

Public but Opaque: The Problems of Tracking Homicide Charging in a California County

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Abstract

This article reports on a project to collect and analyze publicly available demographic data related to not yet adjudicated ('active') homicide cases charged in one large and diverse California County. Much of the desired data, although legally publicly available, turned out to be impossible or practically impossible to obtain. The obstacles we encountered seemed mostly related to bureaucratic overload, indifference, and most importantly, the absence of a systematic data collection and analysis infrastructure in the criminal justice system for tracking active cases. Despite gathering or attempting to gather numerous documents from various criminal justice organizations for 121 active homicide cases, after approximately one year of continued efforts by several people with considerable experience in law, criminal justice research, and records requests, we were only able to state the race of 25% of the defendants and 36% of the victims in these 121 cases. We propose legislation to facilitate data collection on homicide cases.

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Introduction

This article reports on a project to collect and analyze publicly available demographic data related to not yet adjudicated (‘active’) homicide cases charged in one large and diverse California County. As explained below, much of the desired data, although legally publicly available, turned out to be impossible or practically impossible to obtain. Experienced social scientists know that collecting data sometimes resembles a trek through a thick jungle at night, with many obstacles and paths to nowhere. This article certainly depicts such a frustrating journey. But there is no good reason why public records should be so difficult to obtain. The obstacles we encountered seemed mostly related to bureaucratic overload, indifference, and most importantly, the absence of a systematic data collection and analysis infrastructure in the criminal justice system for tracking active cases. We did not encounter explicit hostility or resistance to our project. What we did find was a lot of harried and distracted bureaucrats who did not understand what we wanted, why we wanted it, and that they were legally required to provide the documents.

This situation means that the legal concept of ‘public record’ is something of a fiction, a form of ‘repressive formalism’¹ where the ‘law on the books’ says that government documents are available for public scrutiny but the ‘law in action’ says they are often not available or are prohibitively difficult to obtain. We began this project with the hope that it could shed light on the viability of a statewide system of collecting and analyzing data about homicide charging. What we learned is that without some process that is centralized, institutionalized and

¹ Repressive formalism describes instances where substantive justice is precluded by formal rules; for a discussion, see Milovanovic (2003), p. 21.

systematic, it will be prohibitively difficult to collect and analyze the types of data that are necessary to fulfill the requirements of fair administration of justice in [C1]California[RG2].

In this article, we begin by discussing the California Commission on the Fair Administration of Justice and the importance of ‘the race effect’ in relation to homicide cases, we next explain in detail our data collection efforts for active homicide cases by first focusing on the problems we encountered in attempting to collect official documents and then reporting on what we were able to obtain and the data therein; finally, we propose policy recommendations to remedy the problem of collecting data on active homicide cases. We now summarize our findings and recommendations. After this summary, we describe our project in detail.

Summary of Findings and Recommendations

Findings

For the purposes of obtaining reliable demographic data, we attempted to collect all publically available documents related to active homicide cases in a large and diverse California County. As of this writing, we have files for 121 homicide charges in this county, the earliest of which was charged in 2003 and the most recent in 2008. For each of those 121 cases, we were able to obtain some demographic data, although even what we obtained required a sustained and labor intensive effort. Despite gathering or attempting to gather numerous documents from various criminal justice organizations for every case in this data set, after approximately one year of continued efforts by several people with considerable experience in law, criminal justice research, and records requests, we were only able to state the race of 25% of the defendants and 36% of the victims in these 121 cases.

Recommendations

1. Legislation requiring a standardized system of data collection on homicide cases that could be implemented easily in all California courts
2. Although they provide information only for ‘closed cases,’ we also recommend legislation requiring that probation reports be available for scholarly research purposes indefinitely, abolishing the current 60-day window rule.

Background

In 2004, the California State Senate convened the California Commission on the Fair Administration of Justice (hereafter: ‘the Commission’) in order to address concerns over the phenomenon of wrongful convictions, the possibility of wrongful execution, and the more general problem of fairness in the administration of justice in California including the death penalty. Specifically, the Commission was charged:

- (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons;
- (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions;
- (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate (California Commission, 2008, p. 1).

The Commission was constituted of 23 experts² on the administration of justice and issued eight reports related to the causes of wrongful conviction. The Commission then undertook a comprehensive and unprecedented review of California’s death penalty, conducting three public hearings, listening to 72 witnesses, and digesting several detailed reports (California

² Including LAPD Chief William Bratton, Los Angeles Public Defender Michael Judge, and California Attorney General Jerry Brown. All Commission reports are available at www.ccfaj.org/reports.html.

