsel represented the defendant when he was sentenced to death. After many legal proceedings, the private trial counsel was declared to have been ineffective at trial, twenty-six years after the death sentence was imposed. During the entire twenty-six years and through many, many appeals, Robert Marshall was represented at the state's expense by the Office of the Public Defender. See *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005).

<sup>159</sup> Michael Sneed, Chuck Neubauer & John Carpenter, *Donor Had Case Before Swick; Law Permits Contributions*, CHI. SUN-TIMES, June 26, 2000, at A1 (describing case in which gifts to appellate judge by law firm with case in front of judge were found to be legal).

<sup>160</sup> See details on payments to assigned counsel in CLTF county records, NULSCCD, *supra* note 1.

<sup>161</sup> See also *Marshall*, *supra* note 47, at 958 (describing a concern that local judges may appoint counsel as a form of patronage rather than credentials).



alleged that some trial attorneys in the smaller counties do not seek certification because they do not wish to be appointed to capital cases.<sup>162</sup> The state's attorneys are exempt from the requirements of training and experience for capital certification. Certainly, the prospects of receiving adequate assistance are improved if there are funds to pay for representation.<sup>163</sup> However, the availability of funds alone does not guarantee effective defense representation, especially in a system where appointments and compensation may be rife with possibilities for conflicts of interest, and especially if attorneys are picked from a small pool.

The total of all appropriations for the CLTF for its entire period of operation through Fiscal Year 2010 (ending June 30, 2010), all of which has presumably been spent as of July 1, 2010, was more than \$122 million, a nontrivial amount of state resources by any measure of accounting.

**Table 6**  
*Capital Litigation Trust Fund Expenditures, Cook County, 2004–2009*<sup>164</sup>

Cook County Disbursements to Public Defender's Office	\$9,973,595.20
Cook County Disbursements to State's Attorney's Office	\$15,873,082.62
Cook County Disbursements to Cook County Court System	\$7,409,979.19
Total Cook County Disbursements <sup>165</sup>	\$33,256,657.01

Source: Cook County Treasurer's Office.

Table 6 shows the expenditures in Cook County for the years 2004–2009. The source of these figures is the Cook County treasurer, since Cook County, unlike all other counties in the state, receives its funds directly

<sup>162</sup> The records of expenditures of the state's attorneys and public defenders in Cook County, however, indicate that a number of attorneys from both offices were newly certified as death-qualified attorneys in recent years. ILL. COALITION TO ABOLISH THE DEATH PENALTY, DEATH PENALTY REFORM IN ILLINOIS: FIVE YEARS OF FAILURE 11 (2008), available at <http://www.icadp.org/docs/ICADPannualreport08.pdf>.

<sup>163</sup> See Marshall, *supra* note 47, at 958 (describing the dangers of underfunding legal services for indigent defendants).

<sup>164</sup> Figures are only available for 2004–2009.

<sup>165</sup> This figure accounts for a date range of November 2003 through November 2009.

from the CLTF as block grants. For the other counties, the state treasurer disburses money to the counties for individual cases upon request. Until recently the state treasurer had no authority to question or challenge the amount of a request or its reasonableness. If a trial court judge approved the request, the state treasurer was obliged to pay. The fact that payments were requested for individual cases has allowed for a count of the number of individual capital prosecutions by county, based upon the number of cases for which funds were requested.<sup>166</sup> Once again, it is noteworthy that the amount of money disbursed to public defenders is significantly less than the amount of money granted to the state's attorneys. Again, without knowing how many and what proportion of cases were handled by public defenders in Cook County, as opposed to the number and proportion of cases assigned to private counsel, it is impossible to know whether this allocation of funds is disproportionately or appropriately disbursed.<sup>167</sup> Nor is there any way to judge whether appointed counsel, which as a group received more money than the public defender but less than the state's attorney, received payments appropriately or whether the appointment of counsel was made appropriately.<sup>168</sup>

Absent some independent evaluation of many cases, it is impossible to know the quality of representation by appointed counsel in Cook County cases. Most cases declared capital in Cook County were decided by plea. Did this mean that the capital charge was simply an instrument to extract a plea, or a plea to a longer sentence? Were defendants effectively represented during plea negotiations, whether by private counsel or public defenders? Sentences imposed after a plea negotiation will not be examined carefully on appeal, if they are examined at all. Without detailed information on cases, it is impossible to answer that question.<sup>169</sup>

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<sup>166</sup> There was a supplemental appropriation of \$500,000 to the public defender in 2009, and this may account for the fact that the figures from the Cook County treasurer do not exactly coincide with the amount of appropriations to Cook County. STATE OF ILLINOIS OFFICE OF THE COMPTROLLER, ILLINOIS APPROPRIATIONS: FISCAL YEAR 2009, at 113 (2009), available at <http://www.ioc.state.il.us/library/cr.cfm>. Also note that details on disbursements from Cook County are only available for the years 2004–2009. For the period 2000–2004, the Cook County treasurer did not have automated accounts for the amounts spent from the Capital Litigation Trust Fund.

<sup>167</sup> In Cook County, no account of expenditures for individual cases was available for the years prior to 2004, although money was disbursed during that period.

<sup>168</sup> Together, appointed counsel and the public defender in Cook County received more state funding than the Cook County state's attorney. Since appointed counsel can charge all expenses, including office expenses and staff expenses, which the public defender and state's attorney cannot in Cook County, this is not surprising. A breakdown of how the money was spent in individual cases is not available at present.

<sup>169</sup> Detailed information on the individual charges in indictments for all first-degree murders during 2003–2009 by county is available in the Northwestern School of Law

D. OTHER EVIDENCE OF DISPARITIES IN THE PROSECUTION AND  
DISPOSITION OF DEATH-ELIGIBLE CASES BEFORE AND AFTER THE  
2003 REFORMS

At the request of the Capital Punishment Reform Study Committee, Professor David Olson and research criminologists from Loyola University examined the patterns of imposition of the death penalty across Illinois and prepared for the Capital Punishment Reform Study Committee detailed, offender-level data based upon information from the official records of the Illinois Department of Corrections (IDOC).<sup>170</sup> A summary of this research is presented in Appendix B. This systematic research analyzed information pertaining to 9,592 offenders convicted of and sentenced for first-degree murder and admitted to prison in Illinois from July 1988 through June 2010. This is a longer time period than that reported earlier, and it includes cases and convictions prior to 2000. The study design allows for the assessment of long-term changes by period.

Tables A through F in Appendix B detail the patterns in capital case prosecutions in Illinois as measured by the number of offenders convicted of first-degree murder in Illinois, and the number and proportion of these offenders who received a sentence which was determinate (i.e. a sentence to a specific number of years in prison), a sentence of natural life, or a death sentence across different regions and time periods. The data are classified by type of county, and across the three periods described above.<sup>171</sup>

Data is reported on the basis of the state fiscal year (SFY) from SFY 1989 (July 1, 1988 to June 30, 1989) through SFY 2010 (July 1, 2009 to June 30, 2010). During this twenty-one-year period, a total of 150 persons were convicted of capital murder and sentenced to death. The collection of data over such a long period allowed for an analysis of patterns in three distinct periods: the pre-moratorium period (from July 1988 to December 1999); the moratorium period (January 2000 to June 2005);<sup>172</sup> and finally the post-reform period (July 2005 to 2010).<sup>173</sup>

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Capital Crimes data set. Coupled with data on sentences imposed, which are a matter of public record, the record of charges with the record of sentences imposed would at least be a starting place for that investigation.

<sup>170</sup> Note, this is an entirely different and independent set of data than that reported in Tables 1–7, *infra*. The Tables published here were distributed to the Capital Punishment Reform Study Committee at its meeting in September 2009. They are available to the public as part of the Reform Study Committee's Final Report. Dr. Olson and his colleagues also conducted surveys of police, prosecutors, defense attorneys, and administrators and prepared other data relevant to the 2003 reforms. See *infra* Appendix B.

<sup>171</sup> Note, these records do not indicate whether the sentence was imposed at trial or pursuant to a plea bargain.

<sup>172</sup> This includes the appointment of the Governor's Commission and the publication of the Governor's 2002 Report; the establishment of the Capital Litigation Trust Fund in 2000;

In addition to separating the convictions by time period, the data on convictions are broken down by geographic region: All Illinois; Cook County, Illinois; Illinois outside of Cook County; the Illinois “Collar Counties” (those that border Cook County); the Illinois Urban Counties (excluding Cook and the Collar Counties); and the rural counties. These standard geographic distinctions are based upon the census categories for metropolitan areas. Cook County accounts for the largest absolute number and proportion of murders in the state and must always be examined separately in order to understand the extent to which it drives the numbers for the entire state.

These tables compare statewide patterns in prosecutions and sentencing in the period prior to the Ryan commutations and the establishment of the CLTF, with patterns in prosecution and sentencing during the moratorium period and after the commutations, and then with patterns in sentencing during the post-reform period, after 2003, while controlling for county size and type.<sup>174</sup> The periods are designed to allow for lags in the effect of changes in policy.<sup>175</sup> For example, some changes, such as the requirement of two defense attorneys for a capital case, imposed by a rule of the Illinois Supreme Court, were instituted immediately after pronouncement. Other changes, such as the requirement that interrogations be recorded, or changes in line up procedures, were implemented piecemeal, and sooner in some counties than in others.

It is also important to note what these tables do *not* measure or include. They do not include data on the number of capital prosecutions or the number of first-degree murders, or the number of murder charges that resulted in either an acquittal or a conviction for an offense other than first-degree murder.<sup>176</sup> Tables A–F do not identify the incidence of the decision

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the Ryan commutations emptying death row in 2003; and the passage of an additional set of reforms by the legislature in 2003 and 2004.

<sup>173</sup> Beginning the post-reform period with fiscal year 2005 allows for the 2003 reforms to have taken effect. The effective dates of various reforms differed. By June 2005, however, all would have been in effect. Cullerton et al., *supra* note 41.

<sup>174</sup> The moratorium on executions, imposed in 2000 by Governor George Ryan and continued by Governor Blagojevich, remains in effect in 2010, but it is not a moratorium on capital prosecutions. CPRSC FINAL REPORT, *supra* note 53, at 2.

<sup>175</sup> Because the effect of the reforms will be uneven, the length of the time periods addresses that discontinuity as well. By separating out Cook County and by grouping the remainder of the counties, the unevenness is smoothed out to some extent. The goal of these groupings is to get away from an analysis which simply points to one county, say Cook County, or DuPage County, and compares data across counties without controlling for county type or size. Looking at patterns across hundreds of murder convictions allows for generalizations beyond a single case analysis.

<sup>176</sup> In other words, they do not include capital prosecutions in which the capital charge was dropped, or where the first-degree murder charge was dropped and the defendant pled to

not to charge capital murder when there was a factual basis for a statutory aggravating factor. The tables do not measure the incidence of the decision to prosecute a case capitally, although a conviction and sentence for first-degree murder is at least an indication that there might well have been a factual basis for a capital charge in that case. Tables A–F begin at the end of the trial stage, at the point of sentencing and analyze patterns in prosecutions, retrospectively.

These tables do not indicate how many first-degree murder cases were noticed or identified for possible capital prosecution. They also do not show how many first-degree murders were death-eligible for that period, nor do they show how many times a capital charge resulted in a sentence other than death, whether because the capital charge was dropped during pretrial plea bargaining or because a verdict of death-eligible first-degree murder was not found at capital trial. Further, these tables do not indicate the total number of capital trials in the state during the period. The tables measure the end, not the beginning or middle, of the stages of a prosecution for first-degree murder, and they report only the end stage of a capital prosecution for murder.

These tables highlight strong changes in patterns and trends in sentencing by period and type of county. The tables corroborate that there has been a significant shift in patterns in the incidence of murder and homicide, and in patterns of capital prosecution across the state, both since the Ryan commutations and since the moratorium on executions. Some of these patterns mirror patterns in the country as a whole.<sup>177</sup> During this period, the reported number of homicides in Illinois fell.<sup>178</sup> The same pattern was observed across the country and especially in other urban jurisdictions.<sup>179</sup> During this entire period, the number of capital prosecutions dropped in Illinois generally and across all categories of counties, but not in the same proportion across all geographic categories of counties.<sup>180</sup>

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a charge less than first-degree murder (e.g. felony murder, manslaughter, or another felony such as robbery or arson or burglary).

<sup>177</sup> See Eisenberg & Johnson, *supra* note 38; John Schwartz, *Death Sentences Dropped but Executions Rose in '09*, N.Y. TIMES, Dec. 18, 2009, at A22 (noting decline in death sentences nationally).

<sup>178</sup> See *Chicago Homicides Drop*, CHI. TRIB., Dec. 30, 2009, at A4 (reporting 453 homicides in Chicago for 2009 through December 28, 2009 and analyzing the 2009 homicides in Chicago by type, e.g. gang-related, type of weapon, etc.).

<sup>179</sup> Al Baker, *Homicides Near a Record Low Rate in New York City*, N.Y. TIMES, Dec. 29, 2009, at A1, (describing decline in homicide rates in Atlanta, Chicago, and Boston, and increase in homicide rates in Detroit, Baltimore, and New Orleans).

<sup>180</sup> See *infra* Appendix B, tbls.A–F.

Over the time periods examined, the proportion of first-degree murderers sentenced to death statewide fell from 1.9% in the pre-moratorium period (118/6,224 per col. 2 Table A) to 0.6% in the post-reform period (10/1,525 per col. 2 Table A). In other words, a defendant in a first-degree murder case in Illinois was three times as likely to be sentenced to death in the pre-reform period as in the post-reform period. The death-sentencing rate in Illinois declined significantly during the period measured; this is a significant overall difference.

Across all separate geographic regions (Tables B–F) the proportion of first-degree murderers sentenced to death fell significantly and unevenly between the pre-moratorium and post-reform periods. Significant differences were also found between the likelihood of receiving a death sentence in the pre-moratorium period and the post-moratorium period within specific geographic categories, and within Cook County in comparison to outside of Cook County. While this is not surprising, the extent of the differences is startling, especially given the nature of the data set. These discrepancies have been found after sentencing. Thus, they represent the outcome of disparities in capital case charging at a late stage of the process, as measured by sentences imposed, death sentences, and other sentences.

These results are not based upon a tabulation of persons prosecuted for capital murder or an estimate of the proportion of death eligible murders, where there may be errors in the reporting of cases or inaccuracies in data collection at the local level. These findings are based upon persons found guilty of first-degree murder, sentenced for murder, and actually in prison in Illinois, according to Department of Corrections records.<sup>181</sup> The data collection here is not subject to the allegation that it was biased or incomplete. It is the Department of Corrections' own record of the number of people they have in prison convicted for first-degree murder and what sentences they received from the trial courts, sentences presumably upheld after appeal, during the identified time periods. These are not estimations of sentences, or speculations as to who might be guilty or eligible for the death penalty. These are 9,592 defendants who were convicted of at least 9,592 actual first-degree murders, with the sentences actually imposed by a trial court in 9,592 sentencing proceedings. The data were collected without reference to the death penalty, except that the number of death sentences was recorded.

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<sup>181</sup> See *infra* Appendix B.

Within the post-reform period, for example, 1.0% of all sentences in Cook County were death sentences (72/7,189 per col. 2 Table B); whereas in the counties outside of Cook, 3.1% of all sentences were death sentences (78/2,543 per col. 2 Table C). In other words, during the pre-reform period a defendant was three times more likely to be sentenced to death outside of Cook County than in Cook County, other things being equal.

A defendant was more than four times more likely to receive a death sentence in a rural county than in Cook County. In the rural counties, 4.3% of all sentences for first-degree murder were death sentences (25/577 per col. 2 Table F). These disparities, between Cook County and rural counties, and between Cook County and other categories of counties, result in large discrepancies in odds ratios and persist across all time periods. These disparities have been reduced, but not removed, by the passage of the 2003 reforms, as can be seen by comparing the percentages and odds ratios for the pre-moratorium period with the post-reform period.<sup>182</sup> Nor is this pattern unique to Illinois. The discrepancy between rural and urban counties, or large differences based upon individual prosecutors' charging policies, has been well documented in other states.<sup>183</sup>

Some of these disparities between Cook and other counties, and between types of counties, were reduced after the reforms. Nonetheless, in the period after the passage of the reforms, the likelihood of being sentenced to death if found guilty of first-degree murder in a rural county is still almost eight times higher than the likelihood of being sentenced to death in Cook County.<sup>184</sup> Subsequent empirical analysis, were it to be made, could conceivably show that the relative seriousness of the crimes partly accounts for these discrepancies in both jurisdictions, but the geographic disparity remaining even after the reforms is striking. There is no reason to assume the most serious or aggravated murders regularly occur in nonurban jurisdictions. In fact, there is reason to assume the opposite:

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<sup>182</sup> For example, in the pre-moratorium period 5.4% of the sentences for first-degree murder were death sentences in Illinois rural counties (18 of 331 per Table F); and the percentage of death sentences imposed in the collar counties was 4.7% in the pre-moratorium period (20 of 424 per Table D). The disparities between Cook County and the rural and collar counties remains.

<sup>183</sup> See CALIFORNIA REPORT, *supra* note 33; Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 329 (2009) ("The broad discretion afforded prosecutors in Missouri translates directly into disparities in outcomes across different geographic regions."); Eisenberg & Johnson, *supra* note 38.

<sup>184</sup> Compare Table F, with Table B. Overall, 3.8% of all sentences for first-degree murder in Illinois rural counties resulted in a death sentence in the post reform period, while in Cook County during the post-reform period, 0.5% of all sentences for first-degree murder resulted in a death sentence being imposed.

more aggravated murders are likely to occur in Cook County, where there is the largest absolute number of murders. The result is again somewhat contradictory: urban jurisdictions generally have more murders and presumably more aggravated murders, but a lower rate of prosecuting cases capitally.

The issue of county disparities is not limited to Illinois; it exists in every capital punishment state.<sup>185</sup> The findings from systematic research in this area are similar in every state: the likelihood of being prosecuted for death-eligible capital murder is generally lower in a high crime, urban jurisdiction than it is in a rural or suburban jurisdiction with a relatively low homicide rate.<sup>186</sup> According to study after study, the chance of prosecution for capital murder is significantly higher in rural and suburban counties.<sup>187</sup> The offered explanations for this are many, multilayered, and largely speculative.<sup>188</sup> Whatever the reason, a defendant in Illinois is more likely to be prosecuted for capital murder and sentenced to death in some counties than in others and this pattern has been observed over and over, not just in Illinois.<sup>189</sup>

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<sup>185</sup> Eisenberg & Johnson, *supra* note 38.