Commission, 2008, p. 1). The Commission's findings on the death penalty can be encapsulated in the belief that because of massive delays in the appellate process and the high rate of reversal (70%) of capital guilt or penalty trials, "California's death penalty system is dysfunctional" (p. 3). The Commission further found itself in agreement with California Supreme Court Chief Justice Ronald M. George's view that if the system is not radically reformed, "the backlogs in post conviction proceedings will continue to grow 'until the system falls of its own weight'" (p. 4). One central concern raised by the Commission's investigation is fairness in the adjudication of homicide cases at all stages of the process, from arrest to appeal. As the Commission makes clear, there is relatively abundant research on *death-sentence-resulting* cases, but literally no studies of *charging* in homicide cases. Indeed, "there is no current data to show what proportion of California homicides are *charged* as first degree murder and/or death penalty cases" (California Commission, 2008, p. 90, italics in original). Moreover, the recent research on death sentencing referenced by the Commission shows that the well-known role of race in death sentencing remains alive and well:

Overall, controlling for all other predictor variables, [Pierce & Radelet] found all those who kill African Americans, regardless of the ethnicity or race of the perpetrator, are 59.3% less likely to be sentenced to death than those who kill non-Hispanic whites. This disparity increases to 67% when comparing the death sentencing rates of those who kill whites with those who kill Hispanics, again without regard to the ethnicity or race of the perpetrator (California Commission, 2008, p. 92).

Peirce and Radalet also found that geographic location was related to outcomes:

[Pierce and Radalet's research] strongly suggested 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. The more white and more sparsely populated the county, the higher the death sentencing rate (California Commission, 2008, p. 92)

In re-establishing the importance of the race-of-victim in capital case outcomes, Pierce and Radalet's (2005) study makes clear that, because of the mysterious nature of these disparities, research is needed on *all stages* of the administration of justice in homicide cases. The key question is: why do these racial disparities continue to appear in studies of death-sentencing? The Commission concluded that more data and analysis is needed to answer this critical question.

The Mysterious Race Effect

The 'race effect' on death sentences continues, 25 years after it was famously demonstrated by David Baldus (see Baldus, et al, 1990 and Pierce and Radalet, 2005). We know that in homicides that ultimately become capital cases, the race of the persons involved matters at some point after the discovery of a dead body and before a jury sentences a person to death (and perhaps also after sentencing). But there is an important difference between knowing that race matters and knowing *why* and *how* it matters. Racism haunts the American justice system, but where, why, and how?

The extensive work of the Capital Jury Project (CJP) and other researchers (especially Craig Haney and his colleagues) studying capital jurors has shed some light on the role of race in *juror* decision-making, one of the key junction-points in the processing of capital cases. For example, Fleury-Steiner (2002) analyzed interviews of 66 capital jurors who were on panels that handed down death sentences to black men to show how jurors use the law as a means of drawing identity boundaries that are grounded in hegemonic conceptualizations of race (p. 550). Fleury-Steiner argues that 'hegemonic tales' having to do with class and race play out in jurors' legal consciousness as they draw distinctions between themselves and capital defendants (p. 574).

Similarly, Bowers and his colleagues (2004) show how conscious and unconscious race biases persist among capital jurors, even with the supposed protection of intensive *voir dire* promoted by the United States Supreme Court in *Turner v. Murray* (1986) (p. 1500 – 1501). Specifically, CJP research has shown significant differences between black and white jurors along three dimensions of punishment considerations: 1) lingering doubt about the defendant's guilt, 2) impressions of the defendant's remorselessness, and 3) perceptions of the defendant's future dangerousness (p. 1502); along each dimension, Black jurors perspectives favored the defendant in comparison to white jurors. Moreover, the CJP identified complex processes of bias that operate at the nexus of race and gender:

The statistical evidence reveals that white male jurors were far more likely than African-American male jurors to think of the African-American defendant as dangerous to others and far less apt than their black counterparts to see the defendant for sorry for what he did. White women were much less likely than black women to acknowledge the defendant's emotional disturbance. Concerning the tendency to identify with the defendant, African-American jurors were significantly more likely than others to imagine themselves in the situation of the defendant's family, to imagine themselves as a member of the defendant's family, to be reminded of someone by the defendant, and less likely than others to see the defendant's family as different from their own. And, as the Court supposed [in *Turner*], the evidence shows that white jurors of both genders are much less receptive to arguments and evidence of mitigation than African-American jurors who served on the same black-defendant/white victim cases (p. 1531 – 1532).