<sup>186</sup> See Leibman & Marshall, *supra* note 36, at 1676–82 (identifying high death sentencing counties in Arizona, Nevada, Florida, and Oklahoma, and showing a death verdict in 64 out of every 1,000 homicides and an error rate of 71% in Pima, Arizona (Tucson), the highest county; counties with low death sentencing rates had significantly lower error rates; a few counties had error rates of 100%).

<sup>187</sup> See Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010); Leibman & Marshall, *supra* note 36, at 1676–82; see also Scott W. Howe, *Race Death and Disproportionality*, 37 N. KY. L. REV. 213 (2010); Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama's Election*, 37 N. KY. L. REV. 243 (2010).

<sup>188</sup> Some of the offered explanations include: that the greater likelihood of being prosecuted for a capital case in a rural or suburban district is a proxy for embedded racism in the system; that the likelihood of actually getting a death verdict is higher in counties where the juries are from rural or suburban counties; that murders are less frequent and consequently more “shocking” when they occur in rural or suburban counties; that state’s attorneys in rural or suburban counties must, or perceive they must, campaign more vigorously as being “tough on crime” whereas urban state’s attorneys or prosecutors are less visible in the prosecution of individual cases and judged by their constituents on other criteria; that the voting population in urban areas is less in favor of capital punishment than the voting constituencies in rural and suburban counties, and many other reasons. The reasons may be multiple; the pattern is observable across states, and seems to be characteristic of northern and southern states, states with many capital cases, and states with few. See *infra* Part IV.

<sup>189</sup> For example, in California, ten counties (Los Angeles, Riverside, San Bernardino, Alameda, Orange, Contra Costa, San Diego, Sacramento, Tulare, and Ventura) accounted for more than 70% of all death sentences between 1977 and 1999. Since 2000, these ten counties accounted for 83% of all death sentences. ROMY GANSCHOW, ACLU OF N. CAL., DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN



## E. THE 2006 GUIDELINES FOR STATE'S ATTORNEYS IN ILLINOIS

The publication of guidelines for state's attorneys was one of the reforms recommended by the 2002 Governor's Commission and adopted by the State's Attorney's Association in 2006. They are published here as Appendix A. The 2006 guidelines for the selection of cases for capital prosecution in Illinois are the first formal articulation of a uniform statewide standard to govern the selection of cases for capital prosecution.<sup>190</sup> They were issued in response to the 2002 Governor's Commission finding, documenting county-by-county disparities in charging and sentencing.<sup>191</sup> The guidelines state that following these recommendations is "voluntary" and that the guidelines do not "have the force of law."<sup>192</sup> This was also part of the recommendation of the 2002 Governor's Commission. There are no sanctions or penalties for failure to follow the guidelines.<sup>193</sup> The guidelines state that they articulate the current law and practice regarding the charging of capital murder currently used by state's attorneys throughout Illinois. No empirical evidence is presented in support of this statement.

According to the guidelines, "each capital case is unique and must be evaluated on its own facts, focusing on whether the circumstances of the crime and the character of the defendant are such that the deterrent and retributive functions of the ultimate sanction will be served by imposing the death penalty."<sup>194</sup> The guidelines urge state's attorneys to "resist the temptation or public pressure to seek a death penalty based solely on the brutality of the crime without reference to other relevant factors."<sup>195</sup> The Illinois guidelines further state that, "[t]he probability of a conviction is the central factor in any charging decision."<sup>196</sup>

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CALIFORNIA 3 (2007), available at [http://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/death\\_by\\_geography/death\\_by\\_geography.pdf](http://www.aclunc.org/docs/criminal_justice/death_penalty/death_by_geography/death_by_geography.pdf).

<sup>190</sup> The guidelines are reproduced in Appendix A. The Illinois guidelines are similar to the New Jersey Prosecutors' Guidelines for the Designation of Homicide Cases for Capital Prosecution, reprinted in Leigh B. Bienen et al., *supra* note 5, at 791–93 (Appendix B).

<sup>191</sup> ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23, at 24–25.

<sup>192</sup> See *infra* Appendix A.

<sup>193</sup> By contrast, in New Jersey the state attorney general has supervisory authority over the twenty-one county prosecutors in New Jersey. N.J. STAT. ANN. 52:17B-103 (West 2006) ("The Attorney General shall consult with and advise the several county prosecutors in matters relating to the duties of their office and shall maintain a general supervision over said county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State.").

<sup>194</sup> See *infra* Appendix A, at 7 (quoting *People v. Johnson*, 128 Ill. 2d 253 (1989)).

<sup>195</sup> *Id.* at 5.

<sup>196</sup> *Id.*

The “probability of a conviction,” however, could mean several things: that the evidence of guilt must be overwhelming; that the crime itself was “super-aggravated,” i.e., that it was characterized by multiple statutory aggravating factors, or that the circumstances were unusually antisocial, heinous, or depraved, such as a shooting of innocent children in a school.<sup>197</sup> Alternatively, the high probability of a conviction could mean that a jury would be more likely to sentence a defendant to death because the defendant is a member of a despised or unpopular group, has a criminal history, because the victim was a member of a highly valued segment of society, or because juries in that county generally are willing to recommend a sentence of death.

The statement that state’s attorneys should consider mitigating and aggravating factors in the decision to charge capital murder raises another set of issues. According to the statutory structure embraced in *Gregg v. Georgia*, it is the exclusive and special province of the capital jury at penalty phase to weigh the statutory aggravating factors against the statutory mitigating factors in deciding whether to impose death.<sup>198</sup> It is the province of the jury as representatives of the community to decide who, ultimately, should be sentenced to death and executed.

Another troubling issue with regard to the state’s attorney weighing of statutory mitigating factors in the decision to charge capital murder is that typically, the evidence presented to the jury in the penalty phase of a capital trial as mitigating evidence includes factors that would not be relevant or exculpatory at the guilt phase, but nonetheless might be appropriate to the consideration of mitigating factors at sentencing. Such factors include childhood abuse, mental incapacity or infirmity, or other issues related to the defendant’s mental state or developmental issues (e.g., stress syndromes, a history of drug or alcohol abuse, or other aspects of family history). Mitigating evidence need not meet the evidentiary standards for relevance or admissibility during the capital trial.<sup>199</sup> The defense will almost certainly not know of the existence of any of this evidence in the early stage of the case when the state’s attorney is deciding whether or not to serve a notice of intent to seek the death penalty.<sup>200</sup> And if the case is going to be assigned to appointed counsel after the filing of a notice of intent, the public defender is even less likely to know of such evidence or to

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<sup>197</sup> See CPRSC FINAL REPORT, *supra* note 53, at 93–95.

<sup>198</sup> *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

<sup>199</sup> Mitigating factors may be something as simple as the testimony of the defendant’s mother, wife, or children.

<sup>200</sup> The Committee considered and voted to recommend that the state’s attorney be required to offer an opportunity to the defense to meet in person prior to the serving of a notice of intent. See CPRSC FINAL REPORT, *supra* note 53, at 75.

be motivated to develop it, or to have such evidence to present to the state's attorney prior to the filing of a notice of intent. Nor will the public defender have the resources to begin those investigations so early in the case, when the public defender does not have access to funds from the CLTF because the notice of intent has not yet been filed.

The facts supporting mitigating evidence for submission at the penalty phase typically take months or years to develop for presentation to the capital jury.<sup>201</sup> Both the defense and the prosecution may call special mitigating experts, psychologists, and forensic social workers.<sup>202</sup> The detailed records of expenditures from the CLTF show large amounts allocated to mitigation specialists.<sup>203</sup> The difficulty of discovering and presenting mitigating evidence is one of the reasons capital trials in all capital jurisdictions take so much longer to prepare than non-capital trials. In the 120-day period in which the state's attorney must decide whether to serve a notice, the defense will not have discovered all or perhaps any of the mitigating evidence which might be presented at penalty phase, if there were to be a penalty phase. Moreover, by the time the case reaches a penalty phase, if it ever does, a different attorney will probably be representing the defendant and will have developed the mitigating evidence differently.

The testimony before the Committee that the 120-day requirement for filing a death notice is routinely waived does not address this concern. The purpose of the 120-day notice requirement is to put the defense on notice to prepare for the capital trial and penalty phase, not to expect that the defense counsel will be prepared for capital trial in 120 days. During the 120-day period prior to the filing of a notice of intent, the public defender will not have access to funds from the CLTF. Defense attorneys are concerned that if they are required to present mitigating evidence prior to the filing of a notice, they will be precluded from presenting newly found evidence later. The failure of defense counsel to bring forward mitigating evidence is a

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<sup>201</sup> See Eisenberg & Johnson, *supra* note 38, at fig.2.

<sup>202</sup> The detailed annotation of capital expenditures from the CLTF includes repeated expenditures for mitigation specialists by appointed defense counsel and state's attorneys. See, for example, extensive payments to clinical psychologists, neuropsychological experts, forensic psychologists, forensic social workers etc. in Case No. 96-CF 46, Hancock County, in Capital Litigation Trust Fund, Reports of Expenditures (on file with the *Journal of Criminal Law and Criminology*).

<sup>203</sup> See, e.g., Capital Litigation Trust Fund, Reports of Expenditures (on file with the *Journal of Criminal Law and Criminology*).

frequent reason for a subsequent finding of ineffectiveness of counsel, and this is not a trivial concern.<sup>204</sup>

Capital cases are complicated and difficult to defend, both at trial and on appeal, and a capital defendant may go through several defense attorneys before being represented by an attorney who is competent, able, and willing to look for and find the appropriate and convincing mitigating evidence to present at the penalty phase. Many strategic decisions are involved in presenting mitigating evidence at the penalty phase.<sup>205</sup> For strategic reasons, the defense may not wish to divulge otherwise incriminating mitigating evidence (for example, evidence of prior violent or antisocial behavior by a defendant that did not result in a criminal conviction) before the penalty phase (i.e., to try to convince the prosecutor not to seek death) or even at the penalty phase. The potentially mitigating evidence may turn into evidence of nonstatutory aggravating factors and be admissible and unfavorable to the defense at penalty phase.

One reason for waiver of the 120-day filing requirement by the defense may be the lack of knowledge of the presence of mitigating factors, or how the evidence will develop as to mitigating or aggravating factors.<sup>206</sup> Another reason may be that the defense has not yet decided upon any plan or strategy for the penalty phase, especially if the expectation on the part of

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<sup>204</sup> See, e.g., *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005). In *Marshall*, Robert Marshall's death sentence in New Jersey was set aside by the Third Circuit after twenty years of state and federal litigation on the grounds that his original defense attorney at trial did not present, prepare, or discover mitigating evidence for the penalty phase of his capital trial. In 2005, the Third Circuit held that Robert Marshall's death sentence should be overturned, fourteen years after it had first been upheld by the Supreme Court of New Jersey, on the grounds of incompetence of the private defense counsel who represented him at trial because that attorney called no witnesses in mitigation at his penalty phase trial, although Robert Marshall had children who might have testified in his defense, and other members of his community who might have testified on his behalf. *Id.*

<sup>205</sup> It is the difficulty of finding and developing such mitigating evidence which has resulted in the use of mitigation evidence specialists, adding another layer of specialty and expense to the capital trial. Mitigation specialists are typically not lawyers, but investigators who are specially trained to work with families and to uncover decades-old evidence of circumstances relevant to mitigation. Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 366–68 (1997).

<sup>206</sup> Take, as an example, the potentially death-eligible defendant who is an Iraq War veteran. That fact, perhaps itself known immediately, could be a mitigating factor. Should it influence the state's attorney's decision to charge death-eligible murder? What if it were not yet known that this same defendant had committed violent acts in the military and was dishonorably discharged, or, in contrast, that the defendant was suffering from post traumatic stress disorder or depression? The interpretation of the fact that the defendant is a war veteran will require a great deal of expert research and the compilation of records prior to the presentation of evidence at the penalty phase.

all attorneys is that another defense attorney will be trying the case. If the defense does not yet know of the presence of mitigating evidence, or if the public defender does not think it will be representing the defendant at the time of a hypothetical penalty phase, why or how should the defense bring mitigating evidence to the attention of state's attorneys prior to trial?<sup>207</sup> In fact, if the filing of the notice is to allow for the appointment of private counsel, and to gain access to funds from the CLTF, why is it in the interest of either side to waive the 120-day notice requirement? The state's attorney's knowledge or awareness of statutory mitigating factors will necessarily be incomplete at the 120 day point, since the defense attorneys themselves are unlikely to be aware of any or all mitigating factors prior to the filing of a notice of intent. Certainly there is no obligation for the state's attorney to investigate or take into account mitigating evidence.<sup>208</sup>

The Illinois guidelines further state that race, income, and geographic disparity shall not be factors in charging a defendant with capital murder.<sup>209</sup> However, without systematically examining charging patterns throughout the state, there can be no measure of whether capital notices are filed consistently or without bias. This is especially the case with regard to geographic disparity. In addition, geographic disparities can rise to the level of constitutional infirmity. The counties are widely separated, and while in theory a single set of rules governs all counties in Illinois, in fact

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<sup>207</sup> As an example of how a capital case can involve many more procedural and strategic issues than an ordinary prosecution for murder, see *People v. Ramsey*, 2010 WL 3911466 (Ill. Oct. 7, 2010). The offense occurred on July 9, 1996. The defendant was convicted of two counts of murder and sentenced to death in 1996 by a jury in Hancock County. His convictions were reversed in 2000 by the Supreme Court of Illinois in *People v. Ramsey*, 735 N.E.2d 533 (Ill. 2000). He subsequently pled guilty to the intentional murders, and was again sentenced to death. A series of issues regarding capital punishment procedures were raised again on appeal, the status of his plea, including incompetence of counsel, prosecutorial misconduct, insanity and other mental mitigating factors, and the retrospective applicability of Amended Supreme Court Rule 701 requiring defense attorneys in capital cases to be members of the Capital Litigation Trial Bar and the applicability of the fundamental justice act. *Ramsey*, 2010 WL 3911466, at \*35, \*60. The Supreme Court affirmed the conviction and upheld the imposition of the death penalty.

<sup>208</sup> The CPRSC recommended that the state's attorney offer the defense an opportunity to meet prior to the filing of a notice. CPRSC FINAL REPORT, *supra* note 53, at 75.

<sup>209</sup> Appendix A, *infra*, p. 1396–97. The comparable provision in New Jersey provides:

The twenty-one County Prosecutors in the State of New Jersey reaffirm the fact that race, sex, social or economic religion [sic] and/or national origin of a defendant or victim has not in the past, nor will in the future be considered in any fashion to determine whether or not a case warrants capital prosecution. . . .

NEW JERSEY PROSECUTOR'S GUIDELINES FOR DESIGNATION OF HOMICIDE CASES FOR CAPITAL PUNISHMENT (reproduced in Bienen et al., *supra* note 5, at 792).

the practice varies widely across the state, as is shown by the data presented here.<sup>210</sup>

The guidelines mention that Illinois state's attorneys may consult one another or the Office of the Attorney General; however, it is not required that they do so before deciding whether to charge a case as a capital case.<sup>211</sup> Death penalty experts from the state Office of the Attorney General are available to advise on capital cases and to travel to counties to assist with or take over the prosecution of capital cases in the counties.<sup>212</sup> However, the local state's attorney must call in these lawyers from the central Office of the Attorney General.<sup>213</sup> Capital prosecutions, especially in high profile cases, have always been characterized by the exercise of prosecutorial discretion, and political maneuvering has long been accepted and is well documented.<sup>214</sup> One purpose of centralized review is to allow for an objective review of decisions made in a politically charged atmosphere.

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<sup>210</sup> The state's attorneys have very different constituencies. As a matter of practice they may not spend time travelling to other jurisdictions to hear what other state's attorneys are doing.

It is to a certain extent in the eye of the beholder whether a murder case is capital eligible or not. You know, when I would make my trips to Springfield three or four years ago when we were in the midst of the, I don't know, it was pre-commutation and the post-commutation fallout. We were testifying, and coming here, and going to meetings, and there were statements made that were on both sides of it. Well, you know, the prosecutors can prosecute every murder case as a death case, and then the other side. So it is somewhat problematic, and I don't know if there is enough money in the Capital Litigation Trust Fund. That would be a legislative budget issue, to fund the defense of every murder case. I am sure there is not.

CAPITAL PUNISHMENT REFORM STUDY COMM., PUBLIC HEARING NOV. 13, 2006, at 84 (2006), available at [http://www.icjia.state.il.us/public/pdf/dpsrc/PublicHearings/CPRSC\\_Public\\_Hearing\\_Nov\\_13\\_2006\\_transcript.pdf](http://www.icjia.state.il.us/public/pdf/dpsrc/PublicHearings/CPRSC_Public_Hearing_Nov_13_2006_transcript.pdf) (testimony of Robert B. Haida).

<sup>211</sup> Appendix A, *infra* page 1395.

<sup>212</sup> E-mail from Richard D. Schwind, Chief, Criminal Enforcement Division, Illinois Attorney General's Office, Chicago, IL to Leigh Bienen (Jan. 15, 2010) (on file with author). In contrast to this relatively unstructured decisionmaking, at the federal level the Attorney General of the United States requires all ninety-four United States Attorneys to submit for their centralized review the decision to prosecute a case as a capital case. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-10.040, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/) ("In all cases subject to the provisions of this Chapter, the Attorney General will make the final decision about whether to seek the death penalty.").

<sup>213</sup> E-mail from Richard D. Schwind, *supra* note 212.

<sup>214</sup> See, e.g., GILBERT GEIS & LEIGH B. BIENEN, CRIMES OF THE CENTURY: FROM LEOPOLD AND LOEB TO O.J. SIMPSON 102 (1998) (summarizing the case of Bruno Richard Hauptmann).

Even if arbitrary or capricious patterns were shown by individual county differences in charging, as is suggested by the data reported here, there is at present in Illinois no central authority to review or discover such patterns. The record of federal death penalty prosecutions, which can only take place after centralized review, indicates that an institutionalized centralized review process resulted in fewer capital cases being prosecuted.<sup>215</sup>

Even in the absence of prosecutorial misconduct, bias, or undue influence, the decentralized nature of decisionmaking and the fact that the 102 local state's attorneys from very different parts of the state are answerable only to the county electorate makes it inevitable that there will be geographic disparity in the interpretation of the statute. The question becomes, is it constitutionally acceptable for a state capital punishment system to tolerate such significant disparities in practice across a single legal system ostensibly governed by a single set of laws?

Since the Illinois guidelines have only been in effect since 2006, and there is no sanction for not following them, nor any record of whether they have been followed or if they do indeed represent the current or past practice, it is difficult to attribute any direct effect to their passage. Since there has not been any systematic data collection on the notices of intent filed by state's attorneys since 2003, it is impossible to measure whether the anecdotal reports of significant differences in the political policies of individual prosecutors are important or accurate. There is no reason to think that Illinois is different from other state capital punishment systems, however, where such geographic disparities have repeatedly been identified and evaluated, and where they have risen to a level to imply a due process violation.

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<sup>215</sup> A recent summary and review of the patterns in capital cases charging at the federal level indicated that the Attorney General of the United States approved less than 25% of all requests from the United States Attorneys in districts throughout the United States. Federal Death Penalty Resource Counsel, *Recent Summaries of the Results of Federal Capital Prosecutions*, DEATH PENALTY INFORMATION CENTER (Sept. 4, 2010), <http://www.deathpenaltyinfo.org/federal-death-penalty#statutes>. Note, the federal central reviewing process cannot recommend a capital prosecution where none was sought. The federal review can only grant or deny the local prosecutor's request that the case be brought as a capital case.

### III. THE DOCUMENTED COSTS OF THE DEATH PENALTY IN ILLINOIS

#### A. INSTITUTIONAL AND BUREAUCRATIC INCENTIVES TO MAINTAIN THE CURRENT CAPITAL PUNISHMENT SYSTEM

As soon as the notice of intent to seek the death penalty is filed, the state's attorney and the public defender are both immediately eligible to apply to the CLTF for the reimbursement of non-salaried expenses in connection with that case. The typical pattern is that as soon as the case is declared capital the case is usually out of the Public Defender's Office. Nonetheless, state's attorneys, public defenders, and assigned counsel all expend monies from the CLTF prior to trial on capital cases once a notice is filed, as well as on training for staff and other expenses.<sup>216</sup> None of these agencies or actors repay the monies granted for the preparation of a particular capital case to the CLTF if the notice of intent is later withdrawn.<sup>217</sup> This provides a strong economic incentive to file a notice of intent, even if there is no intention to actually prosecute a case to capital trial.<sup>218</sup> On the other hand, postponing the filing of the notice of intent does not hurt the defense if the defense is not required to do any work on the case because the case is going to be transferred to appointed counsel. There is, however, no incentive for the defense to prepare for capital trial or to discover or investigate possible mitigating factors.

There is no significant cost to filing the notice of intent to seek the death penalty; the state's attorney assigned to the case simply files a piece of paper with the clerk of the court upon the approval of the trial court judge in the county. At that moment the CLTF monies are available to be drawn upon by both the state's attorney and the defense, whether private counsel or public defender. In this sense the public defender also "benefits" from the filing of a notice of intent. There is no requirement that a central agency or court review the charge. The Office of the Illinois Attorney General does not receive information that a notice has been filed, unless it receives a request for trial assistance. There is no requirement that the

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<sup>216</sup> See Capital Litigation Trust Fund, Reports of Expenditures (on file with the *Journal of Criminal Law and Criminology*).

<sup>217</sup> At any time prior to the imposition of a capital sentence, the state's attorney may unilaterally withdraw the notice of intent, immediately transforming a capital case into a non-capital case. The withdrawal typically occurs prior to trial, and typically occurs as part of the defendant's acceptance of a sentence of years, or a sentence of life without possibility of parole, pursuant to a plea bargain. See CPRSC FINAL REPORT, *supra* note 53, at 105–08.

<sup>218</sup> CAPITAL PUNISHMENT REFORM STUDY COMMITTEE, FOURTH ANNUAL REPORT, *supra* note 154, at 31–32.



Illinois Supreme Court be notified.<sup>219</sup> There is no systematic record kept of when notices are filed, or where they are filed, or how often they are filed and then dropped.<sup>220</sup>

Every state's attorney's office and every public defender's office need more resources, more attorneys, and more money for training attorneys.<sup>221</sup> Especially when state agencies have been mandated to cut costs across the board, and state employees are taking mandatory furlough days without pay, more funds, from whatever source, are needed for the responsible prosecution and defense of all criminal cases, not just capital cases. The availability of funds from the CLTF creates an economic incentive for a county state's attorney to declare a case capital, since this gives the state's attorney immediate access to previously unavailable funds, and it also

<sup>219</sup> The establishment of a statewide review committee was, however, a principal recommendation of the 2002 Governor's Commission. ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23, at 25 (Recommendation 30).

<sup>220</sup> Given that neither the Illinois Supreme Court nor the Office of the Illinois Attorney General keep centralized records, the only organization attempting to keep a statewide record of the number of notices filed and their disposition is the Illinois Coalition Against the Death Penalty. Their tabulation is made publicly available in their Annual Reports. *Cf.* ILL. COALITION TO ABOLISH THE DEATH PENALTY, ANN. REP. (2003–2010), <http://www.icadp.org/content/annual-reports>. The ICADP reported the following:

**Footnote Table A**

*Pending Capital Cases in Illinois*

Year	Pending Cases in Cook County	Pending Cases Outside of Cook	Resolved Cases in Cook County	Pending Cases Outside of Cook County
2009	154	*	68	*
2007	169	22	55	6
2006	151	16	53	14
2005	170	26	*	*
2004	164	30	*	*
2003	175	24	22	15

Source: Illinois Coalition to Abolish the Death Penalty Annual Reports 2003–2010.

<sup>221</sup> John Byrne, *Public Defender: No Money, No Death Penalty*, CHICAGOBREAKINGNEWS.COM (June 3, 2009, 5:58 PM CST), <http://www.chicagobreakingnews.com/2009/06/public-defender-no-money-no-death-penalty.html>. According to the article:

Cook County Public Defender Abishi Cunningham Jr. said this money shortage means attorneys in his office will file dozens of motions this week asking judges to either bar the state from seeking death or allow public defenders to withdraw from capital cases because the attorneys can no longer mount adequate defenses. The Cook County State's Attorney's Office opposes the move, spokeswoman Sally Daly said. Cost should not be a factor in determining whether a defendant is eligible for capital punishment, she said.

makes funds available to the public defender, or it may remove a troublesome and expensive case from the public defender's office.<sup>222</sup>

The public defender may be off of the case as soon as it is declared capital, and that may be welcome. Or, if the case is declared capital and the public defender represents the defendant, the public defender's office at that point can request monies unavailable before from the CLTF. There is a demonstrated inequity in the fact that appointed counsel are reimbursed for attorney's fees and the public defender is not. On the other hand, by declaring a case capital the state's attorneys may find themselves facing a relatively well-funded private attorney rather than the public defender. Testimony was presented at the public hearings of the CPRSC that some state's attorneys did use the availability of funds from the CLTF strategically, rather than substantively.<sup>223</sup> The decision to file a notice of intent may be influenced by several contradictory economic and strategic incentives.

The defense may also have a bureaucratic and economic incentive not to oppose the state's attorney's motion to declare the case capital as this opens up accessibility to CLTF funds to the defense as well, or may even allow the case to be offloaded from the public defender's staff to outside paid counsel. However, as soon as the notice of intent is withdrawn, access to funds from the CLTF is removed. At that point, the case will probably come back to the public defender, as appointed trial counsel will have no further access to funds from the CLTF. Given these considerations, the strategic timing of when a case is noticed and when the notice is withdrawn become critical, and perhaps inappropriately the subject of plea negotiations.

If the case remains within the public defender's office, the expenses of investigation and of experts can be paid for by the CLTF as long as the case is designated capital, giving the public defender more resources, and an incentive not to oppose the filing of a notice of intent. If the defendant is represented by appointed counsel, paid for by the CLTF, that defense counsel has an economic incentive to postpone the decertification, or the "de-deathing" of the case as long as possible, in order to continue to be paid

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<sup>222</sup> The money from the CLTF is not to be designated for salaries, yet disbursements to the state's attorneys and the public defenders include payments listed as "salaries." In testimony before the CPRSC, a trial judge stated that budgetary concerns often weigh heavily on the state's attorney's decision of whether to seek the death penalty. See CPRSC FINAL REPORT, *supra* note 53, at 97–98.

<sup>223</sup> *Id.*; see also CAPITAL PUNISHMENT REFORM STUDY COMMITTEE, FOURTH ANNUAL REPORT, *supra* note 154, at 33 (summarizing testimony that notices of intent were in some cases withdrawn on the eve of trial, preventing appointed defense attorneys from obtaining fees from the CLTF).

from the CLTF. These bureaucratic and economic incentives are likely to differ radically from county to county, depending upon the budgetary situation of the county and the number of first-degree murders in that county.

While the Illinois CLTF may be a step towards ensuring adequate representation and investigation for capital defense attorneys and may provide needed funds for state's attorneys, the establishment of the CLTF by itself is not enough to result in indigent defendants receiving the best, or even adequate, representation, contrary to the public perception and the intent of the legislature. Indeed the establishment of the CLTF, with its ready access to large amounts of cash reimbursements for attorney's fees and unreviewed expenses, may have created yet another layer of bizarre bureaucratic and economic incentives which further encumber the effective representation of defendants by public defenders and private counsel, because they provide monetary incentives to declare a case capital and to keep it as a capital case as long as possible.<sup>224</sup>

Furthermore, delays in the receipt of disbursements of already-appropriated state funds due to the state budget crisis have become commonplace in Illinois. State's attorneys might have an incentive to declare a case capital soon after funds are appropriated and received, while they might be less likely to declare cases capital after the year's appropriated funds have run out. The incentives would be very different in Cook County than in other counties because of the different way CLTF monies have been appropriated to Cook County compared with other counties. The delay in the receipt of funds from the CLTF might also result in capital cases remaining pending for longer than they would otherwise, so that money can continue to be drawn from the CLTF.<sup>225</sup>

The expenditures from the CLTF outside of Cook County go primarily to costs associated with appointed outside counsel. Outside counsel might

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<sup>224</sup> 725 ILL. COMP. STAT. ANN. 124/15(e) (West 1993 & West Supp. 2010) (Capital Litigation Trust Fund).

"Moneys in the Trust Fund shall be expended only as follows:

(3) To pay the compensation of trial attorneys, *other than public defenders or appellate defenders*, who have been appointed by the court to represent defendants who are charged with capital crimes. . . . *Moneys expended from the Trust Fund shall be in addition to county funding for Public Defenders and State's Attorneys, and shall not be used to supplant or reduce ordinary and customary county funding.*"

*Id.* (emphasis added).

<sup>225</sup> The Illinois Coalition Against the Death Penalty's tabulation of the number of pending capital cases in Cook County suggests that shortage of funds might be one reason for cases being pending for so long, being neither pled nor going to capital trial. See Footnote Table A *supra* note 220.

or might not provide more effective representation for the defense than the public defender in the county.<sup>226</sup> Absent an independent investigation showing to the contrary, there are economic incentives for judges as well when a case is declared capital. The judge decides who of the eligible attorneys in the county will receive substantial disbursements from the CLTF. This may turn out to benefit the judge when collecting campaign funds or in numerous other ways.<sup>227</sup> The court may also be able to offload certain expenses to the CLTF if a case is declared capital.

As discussed previously there are substantial county disparities in the allocation of funds from the CLTF.<sup>228</sup> Outside of Cook County, the counties with the greatest number of murders are not the counties receiving the largest disbursements from the CLTF. The funding of capital cases in Illinois, as elsewhere, has always been a mix of county and state funds, with counties paying some but not all of the salaries of state's attorneys and public defenders. And different counties are in different states of fiscal health. All counties have been hurt by recent across-the-board cuts in the Illinois budget.

For the first nine years of its operation, the administrators of the CLTF had no authority to deny or approve requests for funds. The trial court judge alone approved the application of funds. There were some restrictions on the use of the funds, such as the general restriction on using funds for the CLTF to hire county staff, but no centralized state agency made any review of these substantial expenditures of tens of millions of dollars. As of 2010, an amendment to the CLTF statute mandates that trial court judges require appointed defense lawyers to provide a proposed litigation budget under seal. The amendment further provides that no

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<sup>226</sup> Private counsel must be capital-crimes certified. ILL. SUP. CT. R. 714. The quality of private counsel nonetheless may be uneven. The relative competence of public defenders and private counsel can only be evaluated by seeing how many persons sentenced to death raise incompetence of counsel on their appeals, and in how many capital cases appellate courts have granted that claim in public defender cases versus in private counsel cases, in the state and federal courts. Those appeals take years, and often involve changes in representation. Anecdotal evidence suggests that public defenders may provide better representation due to their experience in defending capital cases. For example, in *Marshall*, the Third Circuit overturned the defendant's death sentence on the basis of the incompetence of his private counsel at the penalty phase of his initial trial. The private counsel called no witnesses at penalty phase. See *Marshall v. Cathel*, 428 F.3d 452, 474 (3d Cir. 2005). It is unlikely that a public defender at the time would have made that mistake.

<sup>227</sup> The state regulation of public officials, including judges, state's attorneys, and others, has recently been the subject of much attention in the aftermath of the trial of former Illinois Governor Rod Blagojevich. However, an indicted state's attorney was recently allowed to continue his job. See Robert McCoppin & Amanda Marrazzo, *Indicted State's Attorney to Fight*, CHI. TRIB., Sept. 14, 2010, at A7.

<sup>228</sup> See *supra* Part II.C.

payment will be made from the CLTF without a properly itemized and detailed bill examined ex parte and approved by both the trial and presiding court trial judge.<sup>229</sup> Under this legislation, for the first time in nine years the state treasurer is authorized to question or conduct an independent review of applications for payments from the fund.<sup>230</sup> This review and approval, however, is not required for the disbursement of funds to state's attorneys.

The CLTF has helped defense attorneys provide adequate defense in capital cases, and has substantially benefitted state's attorneys and the attorney general, if benefits are measured by the fact all those agencies received money they would have not had otherwise for the prosecution and defense of Illinois capital cases. In fact, it is unclear whether the availability of more than \$100 million from the CLTF over nine years has improved the quality of counsel. All that is clear is that this money has been spent.

#### B. THE HIGH COST OF CAPITAL PROSECUTIONS

It is well established by national research and systematic, detailed studies in other states that capital cases cost more to prosecute and defend than non-capital cases.<sup>231</sup> Capital cases are particularly costly for defense counsel because it is the ethical obligation of defense counsel to present any and all mitigating evidence that might conceivably influence a jury, or even a single juror, not to impose the death penalty.<sup>232</sup> If a defendant is

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<sup>229</sup> 725 ILL. COMP. STAT. ANN. 124/10(a) (West 1993 & West Supp. 2010).

<sup>230</sup> 725 ILL. COMP. STAT. ANN. 124/10(a)(b). This legislation was passed after publicity concerning payments of over \$1 million to a court appointed defense attorney from out of state in the Cecil Sutherland case, tried in Jefferson County in 2006. See CAPITAL PUNISHMENT REFORM STUDY COMM., SECOND ANN. REP. 9 (2006); CAPITAL PUNISHMENT REFORM STUDY COMM., THIRD ANN. REP. 24–25 (2007). The new legislation provides that the state treasurer may object to submitted expenses as unreasonable, unnecessary, or inappropriate. The appointed lawyer then has seven days to respond, and the trial court must promptly rule on the treasurer's objections. The CPRSC endorsed this provision. CPRSC FINAL REPORT, *supra* note 53, at 111.

<sup>231</sup> See *infra* Part IV (discussing cost studies). For an analysis of the differing costs of the prosecution of capital cases and non-capital murders, see Robert M. Bohm, *The Economic Costs of Capital Punishment: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 573–94 (James R. Acker, Robert M. Bohm, & Charles S. Lanier, eds. 1998). This article provides specific dollar figures for the five stages of a capital prosecution and future costs of appellate and postconviction procedures, concluding that capital punishment systems in the United States are *always* more expensive than non-capital punishment systems. *Id.* at 592.

<sup>232</sup> AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 104–06 (2003), *available at*

sentenced to death, defense counsel's every action at trial will be scrutinized during subsequent state and federal appellate proceedings.<sup>233</sup> If subsequent investigation uncovers evidence that might have persuaded the jury not to impose death, the failure to investigate and present such evidence may result in a reversal of the capital sentence on grounds of incompetence of counsel.<sup>234</sup> The United States Supreme Court found this standard appropriate based on the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases,<sup>235</sup> even though these guidelines may be aspirational as a matter of practice.<sup>236</sup> This high standard makes the preparation for the penalty phase of a capital trial particularly compelling, complicated, expensive, and burdensome for the defense.<sup>237</sup> It also results in both the defense and the

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<http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf>. [hereinafter ABA GUIDELINES].

<sup>233</sup> Those sentenced to death generally acquire new counsel after being convicted. Additional funds may be available through the federal public defender system if the procedural standards for habeas corpus have been met. This may allow for a complete investigation of mitigating factors to be conducted for the first time, years after the trial.

<sup>234</sup> See *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). The public discussion typically focuses on public defenders; however, there are noteworthy cases where private counsel has been found incompetent after failing to conduct investigation into mitigation. See, e.g., *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005).

<sup>235</sup> ABA GUIDELINES, *supra* note 232.

<sup>236</sup> Many of the attorneys appointed to represent defendants in capital cases do not even live up to the standards that any lawyer would be expected to meet:

Before dismissing the stories of the sleeping and drunk lawyers in capital cases as freak occurrences, consider that in Illinois, thirty-three defendants who were sentenced to death were represented at trial by an attorney who had once been, or was later, disbarred or suspended. One of these lawyers had been the subject of seventy-eight disciplinary complaints. Another had been disbarred but was later reinstated despite serious issues regarding his emotional stability and drinking. He soon proceeded to represent four men who landed on death row. Shortly thereafter he was disbarred again. Among the other attorneys who have been appointed in Illinois to represent indigent defendants in capital cases are "a tax lawyer who had never before tried a case, an attorney just two years out of law school" who was juggling his capital case with one hundred other criminal cases, and "another attorney just ten days off a suspension for incompetence and dishonesty" exhibited in six separate cases.

*Marshall*, *supra* note 47, at 958–59.