Obviously, race matters for *jurors*.³

But there is no reason to believe that racism is attributable exclusively to jurors. The links of the chain that begins with law enforcement officers and ends with an executioner include plenty of other important decision-makers, not least of which is the prosecutor.

It has been said that prosecutors are the most powerful officials in the criminal justice system (Bubany & Skillern, 1976, p. 477). They have the exclusive power to decide whether or

³ See also Lynch and Haney (2000) for research suggesting that racially biased death sentencing may be exacerbated by juror miscomprehension of California's notoriously confusing capital jury instructions.

not to charge a person with a crime, decide what the specific charges will be, whether or not to plea bargain, whether or not to try a juvenile as an adult, and also the power to decide whether or not to seek the death of a person. Prosecutors exercise the ultimate form of sovereignty when they exercise their discretion to decide which murder cases are suitable for capital punishment and which are not (Songer & Unah, 2006, p. 162). Many factors have been suggested to affect a prosecutor's decision on whether or not to seek the death penalty, but one factor that appears throughout the research on prosecutor decision-making is race.

Prior research has indicated that the race of the victim can influence prosecutors when they are deciding whether or not to seek the death penalty. Free (2002) reviewed 68 empirical studies regarding race and presentencing decisions and found that prosecutors are more likely to charge defendants with capital murder when the victims are white (p. 220). When dealing with defendant/victim combinations, Free also found that the cases that have the highest probability of becoming capital are those in which the defendant is African-American and the victim is white (p. 226).

Paternoster's (1984) research also suggests that the race of the victim is influential. Paternoster analyzed data from 300 homicides involving an aggravating felony that occurred in South Carolina between 1977 and 1981. Prosecutors sought the death penalty in 107 of the 300 capital murders, and Paternoster found that when several legally relevant factors were taken into account, the race of the victim was significantly related to the decision to seek the death penalty (p. 437). Paternoster also found that African-American offenders who killed a white victim were more likely to have prosecutors seek the death penalty while African-American offenders who killed a black victim were less so (p. 437). Songer and Unah (2006) also studied homicides in South Carolina and found similar results. Analyzing homicide cases in South Carolina between

1993 and 1997, during which time prosecutors sought death in 130 out of 2,319 non-negligent homicides, Songer and Unah's found that prosecutors sought the death penalty in 7.6% of the white victim cases and only 1.3% of the black victim cases (p.187). Songer and Unah concluded that South Carolina prosecutors are three times more likely to seek the death penalty in white victim cases than in black victim cases (p. 206). In addition, Songer and Unah's results showed that prosecutors were 3.5 times more likely to seek the death penalty when a black defendant killed a white victim than in all other defendant/victim combinations combined (p. 187).

These findings are important because they illuminate one link in the chain from crime to execution where the race effect appears *prior to sentencing*. Perhaps aside from the jury decision to execute defendants, the prosecutor choice to charge capital murder is the most important moment in the process of state killing. To over-use the metaphor, we can see from prior research at least two links in the chain appear to be tainted with the race effect: prosecutor decisions and juror decisions.

Despite this research showing the race of victims and defendants matter somehow in prosecutor decisions to seek the death penalty, there is almost no research illuminating the *reasons* for this race effect. Why and how do prosecutors seek death in a racially disproportionate manner?

Although not directly addressing the race question, Yarvis (2000) sheds some light on why prosecutors choose the death penalty in some cases and not in others. Yarvis examined 115 homicide cases in California between 1980 and 1991. Of the 115 cases, fifty-two (52) were eligible for the death penalty. Yarvis sought to answer the question: once the death penalty criteria have been met (i.e. when there was at least one special circumstance present), why do prosecutors seek or not seek death, and what are the bases for such decision-making? (p. 258).

Of the fifty-two (52) death eligible cases, Yarvis compared the thirty-nine (39) defendants who met the special circumstance criteria and were charged with the death penalty to the thirteen (13) defendants who met the criteria but were not charged as such. Yarvis found that prosecutors were more likely to seek death when more than one special circumstance was present (p. 263). Yarvis also found that robbery and sexual assault usually provoked prosecutors to file a special circumstance charge (p. 256). When determining if aggravating and/or mitigating factors played a role in prosecutor decision-making in capital cases, Yarvis found that prosecutors focused selectively on aggravating factors and placed much less emphasis on mitigating ones (p. 256), and that the presence of mitigating factors did not deter prosecutors from charging a special circumstance (p. 264). Although Yarvis' findings provide some useful information on prosecutor decision-making and death, this research is limited in that it does not address race and its role in this decision-making process.

The Present Project and Working Group

Recognizing the significance of the race effect on homicide cases, Peirce and Radalet (2005) and the Commission call for official monitoring of homicide cases *from the very beginning*:

Such issues raise crucial questions about the interest, and, more fundamentally, the ability of the State to monitor its death sentencing process. A comprehensive and effective monitoring program needs to track all homicide cases from arrest through appeal. To accurately assess the full range of factors that may or may not affect criminal justice decisions, all links and actors in the decision-making process must be monitored. This necessitates collecting information from the very start of the process, including information on the character of police investigations and prosecutorial charging decisions (California Commission, 2008, p. 93, quoting Peirce and Radalet, 2005, p. 38-39)

Contemporaneous to the Commission's concern over monitoring prosecutorial charging decisions, a working group consisting of academics and attorneys was formed in September,

2007, to initiate a pilot project to track and analyze active cases charged in one large and diverse California County. This pilot project aimed to assess the viability of a statewide initiative that would mandate a similar system of data tracking for all homicides in all California counties. This article reports on this pilot project.

Closed cases which resulted in death sentences are well tracked and documented in various ways in California because at least three agencies—the California Appellate Project, the Habeas Corpus Resource Center, and the Office of the State Public Defender—work together in representing California’s *condemned* prisoners. But almost no data are available for LWOP-resulting capital cases⁴ or active homicide cases of any kind. That is, there are little data on homicide cases that *could* result in death sentences, but did not or might not. Indeed, there is currently no feasible way to find out how many *potential* capital cases are currently pending in California. Nor can it be easily determined how many cases in which special circumstances were charged (e.g., ‘death eligible’ cases) end in verdicts or pleas to sentences less than death. Because there is so little known about the demographic characteristics of non death sentence-resulting homicide cases in California, this project is important simply for the descriptive demographic data it aimed to collect.

The Problems of Collecting Data on Homicide Charges

After establishing the working group on homicide charging, we set out to undertake the following objectives:

1. Investigate what data are publicly available
2. Investigate methods of obtaining the data
3. Collect the data
4. Create a database housing and organizing the data
5. Track active cases to follow changes in homicide charges

⁴ Homicide cases in which the defendant is found guilty of capital murder are followed by a sentencing trial (the ‘penalty phase’), which can result in only death or Life Without the Possibility of Parole (LWOP).

As of this writing, we have collected at least some limited data for 121 homicide charges in our pilot county.

In order to manage and analyze the data contained in the documents we requested, we created a simple database using the software application Filemaker Pro. We created fields to allow storage and tracking of any data related to a given homicide charge, including all demographic information about defendants and victims. We now discuss the various types of documents we attempted to collect.

Charging Documents

Initial charging documents (complaints and information) are public record. Our first attempt at obtaining these documents was to request copies of charging documents pertaining to all active homicide cases from the defense attorneys handling them. The leaders of the two indigent defense attorney organizations in our pilot county—a County Public Defender’s Office and a ‘Conflicts Panel’⁵—agreed to provide a list of active homicide cases handled by their staff attorneys and also ask their attorneys to send copies of all these documents to us. We also communicated directly with several lawyers working in both agencies who volunteered to copy complaints from their files and to notify us of preliminary hearing and sentencing dates. From September of 2007 through December 2008, we made repeated follow up phone calls to defense attorneys with active cases, reminding them to send copies of the initial charging documents. Though almost all had expressed willingness and interest in participating in the project, only a very small number of attorneys followed through by sending copies of charging documents. In all, the attorneys sent charging documents from 39 separate cases.

⁵ A ‘Conflicts Panel’ is a group of qualified private attorneys who are assigned cases in which the Public Defender has a conflict of interest, such as cases with co-defendants.

Because of the limited success in obtaining charging documents from attorneys, we made numerous trips to the pilot project County Courthouses, from October 2007 through July 2008, to make copies of missing documents. This in itself was no easy task: homicide cases are spread among six court houses in the Pilot County. At the Clerk's offices, we requested the file for every homicide case handled in the respective court house, reviewed the files to locate the charging documents, and requested copies of the available documents. On each visit, several case files were not available, either because the file was being used in court, or because the clerk could not locate the file for unexplained reasons. In general, obtaining these public records proved difficult and labor intensive.