<sup>237</sup> A competent, thorough investigation into the defendant's mental health and social history often requires travel to other jurisdictions and hiring of death penalty investigation experts, persons experienced and trained in finding and gaining access to school and health records, finding family members, and investigating circumstances and events which occurred decades ago which the family and others may be reluctant to discuss. There may no longer be living family members available as potential witnesses. Evidence of childhood neglect, abuse, abandonment and the brutality of family members to children or others is not easily discovered or authenticated, and it may take years to identify and reliably document. Sometimes, reliable records will only be found in institutions or schools. In addition, capital defendants are often uncooperative, or unable to articulate or recall aspects of their family or

prosecution seeking expert testimony from mitigation specialists to support the verdict at penalty phase. If a death sentence is imposed the performance of both the defense and prosecution will be reviewed carefully by the appellate courts.<sup>238</sup>

High visibility capital trials are the cases where trial errors due to prosecutorial misconduct are most likely to occur.<sup>239</sup> When prosecutors aggressively pursue the death penalty, as in cases involving false confessions, often there is public pressure for a speedy conviction, and such public pressures may lead to errors, prosecutorial misconduct, and the imposition of guilty verdicts for defendants who are wrongfully prosecuted.<sup>240</sup> The verdicts of the wrongfully convicted add another layer to the cost calculation.

The cases of Rolando Cruz and Alejandro Hernandez provide an example of a prosecutor becoming so locked into a commitment to a capital prosecution and a death sentence that no contradictory evidence could change his mind or derail that prosecution.<sup>241</sup> In these cases, the defendants

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institutional history which might be persuasive to a capital jury. Head injuries are often important for the establishment of disabilities and incompetence, and the source of such injuries may be decades old. Tomes, *supra* note 205, at 368–72.

<sup>238</sup> See Capital Litigation Trial Fund, Reports of Expenditures (on file with the *Journal of Criminal Law and Criminology*).

<sup>239</sup> Gershowitz, *supra* note 187, at 311.

<sup>240</sup> Public pressure in high-profile cases also can lead to police misconduct. *Burge Found Guilty*, CHI. TRIB., June 28, 2010, at A1 (describing torture of criminal defendants by former Chicago police commander, Jon Burge, which resulted in false confessions and wrongful convictions); see also Warden, *supra* note 9, at 413–14 (discussing Cruz and Hernandez case); TUROW, *supra* note 83, at 28–46. There is also public pressure on judges to be “tough” on crime:

Why is the death penalty such a salient issue for judges? The media play an important role both in creating the culture in which being tough on crime is all, and in reducing judicial races and even judicial decision to simplistic sound bites. Judges who seek to flout conventional wisdom and uphold procedural safeguards are pilloried. The media, as we’ve seen, are not often inclined to convey procedural complexities. Even the most serious errors tend to be reduced to sound bites that translate to “he let him off on a technicality because he is soft on crime.” In the particular context of judicial races, judges are placed in the position of needing to create those very sound bites, and there is no substitute for touting one’s own demonstrated commitment to the death penalty, or attacking that of one’s opponent, as a quick and easy way to garner media attention and prove that one is not soft on crime.

Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 596 (2004) (citations omitted).

<sup>241</sup> Cruz and Hernandez were falsely convicted of murdering Jeanine Nicarico. *People v. Cruz*, 643 N.E.2d 636, 639 (Ill. 1994). Every time the death sentence was overturned, the prosecutor was committed to continuing the prosecution, even after additional evidence identified Brian Dugan as the actual perpetrator. Eric Zorn, *DuPage Got It Wrong, Wrong, Wrong*, CHI. TRIB., Nov. 13, 2009, at C21:

were wrongfully convicted multiple times based on unreliable evidence including a statement that was not even a confession.<sup>242</sup> Yet the DuPage County state's attorneys who tried these cases were able to persuade multiple juries to convict the wrong defendants and sentence them to death. In such cases, the cost of trial and appeal is multiplied as the case goes to capital trial, is appealed, is reversed, goes to capital trial again, results in another death sentence being imposed, is appealed, is reversed, and is brought to capital trial again. Along the way, the appeals become more technical, more controversial, and more costly. While these appeals are proceeding, time passes, and the taxpayers pay for the costs of the trials and retrials and appeals, and for the defendant to sit on death row consulting with attorneys at state expense. Meanwhile the actual murderer is out committing other crimes. If the justification for the imposition of the death penalty is deterrence or retribution, then these cases teach us that deterrence and retribution are neither swift nor sure. This wasteful charade is no solace for victims or the public.

### C. THE PRICE OF WRONGFUL CONVICTIONS

A wrongful conviction for capital murder is like a doctor amputating the wrong leg: there is no positive benefit to society, to the victim of the crime, to the wrongfully prosecuted individual, or to the credibility and integrity of the professionals involved and their institutions. Sometimes the wrongful conviction involves malice and deliberate wrongdoing, such as with the police torture cases or the cases where exonerating evidence was withheld or ignored deliberately by prosecutors, as in *Cruz*.<sup>243</sup> These cases involve prosecutorial misconduct at its worst, and certainly a violation of the ABA's recommended ethical standards for prosecutors.<sup>244</sup> Yet few, if any, sanctions have been meted out to state's attorneys in cases of wrongful convictions. The stubborn, overly aggressive prosecutions of innocent defendants in Illinois resulted in the exoneration of ten persons on death row by January 2003, the time of the Ryan commutations. Monetary compensation never will make those defendants whole, nor will it compensate the victims' families for undergoing unnecessary trials and retrials. Some of those individual defendants can and have recovered some

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Dugan's public defender told DuPage County authorities that fact in 1985 after Dugan was arrested and confessed to a strikingly similar rape and murder in LaSalle County. But DuPage didn't get it. They'd already put Rolando Cruz and Alex Hernandez onto death row for the crime, and so dismissed Dugan as a liar.

<sup>242</sup> Warden, *supra* note 9, at 381–82.

<sup>243</sup> See Zorn, *supra* note 241, at C21.

<sup>244</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8, available at [http://www.abanet.org/cpr/mrpc/rule\\_3\\_8.html](http://www.abanet.org/cpr/mrpc/rule_3_8.html) (Special Responsibilities of a Prosecutor).



**Table 7**

*State Expenditures on Wrongful Convictions in Illinois Capital Cases, County and Date of Conviction, Court of Claims Awards, Civil Rights Settlements, as of 2010*<sup>245</sup>

Petitioner	County and Year of Conviction <sup>246</sup>	Court of Claims Award and Year <sup>247</sup>	Legal Fees Accrued <sup>248</sup>	Amount and Year of Settlement	Total State Payments to Petitioner and Counsel
	(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5) (Col. 2+3+4)
Burrows, Joseph	Iroquois [1989]	None	N/A	\$100,000 [1997]	\$100,000
Cobb, Perry	Cook [1979]	\$120,300 [2001]	N/A	None	\$120,300
Cruz, Rolando	DuPage [1985]	\$120,300 [2003]	\$1,960,743	\$2,892,564 [2000]	\$4,973,607
Fields, Nathson	Cook [1986]	\$199,150 [2010]	N/A	None	\$199,150
Gauger, Gary	McHenry [1994]	\$60,150 [2004]	\$2,197,391	None	\$2,257,541
Hernandez, Alejandro	DuPage [1985]	None	\$377,864	\$1,366,085 [2000]	\$1,743,949
Hobley, Madison	Cook [1990]	\$161,005 [2004]	\$3,119,228	\$7,500,000 [2008/2009]	\$10,780,233

<sup>245</sup> This does not include all capital cases, or all wrongful convictions, during the years 1987–2010, but only those for whom final judgments or settlements have been reached. Pending cases, as of August 1, 2010 are not included. Some cases remain under investigation.

<sup>246</sup> Column 1 displays the year that the first death sentence was imposed. In the case of Cruz, for example, a death sentence was imposed in 1985 and again in 1990. Alejandro Hernandez, Cruz's co-defendant, was sentenced to death in 1985 and again in 1991.

<sup>247</sup> There must be a court certified finding of innocence of the offense for which the petitioner was convicted before the court of claims can issue an award. Section 505/8 (c) of the Illinois Court of Claims Act. The amount received is a statutory amount based upon the number of days wrongfully imprisoned.

<sup>248</sup> Column 3 displays the legal fees paid by defendant cities, counties, or both to defend against federal civil rights suits brought by exonerated persons as plaintiffs against the cities, counties, or both, and employees indemnified by them.

**Table 7**  
(Continued)

Petitioner	County and Year of Conviction <sup>246</sup>	Court of Claims Award and Year <sup>247</sup>	Legal Fees Accrued <sup>248</sup>	Amount and Year of Settlement	Total State Payments to Petitioner and Counsel
	(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5) (Col. 2+3+4)
	Column 1	Column 2	Column 3	Column 4	Column 5
Howard, Stanley	Cook [1987]	\$161,005 [2007]	\$767,466	\$800,000 [2008]	\$1,728,471
Jimerson, Verneal	Cook [1985]	\$120,300 [1997]	\$1,054,061	\$8,800,000 [1999]	\$9,974,361
Jones, Ronald	Cook [1989]	\$125,036 [2001]	\$11,126	\$2,200,000 [2003]	\$2,236,162
Kitchen, Ronald	Cook [1988]	\$199,150 [2010]	\$23,118	None	\$222,268
Lawson, Carl	St. Clair [1990]	\$120,300 [2003]	N/A	None	\$120,300
Orange, Leroy	Cook [1985]	\$161,005 [2004]	\$994,257	\$5,500,000 [2008]	\$6,655,262
Patterson, Aaron	Cook [1989]	\$161,005 [2003]	\$2,663,761	\$5,000,000 [2008]	\$7,824,766
Porter, Anthony	Cook [1983]	\$145,875 [2000]	\$661,027	None	\$806,902
Smith, Steven	Cook [1986]	\$125,036 [2003]	\$288,328	None	\$413,364
Tillis, Darby	Cook [1979]	\$120,300 [2001]	N/A	None	\$120,300
Williams, Dennis	Cook [1979]	\$140,350 [1998]	\$1,054,061	\$12,800,000 [1999]	\$13,994,411
Totals:		\$2,240,267	\$15,172,431	\$46,958,649	\$64,371,347

**Source:** Freedom of Information Act requests by the Center on Wrongful Convictions and other public information, on file with Rob Warden, Director of the Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern University.

recompense from the city or county that prosecuted them as well as from the State of Illinois. This money is another item in the cost of capital punishment in Illinois.

Table 7 is an omnibus table for state expenditures for wrongful convictions.<sup>249</sup> The total of more than \$64 million for all cases includes some, but not all, legal payments by counties and the City of Chicago for their defense in these cases. The total does not include, for example, the 2010 civil rights case against Jon Burge, the police officer in charge of the Area 2 police station in Chicago where the Ford Heights Four and others were tortured and then signed coerced confessions.<sup>250</sup> Nor does it include the more than \$10 million in legal fees the City of Chicago has paid to defend Burge and other detectives.<sup>251</sup>

The Court of Claims provides statutory awards representing a particular dollar amount for each day the person was wrongfully imprisoned. The statute is not new, however most of the claims in Illinois were awarded after 2000, perhaps because of the greater availability of counsel after the discovery of so many wrongful convictions.<sup>252</sup> Awards in civil cases are likely to be larger if the defendant was sentenced to death. The statute for federal prisoners explicitly provides for a larger award if the defendant has been sentenced to death.<sup>253</sup>

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<sup>249</sup> The source for figures in individual cases is Rob Warden, Director of the Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern University School of Law (on file with the Center for Wrongful Convictions); *see also* CENTER ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/cwc/>.

<sup>250</sup> *See* Marshall, *supra* note 47, at 967. Marshall describes the large sums paid by Cook County in cases involving police and prosecutorial misconduct:

Ultimately, Cook County paid the men [in the Ford Heights four case] thirty-six million dollars to settle their civil rights actions. . . . Beyond these payouts, Cook County spent well over two million dollars in defending the civil rights lawsuits. In addition, the State of Illinois has paid the five defendants approximately \$600,000 under its compensation statute for the wrongly convicted. In addition to these costs, the State also incurred the needless expense of imprisoning these innocent defendants for seventy-six years collectively. At the current rate of approximately \$22,000 per year to incarcerate an inmate, these seventy-six years cost Illinois taxpayers another \$1.7 million in wasted resources. Thus, without even trying to assess the costs of the multiple trials and appeals involving these innocent individuals, the tab for the errors in this one case come out to over forty million dollars in direct expenditures (with one major lawsuit still pending). . . .

*Id.*

<sup>251</sup> *See* Matthew Walberg, *Ex-Inmate Sues Daley, Burge; Lawsuit: Mayor Did Nothing to Stop Torture*, CHI. TRIB., July 2, 2010, at C8.

<sup>252</sup> *Infra* Table 7. *See* 705 ILL. COMP. STAT. ANN. 505/8(c) (West 1993 & West Supp. 2010). The Ford Heights Four award of \$36 million was a record-breaking amount at the time.

<sup>253</sup> 28 U.S.C. § 2513(e) (2006).

The costs and price of wrongful convictions can be measured in several ways. First, there is the cost of the wrongful prosecution, the trial, and the appeals themselves—all money that has been wasted on the prosecution of an innocent person while the actual killer was not being sought or prosecuted. The amount of wasted money amplifies with each retrial and re-prosecution of the wrongfully convicted person, as well as with the successive appeals and collateral reviews of the same case. Then, there are additional specific costs to the state associated with state payments for the wrongful convictions. Additionally, there are the relatively smaller Court of Claims payments. A number of the wrongful conviction cases resulted in judgments amounting to millions of dollars paid for by the county, the City of Chicago, and the State of Illinois.

Table 7 shows the particularities of the costs of some of those wrongful convictions that resulted in death sentences in Illinois. These costs are not trivial, and the Illinois taxpayers in one form or another pay for them all. Finally, there is the immeasurable cost to society of sentencing an innocent person to death. Wrongful convictions not only allow the real murderer to remain at large to commit other crimes, thus perverting norms of civil protection, but they also erode public confidence in the criminal justice system. Victims' families, as well as defendants and their families, are needlessly subjected to the rigors of a capital trial. The total of over \$64 million to date will only increase.

What is exceptional in Illinois was not the number of wrongful convictions, but rather the long-term commitment of Illinois lawyers, students, journalists and others willing and able to spend years on the laborious, often thankless task of uncovering evidence of innocence and prosecutorial misconduct, and to then pursue these cases until the death sentence is set aside.<sup>254</sup> Newspaper staff and persistent journalists frequently uncovered critical factual evidence of wrongful convictions, thereby providing attorneys with the information needed to file civil rights suits and to bring actions against those responsible.<sup>255</sup> The role of college students, law students, and faculty members from many institutions over a

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<sup>254</sup> The stories of these cases have been fully chronicled elsewhere. See generally Warden, *supra* note 9; Marshall, *supra* note 19.

<sup>255</sup> The roles of the *Chicago Tribune*, the *Chicago Reader*, and the *Chicago Lawyer* in uncovering the wrongful convictions in Illinois have been pivotal. Not only did the *Tribune* conduct its own research and maintain a database of homicides and capital prosecutions in Illinois, but it published a series of articles which were critical in educating the general public and galvanizing the legal community. See Ken Armstrong & Maurice Posseley, *Trial and Error; How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 14, 1999, at N1; John Conroy, *House of Screams*, CHI. READER (Jan. 26, 1990), <http://www.chicagoreader.com/chicago/house-of-screams/Content?oid=875107>; see also articles cited in Warden, *supra* note 9, at 399 n.77.

long period of time was also extensive. There is little, however, in the chronicles of these cases to provide much faith in the accuracy or reliability of the Illinois capital punishment system. Nor is there much reason to think that Illinois is unique in this respect.

#### IV. COST STUDIES AND CAPITAL PUNISHMENT REVIEWS IN OTHER STATES

On October 23, 2009, the Council of the American Law Institute voted overwhelmingly to withdraw § 210.6, the death penalty provisions of the Model Penal Code, due to “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”<sup>256</sup> The Council’s decision was based on a report prepared at the director’s request by Professors Carol Steiker and Jordan Steiker, a report which sets forth in detail the major reasons why the American Law Institute no longer stands behind its own influential statutory formulation of provisions for the principled imposition of the death sentence:

[M]any thoughtful and knowledgeable individuals doubt whether the capital-punishment regimes in place in three-fourths of the states, or in any form likely to be implemented in the near future, meet or are likely ever to meet basic concerns of fairness in process and outcome. These include (a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) *the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate*; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where—even though nearly all state judges perform their tasks

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<sup>256</sup> Message from Lance Liebman, Director, American Law Institute (Oct. 23, 2009), [http://www.ali.org/\\_news/10232009.htm](http://www.ali.org/_news/10232009.htm). The American Law Institute’s Model Penal Code established the theoretical framework and legal architecture to address the constitutional problems with the application of capital punishment statutes identified by the United States Supreme Court. In 1976, the Supreme Court relied explicitly upon the Model Penal Code to rule that Georgia’s new death penalty statute addressed the constitutional infirmities identified in *Furman v. Georgia*. *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion). The states were eager to reenact capital punishment, and state legislatures quickly adopted statutes incorporating the Model Penal Code’s structure of statutory aggravating and mitigating circumstances. See Bienen, *supra* note 2, at 139.

conscientiously—candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues . . . .<sup>257</sup>

The ALI report further notes that there is at present “widespread reflection” about the American capital punishment system, and that its use has declined significantly.<sup>258</sup>

One manifestation of this widespread reflection is the decision by many states to create commissions to study the operation of their death penalty system after becoming aware of systemic inequities or discovering innocent persons on death row. These commissions typically make recommendations to the state legislature or the state governor.<sup>259</sup> In the three decades since *Gregg* allowed for the reestablishment of capital punishment, the reenacting states have had generations of experience with the impact of capital punishment on state legal institutions. The current economic situation and the fiscal crises in many states have encouraged states to investigate the costs and benefits of capital punishment as well.<sup>260</sup> It has been proven repeatedly that capital cases cost substantially more than sentencing a defendant to life in prison.<sup>261</sup> State money is needed to pay for capital trials and adjudication, for extended pretrial incarceration and incarceration in special facilities for capital defendants, for the longer trials and protracted appeals of capital cases, and for the costs of the executions themselves. Further state money is needed for the costs of defending legal challenges to all aspects of the prosecution and trial, as well as extensive legal challenges to the method and procedures concerning executions themselves and the conditions of confinement on death row.

The methodology for conducting a cost and implementation study is now well settled: a statewide study must examine all cases of first-degree murder or potentially death-eligible murder, and those cases must be tracked through the entire state capital punishment system for the results to be credible.<sup>262</sup> The identification of murders and death-eligible murders must be objective and systematic, and the study must disclose its data

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<sup>257</sup> STEIKER & STEIKER, *supra* note 1, at 5. (emphasis added).

<sup>258</sup> *Id.* at 2–3.

<sup>259</sup> See, e.g., CALIFORNIA REPORT, *supra* note 33. The 2002 Illinois Governor's Commission, with its extensive report, was among the first and most comprehensive of such Commissions. See ILL. 2002 GOVERNOR'S COMM'N REPORT, *supra* note 23.

<sup>260</sup> See, e.g., *infra* Part IV.C (discussing CALIFORNIA REPORT).

<sup>261</sup> CALIFORNIA REPORT, *supra* note 33, at 146; Cook, *supra* note 34, at 524.

<sup>262</sup> For a detailed report on the capital punishment cost studies to date and how a credible study must be structured, see David Baldus et. al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 153, 153–93 (Charles S. Lanier et al., eds., 2009).

collection methodology and methods of analysis. The state studies presented here, in order to compare their findings with patterns seen in Illinois, take somewhat different methodological approaches; however, they are all rigorous, exemplary, and, most important, transparent in the disclosure of their methodology, data collection, identification of cases and in the empirical support for their findings and recommendation. These are some, but not all, of the leading case studies of state capital punishment systems and their costs.<sup>263</sup>

#### A. THE NORTH CAROLINA ECONOMETRIC STUDY

A recent detailed study of the cost of the death penalty in a single state is the econometric analysis of the cost of the North Carolina death penalty system during the fiscal years 2007 and 2008.<sup>264</sup> This study uses traditional econometric analytic techniques to compare the actual incurred costs of the death penalty over two years with what *would have been spent* had the death penalty not been the law during that time.<sup>265</sup>

North Carolina has many similarities to Illinois. Both states reenacted the death penalty in 1977 and both have seen a sharp decline in the number of death sentences imposed over the past few years.<sup>266</sup> North Carolina and Illinois both have around 100 counties, and in both states the district attorney in each county has the independent authority to declare a case capital.<sup>267</sup> In 2001, a special Office of Indigent Defense Services was created in North Carolina to provide a new source of funds for the defense of capital cases.<sup>268</sup> North Carolina has not executed anyone since 2006 due

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<sup>263</sup> For a brief overview of cost studies performed in particular states and nationally, see CPRSC FINAL REPORT, *supra* note 53, at app. 10.

<sup>264</sup> Cook, *supra* note 34.

<sup>265</sup> *Id.* at 499. The study in North Carolina describes the research design used in detail. The empirical analysis was based upon a data set of 1,034 indictments for first-degree, potentially capital, murder cases during the study period, fiscal years 2005 and 2006. *Id.* at 513 fig.3. The actual disposition at trial for these cases was as follows: 174 individuals were convicted of first-degree murder, irrespective of whether the case was declared capital; 276 cases resulted in a dismissal of the murder charge or a jury verdict of not guilty of murder; 274 cases (26.5%) were designated capital; 58 cases went to capital trial and 9 death sentences were imposed in 49 penalty phase trials; 2 defendants received a death sentence after pleading guilty. The most common outcome in the 1,024 cases was a conviction of second-degree murder. Approximately five times more cases were declared capital (274) than actually went to trial as capital cases (54) and roughly one in twenty-five cases designated capital resulted in the imposition of a death sentence (11 out of 276). *Id.*

<sup>266</sup> *Id.* at 504.

<sup>267</sup> *Id.* at 524.

<sup>268</sup> *Id.* at 503. Note, this fund, unlike the CLTF, was created to provide state funds only to defense attorneys in capital cases, not to provide funds to prosecutors.

to litigation challenging the use of lethal injection as a method of execution.<sup>269</sup>

The North Carolina study found that the state would have saved almost \$11 million in each of the examined years had the death penalty been abolished prior to the two years under review.<sup>270</sup> Much of the saving would have come in the form of reduced expenditures for specific legal requirements in the prosecution of a capital case. For example, in an ordinary murder prosecution, there is no requirement for the selection of a death-qualified jury, which costs the state extra days in voir dire and in preparations.<sup>271</sup> Without the possibility of a capital trial, there is no need for state's attorneys or defense attorneys to prepare for a penalty-phase trial.

The North Carolina study documented the extra costs to the defense of prosecuting a case capitally.<sup>272</sup> These itemized expenditures did not count the extra cost to the prosecution of proceeding capitally. In addition, there are other system costs for the defense besides the direct payments to individual defense attorneys.<sup>273</sup> The study also found that prisons would

<sup>269</sup> *Id.* at 504. See generally Symposium, *The Lethal Injection Debate*, *supra* note 27.

<sup>270</sup> Cook, *supra* note 34, at 525.

<sup>271</sup> *Id.* at 520:

An additional savings from abolishing the death penalty would be a reduction in jury costs. The thirty-two capital cases concluding in the two-year window (FY 2005 and 2006) lasted an average of 11.7 days longer than noncapital trials of cases that had once proceeded capitally. Given that North Carolina pays jurors \$40 per day after the first five days, I estimate \$224,640 of extra juror payments. That figure does not include the extra payments for the jury pool during *voir dire*, or the reimbursement for parking and meals.

<sup>272</sup> *Id.* at 511. Extra defense costs for capital cases are by far the greatest extra expense for the state. This is because of extra "super due process" protections put in place for defendants by state law and constitutional precedent. *Id.*

<sup>273</sup> *Id.* at 519–520. Cook explains:

In addition to expenditures on private attorneys who are appointed by IDS [Indigent Defense Services] to represent defendants in capital cases, the IDS Office of the Capital Defender has a staff of full-time attorneys and investigators who assist with capital cases and other murder cases around the state. The budget for this office totaled \$3,296,795 for the two years under consideration. IDS officials estimated that 23.8% of the office's budget currently goes to noncapital murder cases . . . [Additionally,] the Center for Death Penalty Litigation (CDPL) helps recruit and train defense attorneys for capital case representation, and consults on specific cases. While CDPL is a private nonprofit agency, it receives part of its budget from the state, amounting to \$1,187,482 during the two years. In sum, the state's extra expenditures on defense in trial phase of capital cases amounted to the following:

\$9,560,181 'Extra' payments to private attorneys and other fees

2,432,722 IDS Office of the Capital Defender

1,187,482 Center for Death Penalty Litigation

\$13,180,385 Total, two years [for FY2005 and 2006].

*Id.* at 519–20.



save a substantial amount per year if those on death row were reassigned to incarceration with the non-death populations.<sup>274</sup>

The study distinguishes between “cash costs” and “in-kind costs.” Cash costs are additional documented dollars that must be spent immediately out of the state budget to prosecute capital cases.<sup>275</sup> In-kind costs include the allocation of existing staff and budgetary resources, for example staff salaries or office overhead, to a particular death-eligible murder case, resources that otherwise would have been available for other criminal cases within the same criminal justice agency.<sup>276</sup>

The North Carolina Study concludes: “If the death penalty had been abolished on July 1, 2004, it is likely that the \$13 million in extra expenditures on defense in capital cases would have been available to fund other activities of state government or to be returned to taxpayers over the subsequent two years.”<sup>277</sup> Note, this is only the savings of costs incurred by the defense. This represents savings of cash costs only, not in-kind costs. The study assumes that freed-up state resources in courts, prosecutors’ offices, and the offices of public defenders would be devoted to other cases, rather than result in an overall reduction in state budgets for attorney and court costs, or a decline in staff at correctional institutions.<sup>278</sup>

As in Illinois, North Carolina prosecutors can use the possibility of a capital trial and a death sentence as a bargaining tool, allowing prosecutors to extract pleas for longer sentences if a case is declared capital. The North

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<sup>274</sup> *Id.* at 524 (finding a total savings of \$169,617 in prison costs over the two years studied).

<sup>275</sup> *Id.* at 514. The “cash cost” includes such items as payments by Indigent Defense Services (IDS) for private attorneys retained to represent indigent defendants in capital cases, payments by IDS for expert witnesses on behalf of the defense, and payments to jurors for cases that go to capital trial. For each of these cost items, there is a reasonable presumption that if the expenditures for any one case were reduced, the overall state expenditures on criminal justice as a whole would be reduced correspondingly. For example, if IDS is not required to appoint a second defense attorney for a murder defendant (because the district attorney decides to proceed non-capitally), and as a result avoids paying \$50,000 in attorney’s fees, that \$50,000 would *not* be reallocated to another IDS case, but rather could be used for other state government programs (education, Medicaid) or returned to the taxpayers in the form of lower tax rates. *Id.*

<sup>276</sup> Cook, *supra* note 34, at 515. Examples of in-kind costs include “time spent by attorneys and other staff in the district attorney’s office, and the use of courtrooms, judges’ time, and all the associated personnel required for hearings and trial days” in capital cases. *Id.* at 515–16.

<sup>277</sup> *Id.* at 520.

<sup>278</sup> In the face of a proposed abolition of capital punishment, state employees in a variety of institutions might well be worried about losing jobs or having their institutional budgets cut. This study found that North Carolina could realize significant savings without cutting a single state job. *See id.* at 505.

Carolina Study notes that the actual length of sentences for murder imposed might be affected by the absence of the possibility of a death penalty as a tool for the prosecutor in plea bargaining.<sup>279</sup> However, the study found that “[r]emarkably, noncapital cases that went to trial had lower defense expenditures . . . than capital cases that were disposed of by pleas.”<sup>280</sup> This implies that the trials themselves are not high in cost; rather the designation of a prosecution as capital increases costs for both the prosecution and the defense.

#### B. THE MARYLAND STUDY

The cost of capital punishment in Maryland was analyzed in detail in a 2008 Report by the Urban Institute’s Justice Policy Center.<sup>281</sup> The Maryland Study measured the differential costs of a death-eligible case according to each stage of the capital prosecution, analyzing all death-eligible cases since the reenactment of the death penalty in 1978.<sup>282</sup> This study uses an individualized, “bottom-up” approach to tabulate actual costs at the trial level.<sup>283</sup> In other words, the Maryland study looked at the cost of an individual case starting at its inception. Notice, however, that Maryland’s relatively complete “bottom-up approach” does not include the cost of retrials after reversal.<sup>284</sup> Currently, capital punishment is on hold in Maryland pending resolution of the challenge to its lethal injections procedures.<sup>285</sup>

The Maryland study found the cost of an average death-eligible case that went to trial in which prosecutors did *not* seek death was \$1.1 million,

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<sup>279</sup> *Id.* at 510–11; *see supra* Part III.A.

<sup>280</sup> Cook, *supra* note 34, at 517.

<sup>281</sup> *See* JOHN ROMAN ET AL., URBAN INSTITUTE, THE COST OF THE DEATH PENALTY IN MARYLAND (2008), available at [http://www.urban.org/UploadedPDF/411625\\_md\\_death\\_penalty.pdf](http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf).

<sup>282</sup> *Id.* at 4.

<sup>283</sup> This “bottom-up” approach is more complete than the more common “top-down” analysis, which assumes that all cases cost exactly the same. *See id.* at 5 for a summary of prior studies and description of these two types of analysis. Several studies do not use random or other sampling procedures to estimate different costs among different cases but rather estimate the cost of a typical case and multiply that by the number of death sentences imposed. *Id.* at 6 tbl.1. This is a less precise estimate of the costs of a capital trial.

<sup>284</sup> *Id.* The study also did not examine “the costs of cases where the death notice did not ‘stick’ and was not prosecuted as a death notice case at trial.” *Id.* at 31.

<sup>285</sup> Scott Calvert & Kate Smith, *In Secret Move, Death Row Inmates Sent to W. Md.*, BALTIMORE SUN, June 26, 2010, at 1A (“Maryland’s death penalty has been on hold since the Court of Appeals ruled in December 2006 that executions could not continue until a regulatory committee of the legislature adopted lethal injection protocols. That hasn’t happened, creating a de facto moratorium on state executions.”); *see also* John Wagner, *Ehrlich Takes Issue with Death Penalty Delays*, WASH. POST, May 8, 2010, at B1.

including \$870,000 in costs of imprisonment over the projected life span of the defendant, and \$250,000 for the cost of trial adjudication.<sup>286</sup> A death-eligible case that went to trial as a capital case, but in which the death penalty was not imposed, cost the taxpayers \$1.8 million, \$670,000 more than a comparable case in which the death penalty was not sought.<sup>287</sup> Most of this increased cost was due to a three-fold increase in the costs of adjudication (\$850,000). The current and projected costs of incarceration were roughly the same (\$950,000).<sup>288</sup>

A death-eligible case in Maryland that resulted in the death sentence being imposed cost considerably more: approximately \$3 million, \$1.9 million more than a case where the death penalty was not sought.<sup>289</sup> Costs of imprisonment were 150% higher (roughly \$1.3 million), but the majority of the increased costs were associated with adjudication, which, at \$1.7 million, was double the cost of a case where the death penalty was not imposed and almost seven times the cost of a case where the death penalty was not sought.<sup>290</sup> This number includes the additional costs of appeals, collateral motions, and other legal proceedings unlikely to be necessary or used in non-capital cases.<sup>291</sup>

Between reenactment in 1978 and 1999, the study identified 6,000 first- and second-degree murders, 1,227 of which were death-eligible under the Maryland statute.<sup>292</sup> A death notice was filed in 173 of these cases (roughly one in seven), which resulted in 162 capital trials and 56 death sentences imposed.<sup>293</sup> The vast majority of those death sentences were

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<sup>286</sup> JOHN ROMAN ET AL., *supra* note 281, at 2.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* (“About 70% of the added cost of a death notice case occurs during the trial phase. These additional costs are due to a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. In addition, death notice cases are more likely to incur costs during the appellate phase even if there is no death sentence.”).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> For example, capital trials involve a more lengthy voir dire processes, and consume greater judicial resources. *Id.* at 11. They also include a penalty phase, a second trial in which the jury is required to weigh aggravating and mitigating factors. *Id.* at 11–12. Cases in which a death sentence have been imposed often have multiple post-sentencing reviews at the trial court level, while non-death cases are limited to one. *Id.* at 13. Death sentences also undergo a more lengthy and involved appeals process. *Id.* at 13–16.

<sup>292</sup> *Id.* at 15. The study identifies 1,311 death-eligible cases, but eighty-four of them were “multiple records of the same event, (usually retrials for the same homicide).” *Id.*

<sup>293</sup> *Id.* at 3, 15. In comparison to Illinois, relatively few notices of intent to seek capital punishment were withdrawn prior to trial (11 of 173). See comparable figures for Cook County, Footnote Table A, *supra* note 220.

overturned on appeal. As of March 2008, five persons had been executed and five others were awaiting execution on death row.<sup>294</sup>

The Maryland Study estimates that reenacting the death penalty will cost Maryland taxpayers over \$186 million over the life of the cases that have been brought to present.<sup>295</sup> It will have cost the Maryland taxpayers more than \$107.3 million to have sentenced fifty-six persons to death in the twenty-one years prior to 1999, and to have executed five.<sup>296</sup> Unsuccessfully seeking the death penalty in an additional 117 cases cost an additional \$71 million.<sup>297</sup> The state spent an additional \$7.2 million for the Maryland Capital Defender's Division.<sup>298</sup> Much of the \$186 million in identified costs are expenses that have not yet been incurred, and will need to be paid out of future state budgets. Furthermore, the \$186 million does not include the costs of any new capital prosecutions.

These costs were estimated conservatively, including only expenditures that could be empirically verified.<sup>299</sup> They do not include cases where the death notice was served, but then was waived or dropped because of a plea bargain, or cases where a death notice was filed but there was a verdict of not guilty.<sup>300</sup> Nor do these enumerated costs of state capital prosecutions include the attorney and court costs of a federal habeas corpus proceedings and appeals to the Fourth Circuit or the United States Supreme Court.<sup>301</sup>

The study considered the possibility that capitally prosecuted cases contain more egregious acts, and consequently would be more expensive to prosecute than cases that are not death-eligible, even if no capital statute were to exist. The actual cost of maintaining the present system of capital punishment in Maryland, which must include these additional expenditures,

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<sup>294</sup> JOHN ROMAN ET AL., *supra* note 281, at 1.

<sup>295</sup> *Id.* at 3.

<sup>296</sup> *Id.* at 28–29. The capital cases continue to cost more than non-capital cases after the imposition of the death penalty for several reasons: the costs of direct appeal for a capital case are more expensive, and the appeals are more extensive and raise issues which would only be raised in capital cases. Then, there are additional costs for collateral and federal appeals in capital cases. The special legal issues related to challenges to the method of execution, for example, raise issues on appeal, which, of course, would not come up if the defendant were sentenced to life. See CALIFORNIA REPORT, *supra* note 33, at 143–44.

<sup>297</sup> JOHN ROMAN ET AL., *supra* note 281, at 28–29.

<sup>298</sup> *Id.* at 28. A substantial amount of the public defender's budget in every state which has capital punishment goes to the defense of capital cases. See *supra* Part III.B for a discussion of costs to the defense in Illinois.

<sup>299</sup> See JOHN ROMAN ET AL., *supra* note 281, at 3.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 14–15.

therefore must be higher than this study's estimate of an additional \$3 million for every new capital sentence imposed after 1999.

### C. THE CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

California represents an extreme example of the contradictions of death penalty jurisprudence, with over 670 inmates on death row at the time of the report (the largest number in the country) but only thirteen executions since the death penalty was reenacted in 1978. Like Illinois, the California legislature created a commission to study and review the administration of criminal justice in capital cases, and to determine the extent to which that legal process has failed in the past, resulting in wrongful executions or the wrongful convictions of innocent persons.<sup>302</sup> The California Commission was composed of persons representing a broad spectrum of views and backgrounds, and conducted its own research. Like the Illinois 2003 CPRSC Committee and the 2002 Illinois Governor's Commission, the California Commission did not view its charge as calling for a judgment or recommendation on the morality of the death penalty itself, or whether capital punishment should be retained.<sup>303</sup> However, the California Commission did conclude that the California death penalty system is dysfunctional.<sup>304</sup> California is currently considering reinstating lethal injection under a new procedure that addresses concerns with its previous three-drug procedure, while California continues to be in a state of budgetary crisis.<sup>305</sup>

As in Illinois, most first-degree murders are technically death-eligible under California's broad statutory definition of special circumstances that provide the legal foundation for a capital charge, but the majority of death-eligible murders are not charged as capital cases.<sup>306</sup> Also like Illinois, the

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<sup>302</sup> CALIFORNIA REPORT, *supra* note 33, at 113.