For example, on one visit in April, 2008 to the main courthouse in our pilot county, we requested copies to be made from approximately 20 separate files. The clerk on duty said she was too busy to copy all of the files on that day and asked us to return several days later to pick up the rest of the copies. When we returned to pick up copied files two weeks later, not all of them had been copied and made ready for pickup. After a series of phone conversations with the clerk, we returned several weeks later to pick up the final copies of charging the documents. In addition, the County Court Clerk in our pilot county charges \$.50 per page for copying, and to date, we have paid approximately \$250 in copying fees for the documents we have received.

Notably, despite repeated visits to the courts and follow up contact to attorneys, we have not been able to obtain charging documents for every active homicide case in the county, from September 2007 to December, 2008.

This situation illustrates the main point of this article—documents that are *legally* available to the public are *practically* unavailable. While it is technically true that anyone has the legal right to view charging documents, it is in fact prohibitively difficult to obtain

comprehensive sets of these documents for the purposes of data analysis. This situation reflects repressive formalism, where substantive justice is precluded by formal justice. Put another way, the practical unavailability of public legal documents shows that, at least to some extent, *procedural* justice trumps *substantive* justice because the practical unavailability of these documents inhibits the purpose for making them public record in the first place—to allow for independent checks on the criminal justice system. How can independent analysts measure the fairness of the criminal justice system if the bureaucratic pressures of the system preclude access to data?

Data Reporting Form to Defense Attorneys

Initial charging documents—when they can be obtained—provide only very limited information about the case they represent, usually only the names of the defendant and victim and the charges sought. This obviously leaves out all descriptive data about the defendant and victim, such as sex, age, race, etc. Charging documents are useful only to the extent that they demonstrate the fact of a homicide charge and provide a link between the defendant and named victim.

Because of the limited information in charging documents, we attempted to obtain demographic information directly from the defense attorneys handling homicides in the Pilot County. In September 2007, we created a demographic reporting form to be completed by the defense attorney in each case. However, because of concerns that completing such a form might violate client confidentiality, and to a lesser extent because we did not wish to burden criminal defense attorneys with extra work, we abandoned this mode of data collection after having received only one completed [C3]form[RGS4].

Police Reports

Next we turned to police reports (arrest reports and homicide reports), which usually contain demographic information about victims and defendants, although usually not in the same document; homicide reports usually list the race of victim and arrest reports usually list the race of defendant. The only way to connect the two is by referencing the complaint—if it has been obtained. Police reports are not public records under state law, but can sometimes be obtained from agencies in a jurisdiction with a local ‘sunshine ordinance.’ Under California Government Code Sec. 6254(f), law enforcement agencies are not legally required to disclose reports to the public. But some local jurisdictions have adopted transparency policies, and are willing to provide such reports to the public. However, this posed a major jurisdictional problem. Cases identified by charging documents exist at the *county* level; but police reports exist at the *municipal* level. Unfortunately, charging documents may or may not contain sufficient information to identify from which municipality within the county the case originates.

The majority of homicide cases in the Pilot County originated from a large metropolitan police department. This large city in the Pilot County has a local sunshine ordinance, which specifies that certain police reports must be disclosed to the public. In November, 2007, we began requesting reports from the municipal police department, using the name of defendant and Superior Court Docket number—as listed in the complaint—to identify the cases. Our first request was for a small number of documents—ten incidents—which we were nearly certain had originated within the city. The police department provided the arrest and incident reports for these ten cases in a timely manner.

However, when we sent a second request to the police department, requesting arrest and incident reports for the 80 remaining cases we had identified by charging documents as likely

originating from within the city, the Public Records Coordinator requested we identify the incident date for each case, because searching records by name for 80 records would be too burdensome. Using information in charging documents, we narrowed the list to cases we were certain originated in the city's police department, which resulted in only 20 more cases. We subsequently sent a third letter with this identifying information, and police department responded by sending reports for five of the cases.

Fortunately, a smaller city in the Pilot County also has a sunshine ordinance. In response to our records request, this police department provided police reports for all seven cases in their city. No other local municipality within the Pilot County has a sunshine ordinance. The point we wish to make in this article is that it is notable that we have only collected police reports for 22 of 42 cases requested *in the municipalities with sunshine ordinances*. That is to say, even when the law requires disclosure, we were only able to collect approximately half of the documents we are legally entitled to obtain.

Public Records Act Request to the District Attorney

In April, 2008 we submitted a Public Records Act request to the Pilot County District Attorney's office, for complete charging and sentencing information for all homicide cases handled in the county between January 2003 and December 2007. The District Attorney's office provided this information in the form of a spreadsheet that lists basic charging and sentencing information (defendant names, case numbers, charges, sentences and pending events) for all cases charged in the *major city* in the Pilot County during this time period (*not* for the entire

county), but lacks any demographic data.⁶ These data by themselves, of course, are useless for the purposes of studying the role of demographics in the process of homicide adjudications.⁷

Reporting from the California Department of Justice

After entering all the data gleaned from the various documents we collected into our database, we ran a report showing for which homicide victims we lacked demographic data. We then requested from the California Department of Justice a complete list of victims, by race and gender, for homicides in the Pilot county from 2003 – 2006 (the most recent year with available data). The California Department of Justice provided a list of only the last names of victims, along with race and sex. We cross-referenced this list with the names in our database and were able to fill out the fields in some, but not all, of the victims lacking demographic data.

Table 1 summarizes the documents we requested and received.⁸

Table 1. Documents Requested and Collected: September 2007 – December 2008

Document	Requested From	Number of Items Requested	Number of Items Received
Complaints/ Informations	Defense Attorneys	104 Cases	39 cases
Complaints/ Informations	Court Clerks	105 Cases	82 cases
Demographic Reporting Form	Defense Attorneys	104 Cases	1 Case
Police Reports	City 1 Police Department	35 Cases	15 Cases
Police Reports	City 2 Police Department	7 Cases	7 Cases
District Attorney Report	District Attorney	1 Report	1 Report

⁶ During this five year span, there were 387 defendants charged with homicide for 309 cases.

⁷ As of this writing, a new PRA is being drafted for submission to this District Attorney’s Office to request demographic information for these cases and also for all other homicides charge in the county.

⁸ Death certificates probably contained helpful information, but were prohibitively expensive for this project.

Findings and Discussion

For each of the 121 cases in our database, we attempted to gather demographic data by way of requesting the publicly available documents described above. A simple way of quantitatively describing the *data* we collected is to list selected categories and enumerate for how many cases we were able to obtain official data in the documents collected. Table 2 lists key data categories and obtained data.⁹

Table 2. Enumeration of Data Collected¹⁰

Data Category	Number of Cases with Data	Percentage
Defendant Name	121	100%
Defendant Sex	106	88%
Defendant Race	30	25%
Defendant Date of Birth	29 ¹¹	24%
Victim 1 Date of Birth	43 ¹²	36%
Victim 1 Sex	100	83%
Victim 1 Race	44	36%

As Table 2 makes clear, obtaining reliable data on the age and race of victims and defendants is difficult. Despite gathering or attempting to gather numerous documents from

⁹ There were some cases lacking data in which it was tempting to guess the gender or race of the defendant or victim by the name (e.g., assuming that Juan Martinez was a Hispanic male). We resisted this temptation and coded for gender and race only with official documentation.

¹⁰ This table only includes demographic data for the defendant and first victim. Of the 121 cases, 40 cases had two or more victims. For brevity, we exclude for now a discussion of demographic data collected for Victim2 – Victim5 on cases with more than one victim.

¹¹ For those defendants we were able to determine age, we found none that were juveniles (under 18) at the time of the offense. This means one of three things: 1) no juveniles committed homicides during our study years, 2) prosecutors in this county decided not to charge juvenile killers as adults, or 3) some of the defendants in our database were juveniles, but we were not able to obtain documents demonstrating their age.

¹² Of these 43, only one victim appears to have been a child at the time of the homicide. But as with the previous category, our lack of data prevents us from inferring anything from this fact.

various criminal justice organizations for every case in this data set, after more than one year of continued efforts by several people with considerable experience in law, criminal justice, research, and records requests, we were only able to state the race of 25% of the defendants and 36% of the victims.

Demographic Information in Different Documents

The only official documents that list the *race of the defendant* are the *police reports*. But police reports are only available in those jurisdictions with sunshine ordinances. As discussed above, even municipalities with sunshine ordinances did not always release all of the documents that we requested.

The only official documents listing the *race of the victim* are the *homicide reports* and the *California Department of Justice reports*. But neither of these is linked to the defendants or arrest reports, making it impossible to connect the cases, unless it is possible to identify both parties in *the complaint*.

Complaints, which are the only official documents listing defendants and victims and which should be easily obtained, were in fact difficult to get. As we attempted to collect complaints, we found that the files were often missing, the clerks were often slow to comply with requests, and we spent a significant amount on copy fees. Moreover, the defendant's name and the docket number are required to request the complaint, so even taking this initial step requires some prior research, either by way of a Public Records Act request to the District Attorney or the cooperation of defense attorneys.