<sup>303</sup> As in Illinois, the members of the Committee held a broad spectrum of views on the death penalty. *See id.* at 114.

<sup>304</sup> *Id.* at 114 n.6 (citing testimony of California Chief Justice Ronald M. George, January 10, 2008).

<sup>305</sup> In the early 1980s, Michael Morales was convicted of raping and murdering seventeen-year-old Terri Lynn Winchell and sentenced to death. He was scheduled to die on Feb. 21, 2006, but his execution was stayed when the two anesthesiologists who were to monitor his execution backed out at the last minute. Without their oversight, there is no guarantee that the three-drug lethal injection will not subject Morales to excruciating pain, which would violate the prohibition against cruel and unusual punishment. Sam Stanton & Denny Walsh, *California Has High Hopes of Reinstating Death Penalty*, SACRAMENTO BEE, June 5, 2010, at 1A.

<sup>306</sup> It is estimated that 87% of first-degree murders are technically death-eligible under the broad definitions of the California statute. CALIFORNIA REPORT, *supra* note 33, at 120.

individual county prosecutors in California decide whether to prosecute a murder as a capital case, and there is no statewide review panel.<sup>307</sup> Again like Illinois, patterns of racial and geographic disparities have been identified in California.<sup>308</sup> As in Illinois, there are vast differences in the handling of death cases in different California counties, in part due to different political climates in the counties and the proclivities of individual prosecutors, and in part due to funding issues.<sup>309</sup>

It takes an average of two decades for California to execute a prisoner who has been sentenced to death.<sup>310</sup> “To keep cases moving at this snail’s pace” costs the taxpayers roughly \$137 million every year.<sup>311</sup> The Commission further found that:

[t]he strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy. *To reduce the average lapse of time from sentence to execution by half, to the national average of 12 years, we [the State of California] will have to spend nearly twice what we are spending now.* The time has come to address death penalty reform in a frank and honest way. To function effectively, the death penalty must be carried out with reasonable dispatch, but at the same time in a manner that assures fairness, accuracy and non-discrimination.<sup>312</sup>

To support its factual conclusions regarding the cost of the death penalty, the Commission relied on a series of conservative approximations.<sup>313</sup> It estimated that, under the current system in place in California, the cost of a capital trial is \$500,000 more than an equivalent non-capital trial.<sup>314</sup> The Commission had more precise data regarding the

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<sup>307</sup> *Id.* at 150 n.120. However, “in almost half the counties, 28 of the 58, no death sentences were imposed during the 1990’s, although 1,160 homicides took place in these counties. The current District Attorney for San Francisco, Kamala Harris, and her predecessor, Terrence Hallinan, pledged never to seek the death penalty.” *Id.*

<sup>308</sup> *Id.* at 150 (noting that those counties with the highest death sentencing rates tend to have the highest proportion of non-Hispanic whites in their population and the lowest population density; and that those who kill African Americans or Hispanics are less likely to be sentenced to death); *see also* ROMY GANSCHOW, ACLU OF N. CAL., DEATH BY GEOGRAPHY: A COUNTY BY COUNTY ANALYSIS OF THE ROAD TO EXECUTION IN CALIFORNIA 1, 3 (2009) (providing statistics on the disparities in capital sentencing among California counties).

<sup>309</sup> CALIFORNIA REPORT, *supra* note 33, at 92–93. The California Commission recognized that under the present system the provision of funds for the prosecution and defense of capital cases was a critical need.

<sup>310</sup> *Id.* at 116.

<sup>311</sup> *Id.* at 116–17.

<sup>312</sup> *Id.* at 116 (emphasis added).

<sup>313</sup> *Id.* at 144–46.

<sup>314</sup> *Id.* at 145. The Commission compares its estimates to the conclusion of a recent ACLU study, which found that the *least* expensive death penalty trial was \$1.1 million more expensive than the *most* expensive non-death penalty trial. *See* NATASHA MINSKER, THE

annual costs of postconviction appeals and habeas reviews, which it found was at least \$54.4 million per year.<sup>315</sup>

The Commission was also able to estimate, in collaboration with the state department of corrections, that confining a prisoner on death row costs an *additional* \$90,000 per year in addition to the normal confinement costs of \$34,150 for a prisoner sentenced to life in prison without the possibility of parole.<sup>316</sup> Thus, California pays \$63.3 million more every year than it would if its death row population of what was at the time of the report 670 were sentenced to life in prison without the possibility of parole.<sup>317</sup>

The California Commission reported significant county-by-county disparity in sentencing, with death sentences being ten times more likely to be imposed in some counties than in others.<sup>318</sup> The trends in these data are similar to Illinois: death sentences are more likely to be imposed in rural counties than urban areas.<sup>319</sup> California prosecutors testifying before the Commission argued that this disparity “is not a problem, because locally elected District Attorneys are responding to the demands of the electorate which they represent.”<sup>320</sup> The Commission, however, concluded that “evidence of disparities in the administration of the death penalty undermines public confidence in our criminal justice system.” However, the Commission was “unwilling to recommend that death penalty decisions be reviewed by a statewide body . . . without additional data and research.”<sup>321</sup> Due to the difficulty of obtaining data from county prosecutors’ offices individually, the Commission recommended that the state legislature impose reporting requirements upon prosecutors to collect and make publicly available data regarding the charging decisions made by prosecutors in murder cases at the county level.<sup>322</sup>

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HIDDEN DEATH TAX: THE SECRET COSTS OF SEEKING EXECUTION IN CALIFORNIA 32 (2008), available at [http://www.deathpenalty.org/downloads/The\\_Hidden\\_Death\\_Tax.pdf](http://www.deathpenalty.org/downloads/The_Hidden_Death_Tax.pdf).

<sup>315</sup> CALIFORNIA REPORT, *supra* note 33, at 146.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* As of the writing of this article in November 2010 there are 697 people on death row. For a current count of the number of people on death row in each state, see DPIC *State by State*, *supra* note 16.

<sup>318</sup> *Id.* at 150. The Commission’s report relied on a study that found that death sentencing ratios varied from between 0.58% of murder prosecutions to more than 5% of murder prosecutions (after excluding counties with five or fewer death sentences during the study period). See Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1 (2005).

<sup>319</sup> CALIFORNIA REPORT, *supra* note 33, at 150.

<sup>320</sup> *Id.* at 151.

<sup>321</sup> *Id.* at 152.

<sup>322</sup> *Id.* at 153–54.

The primary concern of the California Commissioners was not that the death penalty was being applied unfairly, but rather that not enough resources were being appropriated to carry it out expediently. The delay between sentencing and execution is longer in California than in any other state; the Commission projects that it takes twenty-five years for a defendant to exhaust the available stages of review, as compared with the national average of eleven to fourteen years.<sup>323</sup> These delays largely are a result of inadequate resources in the capital punishment system; a defendant can expect to wait three to five years after sentencing for counsel to be appointed to handle a direct appeal.<sup>324</sup> After the direct appeal is decided, the defendant will have to wait for habeas counsel to be appointed, which generally does not occur until eight to ten years after sentencing.<sup>325</sup> To address these delays the Commission unanimously recommended that the California legislature immediately address “the unavailability of qualified, competent attorneys” to handle various death penalty appeals by hiring additional government lawyers, reimbursing counties for death-penalty related expenses, and providing adequate funding for the appointment of trial counsel.<sup>326</sup>

Even after a lawyer has been appointed and has conducted the extensive investigation required to prepare a direct appeal of a death sentence, there is still a substantial delay in scheduling court hearings to have those appeals heard.<sup>327</sup> At the time of the Commission’s report, the California Supreme Court had a backlog of eighty fully briefed death penalty cases on direct appeal awaiting argument, making the average wait

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<sup>323</sup> *Id.* at 123–25. A study by Senior Judge Arthur Alacon of the Ninth Circuit Court of Appeals identified five major periods of delay:

“First is the delay in appointing counsel to handle the direct appeal. . . . Second is the delay in scheduling the case for a hearing before the California Supreme Court . . . Third is the delay in appointing counsel for the state habeas corpus petition . . . Fourth is the delay in deciding state habeas corpus petitions. . . . Fifth is the delay in deciding federal habeas corpus petitions.”

*Id.* at 122–23.

<sup>324</sup> *Id.* at 122.

<sup>325</sup> *Id.* (“Prompt appointment of habeas counsel would permit the habeas petition to be prepared while the appellate briefing is being prepared, so it can be promptly filed shortly after the direct appeal is decided.”).

<sup>326</sup> *Id.* at 116–17. The Commission further emphasizes that private counsel being appointed must be compensated at hourly rates, rather than on a flat-fee basis. Flat-fee arrangements create conflicts of interest between a lawyer and his client by encouraging the lawyer to maximize his return by minimizing the time and expenses incurred in a case. *Id.* at 117.

<sup>327</sup> *Id.* at 122–23 (“The California Supreme Court currently has 100 fully briefed habeas corpus petitions awaiting decision. . . . [T]here is now an average delay of 22 months between the filing of the petition and the decision of the California Supreme Court.”).



for oral argument after the filing of a motion two-and-a-quarter years.<sup>328</sup> There is an additional two-year wait to receive a decision from the supreme court in a state habeas proceeding.<sup>329</sup> After that comes the federal habeas appeal, which takes an average of 6.2 years in federal district court and another 2.2 years before the case is decided by the Ninth Circuit, in large part because inadequate records in the state proceeding make it difficult for the federal courts to determine why state relief was denied.<sup>330</sup>

To address these delays, the Commission recommended that the California state legislature make more funding available to the state Public Defender's Office, the California Habeas Corpus Resource Center, the Office of the Attorney General, and to the California Supreme Court for the appointment of private counsel.<sup>331</sup>

The Commission also recommended that the state legislature appropriate additional funds to reimburse the counties for payments for defense services and trial costs.<sup>332</sup> The recommended reimbursement of the counties would be following through on an existing unmet obligation. When California's death penalty law was originally enacted in 1978, the legislature addressed the serious financial burdens that death penalty trials impose on counties by adding section 987.9 to the California Penal Code which provided that defense counsel in capital cases "may request the court for funds for the specific payment of investigators, experts and others for the preparation or prosecution of the defense."<sup>333</sup> The State of California was supposed to provide these funds. However,

no funds have been appropriated for such reimbursement *for more than fifteen years*, leaving counties to foot the bill. As a result, the willingness of courts to grant section 987.9 requests varies significantly from county to county, with greater reluctance to grant requests in cash-strapped counties. Access to investigators and experts necessary for the defense of death penalty cases should not depend upon the vagaries of county budgets.<sup>334</sup>

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<sup>328</sup> *Id.* at 122. The California Supreme Court ordinarily hears twenty to twenty-five death penalty cases each year.

<sup>329</sup> *Id.* at 123.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 116–17.

<sup>332</sup> *Id.* at 117.

<sup>333</sup> CAL. PENAL CODE § 987.9 (West 2008). This provision is analogous to law establishing the Capital Litigation Trust Fund in Illinois. However, the funds are only granted to the defense.

<sup>334</sup> CALIFORNIA REPORT, *supra* note 33, at 128 (emphasis added). "The estimated annual cost of Section 987.9 payments for death penalty cases in Los Angeles County in 2007 was \$4.5 million." *Id.*

The exacerbation of the California budget crisis can only mean that such shortfalls will be more extreme and occur more often in the future.<sup>335</sup>

The reforms suggested by the Commission, if fully implemented, are projected eventually to reduce delays in death penalty processing to the national average of eleven to fourteen years between sentencing and execution, at a price tag of \$95 million per year above what currently is being spent.<sup>336</sup> However, California had over 670 inmates on death row at the time of the Commission report, and it is unclear how quickly the system could process their cases. The Commission pointed out that:

[i]f the current average of 20 new death judgments per year is maintained, full implementation of the Commission's recommendations could begin to reduce the size [of death row]. But the backlog is now so severe that *California would have to execute five prisoners a month for the next twelve years* just to carry out the sentences of those currently on death row.<sup>337</sup>

California has executed thirteen prisoners since it reenacted capital punishment in 1978, and two of those were volunteers who withdrew their appeals. It seems unlikely that California would move to executing five death row prisoners a month, even if the current moratorium were lifted.<sup>338</sup>

Recognizing the impracticality of increasing the amount allocated to capital cases from \$137 million per year to an estimated \$232.7 million per year to cure California's systemic dysfunctions, the California Commission offers two alternative recommendations.<sup>339</sup> First, California could significantly narrow the "special circumstances" that allow for imposition of the death penalty from twenty-one to roughly five.<sup>340</sup> The Commission heard testimony that the primary reason that California's death penalty law is dysfunctional is because it is too broad, and that twenty-one special circumstances "open the flood gates beyond the capacity of our judicial system to absorb."<sup>341</sup> This is similar to the situation in Illinois. The Commission presented the findings of several other studies that have

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<sup>335</sup> *New Furloughs for State Workers in California*, N. Y. TIMES, July 29, 2010, at A17 (noting that California plans to add new mandatory furlough days for state workers, and that the state would probably be issuing I.O.U.s instead of paychecks after September).

<sup>336</sup> CALIFORNIA REPORT, *supra* note 33, at 117, 123–24.

<sup>337</sup> *Id.* at 121 (emphasis added).

<sup>338</sup> *Id.* at 122 n.25. Two of these executions were "volunteers" who withdrew their appeals and requested execution. *Id.*

<sup>339</sup> *Id.* at 117.

<sup>340</sup> *Id.* at 138.

<sup>341</sup> *Id.* ("A number of research projects have concluded that the narrower the category of those eligible for the death penalty, the less the risk of error, and the lower the rate of racial or geographic variation.").

recommended narrowing the statutory aggravating factors for death-eligibility to the five recommended by the Constitution Project:<sup>342</sup>

The murder of a peace officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance;

The murder of any person . . . occurring at a correctional facility;

The murder of two or more persons . . . as long as the deaths were the result of an intent to kill more than one person, or a reckless disregard for such a possibility;

The intentional murder of a person involving . . . torture; and

The murder by a person who is under investigation for . . . a crime that would be a felony, or the murder of anyone involved in that investigation, prosecution, or defense of that crime . . .<sup>343</sup>

These factors would be exhaustive, and they do *not* include felony murder as a basis for imposing the death penalty.<sup>344</sup> The Commission did not suggest “any particular formula,” leaving the specifics of the list “to the legislative process,” but it did caution that “the list must be carefully measured to actually achieve the benefits of narrowing that have been identified.”<sup>345</sup> The Commission found that if the death penalty statute had been so narrowed previously, the present enormous death row population would have been reduced by half.<sup>346</sup> If the death penalty was to be so narrowed, the Commission recommended that those whose death judgments were not based upon one of the narrower special circumstances should have

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<sup>342</sup> *Id.* (The Constitution Project is a “blue-ribbon, bipartisan commission of judges, prosecutors, defense lawyers, elected officials, FBI and police officials, professors and civil and religious leaders” assembled to assess the death penalty. It has achieved broad consensus that the death penalty should be reserved for the most culpable offenders.”). *See generally* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED xxiv–xxv (2005) available at [www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf](http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf).

<sup>343</sup> CALIFORNIA REPORT, *supra* note 33, at 139.

<sup>344</sup> *Id.*; *cf.* CPRSC FINAL REPORT, *supra* note 53, at 62–67 (reviewing the recommendation of the 2002 Governor’s Commission in Illinois that the eligibility for capital punishment be reduced similarly and recommending that the Illinois General Assembly address the issue).

<sup>345</sup> CALIFORNIA REPORT, *supra* note 33, at 139–41. The Commission pointed out that “the current list of special circumstances could still be utilized to impose sentences of life without possibility of parole.” *Id.* at 141.

<sup>346</sup> *Id.* at 139 (“[S]ince 1978, one of the five special circumstances identified by the Constitution Project was found in 55% of California death cases, or a total of 451 of the cases examined. This means that if the California death penalty law had limited itself to the ‘worst of the worst’ as identified by the Constitution Project and the Illinois Commission, we would have approximately 368 on death row, rather than 670.”). As of September 13, 2010 the California death row population stood at 697, sixteen of them women. DPIC *State by State*, *supra* note 16.

their sentences commuted to life without possibility of parole.<sup>347</sup> This would reduce the current death row population from its then level of 670 to 368, and result in a capital system that would cost California about \$130 million a year going forward, which, it is estimated, is roughly the same as the current, broken system.<sup>348</sup>

The second alternative the California Commission proposed is for California to follow the lead of New Jersey by abolishing capital punishment and commuting the sentence of all inmates at present on death row to life in prison. The Commission estimates this would save the State of California roughly \$126 million every year.<sup>349</sup> While there is no evidence that California has executed an innocent person, six inmates on death row have been exonerated of the murders for which they had been sentenced to death.<sup>350</sup> If this “New Jersey approach” were used in California, there would be no risk of wrongful executions.<sup>351</sup> The death penalty backlog would also disappear, freeing up state judicial resources and allowing all appeals to be handled more expeditiously.<sup>352</sup>

#### D. THE NEW JERSEY DEATH PENALTY STUDY COMMISSION

The New Jersey Death Penalty Study Commission was created by statute in 2006 and published its Final Report in January 2007.<sup>353</sup> Like the California Commission, the 2002 Governor’s Commission, and the Illinois Capital Punishment Reform Study Committee, it included both men and women from the community who were not lawyers, as well as persons with

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<sup>347</sup> As a practical matter, this

would actually have little impact for the death row inmates involved. Most of them will never be executed, but will die in prison. Changing their sentence . . . would only change the location in which they will serve their sentence. But just that change could save the State of California \$27 million dollars each year over the current cost of confining these prisoners on death row.

*Id.* at 141. Presumably the Governor would perform these commutations as Article V, Section 8(a) of the California constitution grants the Governor the power to commute a death sentence.

<sup>348</sup> *Id.* at 117, 142.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 126 n.40. Between 1989 and 2003, there were 205 exonerations of defendants convicted of murder nationwide. Fourteen of them were in California, and six of those had been sentenced to death. *Id.*

<sup>351</sup> *Id.* at 143.