The requester must have all three of these documents to identify the race of the victim, the race of the defendant, and the charges. Even then, little other relevant information can be reliably obtained from these documents. This leaves out important demographic information that

may or may not be reliably reported such as citizenship and nation of birth of the victim and defendant.

A Note on Probation Reports

Although they can only be obtained for adjudicated cases, we decided to request *probation reports on sentencing*¹³ in order to capture more information about sentencing and demographics. We invoked Penal Code section 1203.05(a) that provides for the public's right to copy probation reports within 60 days of a judgment being pronounced. In October 2007, we submitted a written request to the Pilot County Superior Court for a probation report for a defendant sentenced September 19, 2007, within 60 days of the sentencing. We made several follow up phone calls, and were inaccurately told by the Clerk that we were not entitled to the report. When we visited the court house in person to retrieve the file, we were told we were only allowed to view the file and not copy it. In December, 2007 we sent another letter to the Clerk's Office requesting they make the report immediately available, as their refusal to do so constituted a violation of the Penal Code. After another follow up letter, the courts complied with the request, over two months after the original request was made. It took no less than six attempts over several months to obtain this single publicly available probation report. We encountered similar problems requesting probation reports in subsequent cases. Nearly every request has required repeated follow up phone calls and several follow up letters. As of this writing, we have requested copies of 44 probation reports from the courts and received 13.

Obtaining probation reports is made exceedingly difficult both the 60 day statutory limit on their availability and by the unsystematic nature of learning of sentencing dates. We learned of sentencing dates, which trigger the 60 day clock, from the Conflicts Panel administrator in the

¹³ Probation reports on sentencing are the sentencing recommendations provided by the probation department to the court for convicted defendants.

Pilot County. It happens that this office is able to track sentencing dates for recently adjudicated cases. However, this is entirely idiosyncratic—the Public Defender’s office happens *not* to track sentencing dates. This means that in our study, we only routinely learned of sentencing dates (which allow us to request probation reports) for a small portion of the cases. The court docket is available on-line and we attempted to use the on-line service to monitor sentencing dates. This, however, requires checking each docket number individually numerous times a week, a task that is prohibitively inconvenient for a data set with more than 100 cases.

We found that the best source of demographic data on homicide victims and defendants were these probation reports, which often contain fairly comprehensive age, sex, and race information for both victims and defendants as well as a description of the facts of the case. However, because probation sentencing reports are only available *after disposition*, these rich data sources can only be used to study adjudicated cases, not active cases.

Conclusion

Social scientists have produced research for decades that questions the fairness of the criminal justice system, especially in homicide cases. Though social scientists have examined ethnic, gender and age discrimination on death-sentence-resulting capital cases and have found that the demographics of both defendants and victims can affect outcomes, they have paid little attention to *active* homicide cases. Tracking active homicide cases is important because doing so takes up the question of fairness from the very beginning of the adjudication process; we know from prior research that ‘race matters,’ but we do not know very well which of the links in the adjudication chain are tainted or why. As the California Commission on the Fair Administration of Justice has made clear, research is needed on homicide charging (California Commission,

2008, p. 93). This study attempted to take a first step toward investigating the characteristics of victims and defendants at an earlier part of the process than has been studied previously.

Although most of the data sought in this study was public information, we found that obtaining these public records was practically impossible. After a diligent search, we were only able to determine the race of 25% of the defendants and 36% of the victims for the 121 homicide charges we learned [C5]of[RGS6]. Thus, we concluded that the legal concept of ‘public record’ is something of a fiction, where the ‘law on books’ says that government documents are available for public scrutiny but the ‘law in action’ says they are often not available or prohibitively difficult to obtain. Analysts of the legal system since the time of Legal Realism in the early part of the 20th Century have pointed to this problem (see Milovanovic, 2003, pp. 114 – 119). We suggest that a centralized, institutionalized and systematic database be created so that the public has access to these documents. Without a centrally located database, social scientists will continue to struggle to obtain these documents and therefore will not be able to effectively measure the fairness of the criminal justice system.

Policy Recommendations

1. We recommend legislation requiring courts to submit demographic data to a centralized agency upon the filing and adjudication of homicide cases. See Appendix 1 for a draft of this proposed legislation, including recommended categories for data collection.
2. We also recommend legislation changing the rules on availability of probation reports. See Appendix 2 for a draft of this proposed legislation.