<sup>352</sup> *Id.*

<sup>353</sup> See NEW JERSEY REPORT, *supra* note 31; see also Mary E. Forsberg, *Money for Nothing? The Financial Cost of New Jersey’s Death Penalty*, N.J. POL’Y PERSP., Nov. 2005, available at [www.njpp.org/rpt\\_moneyfornothing.html](http://www.njpp.org/rpt_moneyfornothing.html). Mary Forsberg is the Research Director of New Jersey Policy Perspective, a nonpartisan, nonprofit organization established in 1997 to conduct research on state issues.

extensive experience with the legal system, judges, former prosecutors and legislators, as well as Senator John F. Russo, the “father of the death penalty in New Jersey.” Former Senator Russo was the lone dissenter to the New Jersey Commission’s recommendation that the New Jersey death penalty be abolished.<sup>354</sup> In creating the New Jersey Commission, the New Jersey legislature found:

[T]he experience of this State with the death penalty has been characterized by significant expenditures of money and time; the financial costs of attempting to implement the death penalty statutes may not be justifiable in light of other needs of this State; There is a lack of any meaningful procedure to ensure uniform application of the death penalty in each county throughout the State; There is public concern that racial and socio-economic factors influence the decision to seek or impose the death penalty. There has been increasing public awareness of cases of individuals wrongfully convicted of murder, in New Jersey and elsewhere in the nation . . . .<sup>355</sup>

The New Jersey Death Penalty Study Commission was established to “study all aspects of the death penalty as currently administered,” including:

whether the death penalty serves a legitimate penological intent such as deterrence; whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole . . . whether the death penalty is consistent with evolving standards of decency, whether the selection of defendants in New Jersey for capital trials is arbitrary, unfair, or discriminatory in any way and there is unfair, arbitrary, or discriminatory variability in the sentencing phase or at any stage of the process; whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison . . . .<sup>356</sup>

The New Jersey Commission was composed to be representative of the diversity of the population of New Jersey and to include representatives from crime victim groups as well as representatives of the county prosecutors, the Office of the Attorney General, the Office of the Public Defender, and others.<sup>357</sup> The enabling legislation for the New Jersey Commission also put in place a moratorium on executions in the state for the duration of the Commission.<sup>358</sup> At the time of the moratorium, there

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<sup>354</sup> NEW JERSEY REPORT, *supra* note 31, at 79.

<sup>355</sup> *Id.* at 118 (original formatting omitted).

<sup>356</sup> *Id.* at 118–19.

<sup>357</sup> *Id.* at 119. As with the California Commission and the Illinois Commission, the New Jersey Commission solicited testimony from the public and institutional representatives. The Commission was ordered to report its findings and recommendations, including recommended legislation, to the Governor and legislature, with the assistance of staff from the Office of Legislative Services. Members were to serve without compensation, as was also the case in Illinois and California.

<sup>358</sup> *Id.* at 120. The resulting legislation was C: 2c: 49 – 3, effective Jan. 12, 2006, which provides: “Beginning on the effective date of this act, if a defendant has been sentenced to death pursuant to subsection c. of N. J. S. 2c: 11 – 3, the sentence of death will not be

were nine men on death row in New Jersey. However, in February 2004, prior to the 2006 effective date of the statutory moratorium on executions, in response to a challenge to the legality of the procedures for lethal injection in New Jersey, a unanimous New Jersey appellate court had already suspended all executions throughout the state of New Jersey.<sup>359</sup>

The New Jersey Commission recommended that the death penalty be abolished and replaced with life imprisonment without the possibility of parole, to be served in maximum security prison.<sup>360</sup> The New Jersey legislature adopted that legislation and abolished the death penalty in December 2007.<sup>361</sup>

Among its major findings, and one basis for the recommendation to repeal the death penalty, was the finding that the Office of the Public Defender alone would save approximately \$1.46 million per year if the death penalty were eliminated.<sup>362</sup> At that point, the New Jersey Office of the Public Defender had nineteen pending death cases.<sup>363</sup> The savings would come from not having to investigate in preparation for a penalty phase trial, as well as savings in additional attorney and staff time for capital trial jury selection and the preparation of motions that are only required in capital cases.

The New Jersey Report is particularly useful because the state Department of Corrections provided estimates for the money that it would save by the abolition.<sup>364</sup> The Department of Corrections in New Jersey

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executed prior to 60 days after the issuance of the commission's report and recommendations." NEW JERSEY REPORT, *supra* note 31, at 60.

<sup>359</sup> *In re* Readoption with Amendments of Death Penalty Regulations, N.J.A.C. 10A-23, by the New Jersey Department of Corrections, 842 A.2d 207, 211 (N.J. Super. Ct. App. Div. 2004). In New Jersey, the decisions of the Appellate Division of the Superior Court are binding upon the entire state, even though the intermediate appellate court is divided into parts and hears cases by region. See *State v. Rembert*, 383 A.2d 747 (N.J. Super. Ct. App. Div. 1978) ("Decision of an intermediate appellate court is the law of the State until reversed or overruled by the court of last resort.").

<sup>360</sup> NEW JERSEY REPORT, *supra* note 31, at 2.

<sup>361</sup> Act of December 17th, 2007, 2007 N.J.Ch. 204 (abolishing the death penalty and providing for life in prison without the possibility of parole). As was the case with the Ryan commutations, unpredictable, idiosyncratic political events and external circumstances contributed to this dramatic outcome. The statute was enacted during a brief period in December of 2007 before the new legislature was sworn in and when none of the legislators were up for reelection. Robert J. Martin, *Killing Capital Punishment in New Jersey: The First State in Modern History to Repeal Its Death Penalty Statute*, 41 U. TOL. L. REV. 485, 530-31 (2010).

<sup>362</sup> NEW JERSEY REPORT, *supra* note 31, at 31.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 33. In many states the Department of Corrections has not provided such figures. However, the New Jersey Commission also cited studies in Tennessee, Kansas, Indiana,

estimated that eliminating the death penalty would save the State of New Jersey \$947,430 to \$1,299,240 over the lifetime of each inmate sentenced to death.<sup>365</sup> These figures were based upon the Department of Corrections' own estimate that it cost \$72,602 to house an inmate in the capital sentencing unit, \$32,481 more than to house an inmate in the general population of that same maximum security prison.

This figure was based upon an assumption that an inmate sentenced to death in New Jersey would spend decades on death row.<sup>366</sup> That assumption is reasonable given the experience in New Jersey and other states. Take, for example, Robert O. Marshall, who spent more than twenty-five years on death row as his case was reviewed in multiple state and federal appeals before the final decision *not* to re-prosecute him for capital murder was made at the county level after a reversal of his death penalty by the Third Circuit.<sup>367</sup>

The New Jersey Administrative Office of the Courts submitted its internal finding that with the abolition of the death penalty, reduced trial court costs and savings from not having to conduct the required proportionality review of each death penalty imposed would lead to savings to the operation of the court system.<sup>368</sup> The Administrative Office of the Courts estimated that it cost the courts and court staff \$93,018 to conduct the mandated proportionality review of each death sentence imposed.<sup>369</sup> The Administrative Office of the Courts did not include a separate estimate for the extra days of trial time for capital cases, or the extra time required for death qualification and jury selection in capital cases.

The attorney general of New Jersey reported that the abolition of the death penalty would result in little cost saving in that office since local prosecutors would have to prepare for guilt determinations in murder cases with or without the death penalty.<sup>370</sup> The New Jersey Commission noted that while there might not be a savings to the central Attorney General's Office or to the operation of the county prosecutors' offices, presumably

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Florida, and North Carolina, which all concluded that the costs associated with death penalty cases are higher than those associated with life without parole cases. *Id.*

<sup>365</sup> *Id.* These studies further illustrate that each study and every state computes cost differently. In New Jersey the Department of Corrections estimated cost by taking the projected life span of each capital defendant, instead of totaling the entire cost of death row and dividing by the number of persons on death row.

<sup>366</sup> *Id.* at 32.

<sup>367</sup> See *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005); Bienen, *supra* note 9, at 102.

<sup>368</sup> NEW JERSEY REPORT, *supra* note 31, at 32. Like the Department of Corrections, it is common for the Administrative Office of the Courts to separately estimate the costs of the death penalty within its budget.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 32–33.

there would be a change in the allocation of staff resources.<sup>371</sup> Those attorneys and their support staff now spending time and resources on the preparation of capital cases would be able to devote themselves to other cases, or to other areas. Since all public defenders and county prosecutors work under financial constraints and against a substantial backlog of cases, eliminating capital prosecutions might well go to the reduction of institutional backlogs.<sup>372</sup>

The New Jersey Commission took note of the emotional and psychological costs of the death penalty for victims, their families, and the families of defendants, as well as the effects upon third parties, the staff of courts and justice and corrections departments, and others.<sup>373</sup> The New Jersey Commission further found that rationales for maintaining the death penalty were inadequate,<sup>374</sup> and that the death penalty was inconsistent with evolving standards of decency.<sup>375</sup> The Commission did not find invidious racial bias in the application of the death penalty in New Jersey.<sup>376</sup> However, the Commission noted that there was county-by-county variability in the application of the death penalty, and perhaps that variability was related to the race or socioeconomic status of the victim.<sup>377</sup>

Former Senator John Russo expressed the minority opinion that the cost of the death penalty should not be considered in the decision regarding its retention.<sup>378</sup> He also dissented from the majority's characterization of how the New Jersey capital punishment system operated in practice. His view was that the death penalty should continue as "an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that

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<sup>371</sup> *Id.* at 33.

<sup>372</sup> *Id.* at 32–34.

<sup>373</sup> *Id.* at 34–35, 62. The Commission made an additional finding that "sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims." *Id.* at 62. This is analogous to the 2010 recommendations of the CPRSC in Illinois. See CPRSC FINAL REPORT, *supra* note 53, at 150–56.

<sup>374</sup> NEW JERSEY REPORT, *supra* note 31, at 51, 56. The Commission found that the penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irrevocable mistake. *Id.* at 51. The Commission also found that the alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims. *Id.* at 56.

<sup>375</sup> *Id.* at 35–40.

<sup>376</sup> *Id.* at 41.

<sup>377</sup> *Id.* at 42.

<sup>378</sup> *Id.* at 78–83.



asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs . . . .”<sup>379</sup>

The attorney general of New Jersey abstained from the Commission’s recommendation to abolish capital punishment on the ground that the attorney general, as the chief law enforcement officer of the state, is sworn to uphold the laws of the state, and that the legislature has come to a consensus that capital punishment is an appropriate penalty in certain egregious circumstances. Therefore, as attorney general, his official position must be to support and uphold the existing law.<sup>380</sup> The attorney general, however, noted that in the twenty-four years since the reenactment of the death penalty, not one person had been executed:

The death penalty is irreversible, and that fact alone demands that the sanction be pursued with extraordinary care and circumspection. But delay and uncertainty in the imposition of sentence undermine its deterrent effect. Also, when after so many years a sentencing option has never been used, it is difficult to characterize it as real.<sup>381</sup>

## V. CONCLUSION

Whether to do nothing, to make the investments necessary to fix the current system, to replace the current system with a narrower death penalty law, or to replace capital punishment with lifetime incarceration are ultimately choices that must be made by the . . . electorate, balancing the perceived advantages gained by each alternative against the potential costs and foreseeable consequences. We hope the balancing required can take place in a climate of civility and calm discourse. Public debate about the death penalty arouses deeply felt passions on both sides. The time has come for a rational consideration of all alternatives based upon objective information and realistic assessments. As U.S. Supreme Court Justice John Paul Stevens observed . . . “The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation impose on society with the benefit that it produces has certainly arrived.”<sup>382</sup>

Had Illinois abolished the death penalty in 2000 instead of imposing a moratorium on executions, the State of Illinois would not have spent the \$122 million from the Capital Litigation Trust Fund, nor would it have spent the tens of millions of dollars of other expenditures incurred by keeping the capital punishment system in Illinois going over the following decade. Not only is the amount of the expenditure a budgetary concern, but also much of the money seems to have been spent without societal justification, purpose, or benefit. Some state actors with the discretionary

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<sup>379</sup> *Id.* at 79–80 (The Honorable John F. Russo, Minority View) (quoting Justice Potter Stewart in *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

<sup>380</sup> NEW JERSEY REPORT, *supra* note 31, at 85.

<sup>381</sup> *Id.* at 86.

<sup>382</sup> CALIFORNIA REPORT, *supra* note 33, at 117–18 (quoting *Baze v. Rees*, 553 U.S. 35, 81 (2008) (Stevens, J., concurring)).

power to do so have made unilateral decisions to prosecute a few cases capitally. As a result, more than \$150 million, at the most conservative estimate, was spent to put seventeen people on death row, where some of them will likely remain for years. At the same time, there have been at least 2,000 defendants eligible for capital prosecution under the statutory definitions of death eligibility, and many of those murders were heinous and aggravated, and yet death was not sought at the discretion of the county state's attorney.

The economic and bureaucratic pressures encourage political actors to spend public money when it is made easily available and to continue prior legal practices, no matter how dysfunctional or counterproductive they may be. The political incentives seem equally uncontroverted: state's attorneys, state legislators, elected judges, and other elected officials are afraid to come out and say that maintaining the present capital punishment system is dysfunctional and irrational at best, and at worst destructive of the legal principles that are the bedrock of our system of due process of law and other constitutional guarantees. What is the justification for a capital punishment system that metes out sentences arbitrarily? Or one in which systemic disparities are documented? Such concerns are before the question of sending innocent persons to death row is even reached. Should capital punishment remain in effect so that the present, flawed system can send more innocent people to jail, so that when their innocence is discovered—which it may never be—they can then successfully sue and collect millions of dollars from the already bankrupt State of Illinois?

It is not just that this is a waste of taxpayer dollars, at a time when Illinois needs every dollar for other services, but that the money has been spent foolishly, cynically, heedlessly, and without a discernible indication of responsibility to the state or the public. If one family feels vindicated by a death sentence imposed a quarter of a century after a brutal murder, does that justify the waste of state resources, or the wrongful conviction and arbitrary prosecutions of others? The rule of law is based upon something other than the personal revenge of individuals. A public that sees some murders prosecuted capitally does not see the thousands of other murders that were, by comparison, never avenged.

For example, the state of Illinois wasted millions imposing a death sentence on Brian Dugan, who was already serving life in prison without possibility of parole for another murder. This is not a wise or sober use of public monies. It is no solace to the public, to the thousands of other murder victims' families, or to the professionals committed to a principled criminal justice system. To make matters worse, this prosecution came only after two other people were wrongfully convicted, retried, and convicted again for the crime Dugan admitted to having committed. The

state spent millions of dollars prosecuting these capital cases, and then paid out millions more to the men it had wrongfully sentenced to death.

When a legal system's legitimate authority to prosecute, to convict, to punish, and even to take a life is perverted and exploited for personal or political expediency, the state loses, and the community loses. We are all the poorer when the legal system we trust, and the law enforcement agencies and the lawyers whom we expect to protect us and act in our best interests, are locked into a self-perpetuating system where irrational incentives encourage decision making which results in systemic disparities with no checks or monitors on aberrant individual choices. Those responsible for maintaining the present system must justify its continuation on grounds consistent with constitutional principles in the interests of all of us, taxpayers, citizens, and members of a legal community and a criminal justice system deserving of, and dependent upon, our respect.

Appendix A: Illinois State's Attorneys' Death Penalty Decision  
Guidelines<sup>\*</sup>

*INTRODUCTION*

The Illinois State's Attorney's Association and the Illinois Attorney General, acting pursuant to the Illinois' First Degree Murder Statute, have consulted and hereby recommend these "voluntary guidelines for procedures governing whether or not to seek the death penalty," 720 ILCS 5/9-1(k). These guidelines reflect the policies and practices already in place in many counties across the state. The drafters also incorporated relevant recommendations of the various task forces and committees that reviewed Illinois' capital punishment system. These guidelines do not have the force of law, but they are intended to assist State's Attorneys in exercising their discretion in conformance with the highest standards of justice.

The Illinois State's Attorneys and the Attorney General recognize that seeking the death penalty is the most difficult decision within the criminal justice system and appreciate the awesome responsibility vested in them by the citizens of Illinois. The "exercise of informed discretion by the State's Attorney after a review of all available information, including information that might be mitigating, is an important safeguard against injustice in the administration of capital punishment." (Supreme Court Committee on Capital Cases, Supplemental Findings and Recommendations, page 71).

We recognize that the primary expression of public and social policy of this state emanates from the legislature and that as the elected prosecutors we have a responsibility to respect society's judgment which allows for the imposition of the death penalty for the most heinous murders. 720 ILCS 5/9-1(b). The primary factors in making a decision to seek a death sentence are the need to not only have absolutely no doubt regarding the defendant's guilt but also his/her eligibility for the imposition of death pursuant to the first degree murder statute. The basis of both the charging decision and the decision to seek death must be fundamentally fair and consistent with the law. The decision to seek death should not be automatic simply because the defendant appears to be clearly guilty and clearly eligible. In making this decision, State's Attorneys should be focused on the strength of the case and the background and character of the defendant. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed.2d 859, 903 (1976).

When deciding whether or not to seek the death penalty, the State's Attorney should have the benefit of as much information as possible about the offense and the offender and a reasonable time to make the decision.

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<sup>\*</sup> Prepared by the Office of the Illinois Attorney General and the Illinois State's Attorneys Association. Promulgated February 22, 2006.

Prosecutors recognize that because the decision is so visible to the public and vital to the administration of justice that it will reflect on the legal system as a whole. Through these guidelines prosecutors seek to ensure that in cases where the death penalty is sought, trials are fair and justice is done. In exercising discretion, the State's Attorney is responsible for protecting the rights of society and the rights of the defendant.

These proposed guidelines are not intended to be a substitute for adopting appropriate policies and procedures at a local level. These guidelines are illustrative of certain basic factors which should be considered in the exercise of discretion.

### CHARGING

The probability of a conviction is the central factor in any charging decision. This is especially true in first degree murder cases in which the defendant may be exposed to the death penalty. While the concept of "residual doubt" has been held not to be a "mitigating circumstance", *Franklin v. Lynaugh*, 487 U.S. 164, 101 L.Ed.2d 155 (1988); and *People v. Edgeston*, 157 Ill.2d 201, 623 NE 2d 329 (1993); the strength of the case and the likelihood of a conviction must be clear based upon the available evidence. Charging decisions, which may be modified as the State's Attorney gains additional information about the offense and offender, should appropriately reflect both the nature of the offense and the culpability and eligibility of the offender. The State's Attorney should file charges which adequately encompass the offenses believed to have been committed by the defendant. The State's Attorney should be confident in the quality of the evidence and its ability to meet, and even surpass, the burden of proof of beyond a reasonable doubt. The observations of the United State's Supreme Court in 1976 are instructive regarding the exercise of discretion in capital cases. "Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong." *Gregg* 428 U.S. 153, 49 L.Ed.2d 859, 903 (1976).

In order to make an appropriate charging decision, it is crucial that the State's Attorney takes steps to ensure that investigative personnel have provided all material and information relevant to the accused and the offenses under consideration. See Supreme Court Rule 412(f) and 725 ILCS 114-13. The failure to obtain and evaluate all relevant evidence can have a detrimental effect on not only the charging decision, but the ultimate disposition of a case. Investigative power and responsibilities of State's Attorneys are inherent and incidental to our prosecutorial powers. *People v. Thompson*, 88 Ill.App.3d 375 (1980). We have a continuing duty in all cases, but especially in capital cases, to evaluate and investigate the facts of

a case. All reports, items of evidence and other relevant material should be evaluated in order to determine whether additional evidence is necessary in order to reasonably assure that a conviction may be obtained. The strengths and weaknesses of a case should be evaluated in light of anticipated defenses.

#### *THE NATURE OF THE OFFENSE*

The State's Attorney must determine whether the murder is the type of crime that calls for the ultimate punishment. Factors such as pre-meditation; torture; dismemberment and other depraved conduct should be considered. However, State's Attorneys must resist the temptation or public pressure to seek a death sentence based solely on the brutality of the crime without reference to other relevant factors.

#### *ELIGIBILITY (STATUTORY FACTORS IN AGGRAVATION)*

The existence of aggravating factors which make the defendant eligible for the death penalty pursuant to 720 ILCS 5/9-1(b) must be carefully evaluated in light of the burden of proof beyond a reasonable doubt. In cases where the death penalty is sought, the factors relied upon must be included in the notice provided to the defense pursuant to Supreme Court Rule 416 (c). Statutory aggravating factors should be evaluated in light of both the proofs and an examination of the decisions of the United States and Illinois Supreme Courts. The following examples demonstrate the importance of careful evaluation of potential aggravation:

- a. 720 ILCS 5/9-1(b)(11) of the Illinois statute makes a defendant eligible for death if "the murder was committed in a cold, calculated and pre-meditated manner pursuant to a preconceived plan, scheme or design to take a human life. . ." State Courts interpreting this factor have determined that time is a critical element in assessing whether this factor is satisfied. A substantial period of reflection or deliberation is required. The prosecutor must prove more than that the murder was technically pre-meditated. By applying this type of analysis the Courts properly narrow the class of death eligible defendants and provide a "meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." *Gregg*, 49 L.Ed.2d at 883.
- b. To be eligible based upon murder of a peace officer (or for that matter any special class of victims) the evidence must show that the defendant knew or should have known that the victim was a peace officer. 720 ILCS 5/9-1(b)(1).
- c. Eligibility under the multiple murder provision may depend upon the proofs and findings supporting the prior conviction. For example, evidence of a prior conviction based on accountability, without more, is not sufficient for eligibility under 720 ILCS 5/9-1(b)(3). It must be certain that the prior conviction is for murder. The date of the murders is generally of no significance. The case in which the defendant is being sentenced may be considered for multiple-murder eligibility. He is "convicted" under 9-1(b)(3) once the court enters judgment on the verdict. A defendant is also eligible

under 9-1(b)(3) if he has killed more than one victim in the case for which he is being sentenced.

d. Under the felony murder provision (section 9-1(b)(6)) a number of factors must be considered. Generally, timing of the acts which cause death does not affect eligibility as long as it can be shown that the murder was in the "course of" the other felony. In an accountability case, it must be proven that the defendant's mental state and participation satisfy the Court's interpretation of the statute. See *Tison v. Arizona*, 481 U.S. 137 (1987).

e. Murder of a victim under age 12 (9-1(b)(7)) must be accompanied by "exceptionally brutal or heinous behavior indicative of wanton cruelty." Murder by suffocation almost immediately after injuries that could have been inflicted by a single blow does not satisfy this requirement. *People v. Lucas*, 132 Ill.2d 399, 548 N.E. 2d 1003 (1989). Deliberate starvation and exposure satisfies this requirement. *People v. Banks*, 161 Ill.2d 119, 641 N.E. 2d 331 (1994).

f. Generally, the murder of a witness provision (9-1 (b)(8)) does not include investigation or prosecution for offenses which occurred in the course of commission of the murder, including the murder itself. In *People v. Brownell*, 79 Ill.2d 508, 404 N.E. 2d 181 (1980) the Court said:

Otherwise, were we to adopt the trial court's finding, this aggravating factor could apply in every prosecution for murder where another offense contemporaneously occurs because the victim could have been a witness against the defendant. Or, even more broadly, this aggravating factor could apply to every prosecution for murder since every victim, obviously, is prevented from testifying against the defendant. We do not think the General Assembly intended the death penalty to be applied in every murder case, and, if it did, the General Assembly could certainly find a more direct way to express its intent than through this aggravating factor." In other cases, the courts have held that this factor is satisfied where the evidence clearly shows that the defendant contemplated killing the victim for the specific purpose of preventing his/her testimony, even when the murder is in the course of various felonies. See *People v. Hernando William*, 97 Ill.2d 252, 454 N.E. 2d 220 (1983), *Williams v. Chrans*, 945 F 2d 926 (7th Circuit 1991).

While evidence supporting a single statutory aggravating factor is sufficient to support a decision to seek death, the number of aggravating factors should be considered. Similarly, the State's Attorney should consider each potential mitigating factor and while more than one mitigating factor may exist, it is the weight of such evidence compared to the nature and circumstances of the murder that should guide the decision to seek or not to seek the death penalty.

#### CAPITAL LITIGATION COMMITTEE

It has long been recognized that the State's Attorney is entrusted with exclusive discretion to decide which charges shall be brought, or whether to prosecute at all. This discretion extends to the decision of whether or not to seek the death penalty in a first degree murder case. "Each capital case is unique and must be evaluated on its own facts, focusing on whether the

circumstances of the crime and the character of the defendant are such that the deterrent and retributive functions of the ultimate sanction will be served by imposing the death penalty.” *People v. Johnson*, 128 Ill.2d 253 (1989). While the death penalty decision rests exclusively with the State’s Attorney, it is advisable that the State’s Attorney seek input from experienced prosecutors in making necessary decisions regarding potential capital cases. State’s Attorneys in counties with an adequate number of sufficiently experienced Assistant State’s Attorneys should form a committee, which includes the Assistants assigned to the case, to consult and assist the State’s Attorney in making death penalty decisions. State’s Attorneys in counties without an adequate number of sufficiently experienced prosecutors, if they choose to do so and so request, may consult with a committee of experienced State’s Attorneys appointed by the President of the State’s Attorneys Association in making death penalty decisions. A fact sheet is helpful to committee members. Appended to these guidelines is a sample Capital Litigation Fact Sheet. Notes of the committee that pertain to the State’s theories, opinions or conclusions, should not be discoverable, as they qualify as work product pursuant to Supreme Court Rule 412(j)(i).

Experienced capital litigators from the Office of the Illinois Attorney General and the State’s Attorneys Appellate Prosecutors Office are resources available to assist State’s Attorneys in all counties. All prosecutors appearing as lead or co-counsel in a capital case must be members of the Capital Litigation Trial Bar as provided in Supreme Court Rule 714.

#### *VICTIM’S FAMILY*

Under 725 ILCS 120/4, family members of murder victims, like all victims of crime, have specific rights which include:

1. The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
2. The right to be notified of all court proceedings.
3. The right to communicate with prosecutors.
4. The right to make a statement to the court at sentencing.
5. The right to information about the conviction, sentence, imprisonment and release of the accused.
6. The right to a timely disposition of the case.
7. The right to be reasonably protected from the accused during the criminal justice process.



8. The right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial.
9. The right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim's choice.
10. The right to restitution.

The State's Attorney or his/her representative should consider the views expressed by the victim's family in making the decision to seek or not seek the death penalty. The family should be advised that the decision regarding what penalty to seek is the State's Attorney's and although the family's views are important, their views are only one factor in making the decision. See *People v. Mack*, 105 Ill.2d 103,473 N.E.2d 880, 85 Ill.Dec.281 (1985).

#### *DEFENSE COUNSEL INPUT AND MITIGATION*

Prior to announcing a decision to seek death, the State's Attorney should provide defense counsel with an opportunity to present matters in writing and/or in person, which might affect the decision to seek or not seek death. This communication should not be used to negotiate a disposition, but give defense counsel a fair opportunity to present valid reasons why the death penalty should not be sought in his/her client's case. It is important that the offer to the defense be an open offer and that the State's Attorney be willing to review information presented by the defense at any reasonable time.

In addition to information provided by the defense, the State's Attorney should carefully assess all potential mitigating factors; both statutory and non-statutory, and evaluate them in light of the nature of the offense.

The investigation of the defendant's background should include a review of any and all information concerning the defendant. The defendant's prior criminal record, including police reports and jail records, should be evaluated and witnesses interviewed. All other available information relevant to the defendant's life history and character should be considered.

#### *FACTORS THAT SHOULD NOT BE CONSIDERED*

The basis of a State's Attorney's decision to charge and to seek the death penalty must be grounded upon the strength of the case, the background and character of the accused and other relevant factors.

- a. The race, ethnicity, religion, sex, social or economic standing of the defendant or the victim should play no role in the prosecutor's decision.

b. The wealth of the defendant or the quality of his/her representation should not be factors in the decision.

c. The prosecutor should not seek a death sentence solely because the defendant refuses to plead guilty. The U.S. Supreme Court has held that the conscious exercise of some selectivity in enforcement is not in itself a Federal constitutional violation absent a showing that the selection (offer) is based on an unjustifiable standard such as race, religion or other arbitrary classification. *See Oyler v. Boles*, 368 U.S. 448, 72 Ed.2d 446 (1962). A plea of guilty entered by the defendant to avoid a possible death sentence is not compelled within the meaning of the Fifth Amendment. *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed.2d 162, 167 (1970). The record must clearly establish that “the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Alford*, 27 L.Ed. 2d at 168. It is critical to protecting the integrity of judgments that Supreme Court rules governing guilty pleas are followed. If a plea offer is communicated and rejected, it is important to make a record. In many cases, the defendant who receives the death sentence will later claim ineffective assistance of counsel. The objective of making a complete record is to avoid providing the defendant with grounds in support of post-conviction proceedings. For a particularly compelling example of why a clear record is essential read *People v. Montgomery*, 192 Ill.2d 642, 736 NE 2d 1025, 249 Ill.Dec. 587 (2000).

State’s Attorneys must always be mindful of the impact the prosecutor’s decisions will have on the administration of justice and respect for the rule of law in this State.

#### *TIMING OF THE DECISION AND NOTICE*

The purpose of providing notice to the defense is to allow for meaningful preparation and representation of the defendant by counsel in good standing with the Capital Litigation Trial Bar pursuant to Supreme Court Rule 714. Illinois Supreme Court Rule 416(c) requires:

“The State’s Attorney or Attorney General shall provide notice of the State’s intention to seek or reject imposition of the death penalty by filing Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the Court directs otherwise. The Notice of Intent to seek imposition of the death penalty shall also include all of the statutory aggravating factors enumerated in section 9-1(b) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)) which the State intends to introduce during the death penalty sentencing hearing.”

In cases where the State’s Attorney has decided early on to seek the death penalty, it is prudent to inform defense counsel informally of the decision and complete all follow up investigation before formally filing timely notice pursuant to Rule 416. There is always the possibility that new information may develop which causes the State’s Attorney to change the decision that “death is the appropriate sentence.” The State’s Attorney should not lead defense counsel to believe that the death penalty will not be sought unless that actually reflects a formal decision. State’s Attorneys should be aware of the possibility of de-certification of a capital case by the

trial court following conviction. Under 720 ILCS 5/9-1(h-5), the trial court, on its own motion or on written motion of the defendant, may decertify the case as a death penalty case if the court finds that the only evidence supporting the defendant's conviction is the uncorroborated testimony of an informant witness concerning the confession or admission of the defendant or that the sole evidence against the defendant is a single eyewitness or single accomplice without any other corroborating evidence.

#### *CONCLUSION*

The fair and impartial administration of Capital Punishment in this State depends largely on the decisions of the State's Attorneys and the Illinois Attorney General. In those few cases in which the death penalty is successfully sought and actually imposed the citizens of Illinois must, at all times, be assured that the process was fair and that the conclusion was just.

APPENDIX B: TABLES SUMMARIZING THE SENTENCING OF FIRST DEGREE  
MURDERERS IN ILLINOIS, STATE FISCAL YEARS 1989 THROUGH 2010\*

*General Overview*

In an effort to examine the patterns of death penalty imposition across Illinois, researchers from Loyola University obtained detailed, offender-level data from the Illinois Department of Corrections (IDOC) that included information pertaining to the 9,592 offenders convicted of first-degree murder and admitted to prison in Illinois from July 1988 through June 2010, or state fiscal year (SFY) 1989 (which covers the period from July 1, 1988 to June 30, 1989) to SFY 2010. During this twenty-two-year period, a total of 150 individuals were convicted and sentenced to death.

The tables on the following pages summarize the total number of offenders convicted of first degree murder in Illinois and the number and proportion of these offenders who received a death sentence across different regions of Illinois and across different time periods. The time periods used in the analyses were the “Pre-Moratorium” (July 1988 to December 1999), the “Moratorium & Governor’s Capital Punishment Commission” period (January 2000 to June 2005) and the “Post-Reform passage” period (July 2005 to June 2010).

Over the time periods examined, the proportion of first-degree murderers sentenced to death statewide fell from 1.9 percent in the pre-moratorium period to 0.6 percent in the post-reform passage period (Table A). In purely statistical terms, this decrease from 1.9 percent to 0.6 percent translates to roughly a 66 percent reduction in the likelihood of the death penalty being imposed over these time periods. Across all separate geographic regions of Illinois examined (Tables B through F), the proportion of first degree murderers sentenced to death fell between the pre-moratorium and post-reform passage periods.

Separate tables are included that summarize the sentences imposed on convicted murders across different regions of Illinois, including Cook County (Chicago), the suburban Collar Counties (Lake, McHenry, Kane, DuPage, and Will counties), other urban areas outside of Cook and the Collar Counties (counties that fall within a metropolitan statistical area based on U.S. Bureau of the Census classifications) and the remaining rural counties in Illinois.

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\* Prepared for the Illinois Capital Punishment Reform Study Committee in September 2010 by David E. Olson, Ph.D., Donald Stemen, Ph.D., and Jordan Boulger of Loyola University.

**Table A**  
*Statewide Sentences Imposed on Convicted Murderers in Illinois*

	Non-Death Sentences	Death Sentences	Total
Pre-Moratorium (July 1988 through December 1999)	6,106 (98.1%)	118 (1.9%)	6,224 (100.0%)
Moratorium (January 2000) through Passage of Reforms (June 2005)	1,961 (98.9%)	22 (1.1%)	1,983 (100.0%)
Post-Reform Passage (July 2005 through June 2010)	1,515 (99.4%)	10 (0.6 %)	1,525 (100.0%)
Total	9,582 (98.4%)	150 (1.6%)	9,592 (100.0%)

**Table B**  
*Sentences Imposed on Convicted Murderers in Cook County, Illinois*

	Non-Death Sentences	Death Sentences	Total
Pre-Moratorium (July 1988 through December 1999)	4,655 (98.8%)	58 (1.2%)	4,713 (100.0%)
Moratorium (January 2000) through Passage of Reforms (June 2005)	1,405 (99.3%)	10 (0.7%)	1,415 (100.0%)
Post-Reform Passage (July 2005 through June 2010)	1,057 (99.6%)	4 (0.4%)	1,062 (100.0%)
Total	7,117 (99.0%)	72 (1.0%)	7,189 (100.0%)

**Table C**

*Sentences Imposed on Convicted Murderers in Illinois Outside of Cook County*

	Non-Death Sentences	Death Sentences	Total
Pre-Moratorium (July 1988 through December 1999)	1,451 (96.0%)	60 (4.0%)	1,511 (100.0%)
Moratorium (January 2000) through Passage of Reforms (June 2005)	556 (97.9%)	12 (2.1%)	568 (100.0%)
Post-Reform Passage (July 2005 through June 2010)	458 (98.7%)	6 (1.3%)	464 (100.0%)
Total	2,465 (96.9%)	78 (3.1%)	2,543 (100.0%)

**Table D**

*Sentences Imposed on Convicted Murderers in Illinois' "Collar Counties"  
(Lake, McHenry, Kane, DuPage, and Will Counties Combined)*

	Non-Death Sentences	Death Sentences	Total
Pre-Moratorium (July 1988 through December 1999)	405 (95.3%)	20 (4.7%)	425 (100%)
Moratorium (January 2000) through Passage of Reforms (June 2005)	133 (98.5%)	2 (1.5%)	135 (100%)
Post-Reform Passage (July 2005 through June 2010)	129 (97.8%)	3 (2.2%)	132 (100%)
Total	667 (96.4%)	25 (3.6%)	692 (100%)

**Table E**

*Sentences Imposed on Convicted Murderers in Illinois' Urban Counties,  
Excluding the Cook and "Collar" County Region*

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	725 (97.1%)	22 (2.9%)	747 (100%)
Moratorium (January 2000) through Passage of Reforms (June 2005)	276 (97.9%)	6 (2.1%)	282 (100%)
Post-Reform Passage (July 2005 through June 2010)	247 (100%)	0 (0%)	247 (100%)
Total	1,248 (97.8%)	28 (2.2%)	1,278 (100%)

**Table F**

*Sentences Imposed on Convicted Murderers in Illinois' Rural Counties*

	Non-Death Sentence	Death Sentence	Total
Pre-Moratorium (July 1988 through December 1999)	319 (94.7%)	18 (5.3%)	337 (100%)
Moratorium (January 2000) through Passage of Reforms (June 2005)	154 (97.5%)	4 (2.5%)	158 (100%)
Post-Reform Passage (July 2005 through June 2010)	79 (96.4%)	3 (3.6%)	82 (100%)
Total	552 (95.6%)	25 (4.4%)	577 (100%)