Appendix 1:

PROPOSED LEGISLATION ON HOMICIDE CASE DATA REPORTING

(a) In all criminal actions in which the defendant was charged with a violation Penal Code section 187, the judge presiding over the final disposition of the case by imposition of judgment or dismissal of all charges shall complete a Homicide Case Data Report. The judge may designate a court clerk to complete the report, provided that the judge review and approve the completed report. The judge or clerk shall complete and send the report to the Supreme Court [or Judicial Council] within 60 days of the final disposition of the case by dismissal or imposition of judgment. The judge or clerk shall prepare the Homicide Case Data Report by reviewing the record and consulting with the prosecutor, and defense counsel.

(b) The judge or clerk shall attach a copy of the following documents to the Homicide Case Data Report: (1) all charging documents including the complaint, information or indictment, any amendments; (2) the final judgment; and (3) the probation report.

(c) The Judicial Council shall prescribe the form of the Homicide Case Data Report. Each completed Homicide Case Data Report shall be assigned a unique tracking number. The Homicide Case Data Report shall include the following information:

1) Basic Case Information

- Docket numbers: all docket number(s) for the case.
- Location: county of prosecution, county of trial and name of court branch within county where trial occurred, if applicable.
- Attorneys and judges: For each of the following stages, identify the names of all attorneys appearing for the prosecution and defense and all judges presiding: arraignment(s), preliminary hearing, motion hearings, including requests for funds, trial, and sentencing.
- Dates: date of the following: offense(s); first charging document filed; preliminary hearing; information filed; conviction; sentence; and dismissal of any charges.
- Charges: all charges, including all special circumstances and prior convictions alleged at any time during the proceedings, and the results for each, indicating either true/ not true or convicted/ not convicted/ dismissed.
- Sentence: sentence imposed.
- Prior Homicide Case Data Reports: the tracking number for any other Homicide Case Data Report prepared for any prior cases in which the defendant was charged for the events charged in the case, if known.

2) Basic Demographic Information for the Defendant

- Date of birth

- Sex
- Citizenship
- Nation of birth
- Address of residency
- Race and ethnicity using U.S. Census categories: race and ethnicity information for the defendant must be based on information contained in the FBI Uniform Crime Report, the probation report or another reliable source such as jail intake records or records of the California Department of Corrections.
- Use of Interpreter: if the defendant used an interpreter in court, specify what language.
- Intellectual or development disabilities: any cognitive impairments as defined in Penal Code section 1001.20, if reflected in the probation report.
- Criminal record: any felony convictions identified in the probation report or alleged in the charging documents.
- Record of incarcerations: any prior confinement in state prison, county jail, or secure juvenile facilities, if reflected in probation report.

3) Co-Defendant Identifying Information

- The name of any co-defendant charged under the same case number.

4) Victim Information

- All of the basic demographic information listed above in subsection (2), as reflected in reliable documents including birth or death certificates, police reports, or medical records.
- The victim's relationship with the defendant including whether they were strangers, blood-relatives, current spouses, ex-spouses, current partners, ex-partners, business associate, neighbors, friends, criminal associates or other.

5) Circumstances of the Crime

- Number of victims killed and number injured.
- Method of killing, using FBI Uniform Crime Reporting categories.
- Aggravating factors set forth in any notice of aggravation filed pursuant to Penal Code section 190.4.

(d) All Homicide Case Data Reports received by the Supreme Court [or Judicial Council] shall be compiled into a Uniform Homicide Case computer database containing the information in each report. The data shall be maintained in a manner that allows for comprehensive searches and provides for electronically transferable and printable reports.

(e) The data in the Uniform Homicide Case computer database and all reports generated from the database shall constitute public records under the Public Records Act. Full reports from the Uniform Homicide Case computer database shall be made available to the Supreme Court, the California Appellate Project and the Attorney General on an annual basis.

(f) If the conviction or sentence in a case that has been entered into the Uniform Homicide Case is subsequently reversed or modified, the Supreme Court [or Judicial Council] shall add to the entry about the case a notation that the judgment was the reversed or modified.

Appendix 2:

PROPOSED LEGISLATION FOR ACCESS TO PROBATION REPORTS

Proposed addition to PC § 1203.05:

(h) For probation reports that are in the possession of the California Department of Corrections and Rehabilitation, such reports may also be inspected and copied, as follows:

(1) By a public defender or attorney of record when representing a person in a criminal case, when the information is requested to assist the attorney in representing his or her client.

(2) By a member of the public, if release of the information would enhance public safety, the interest of justice, or the public's understanding of the justice system and the person making the request declares that the request is made for a scholarly or journalistic purpose. If a person in a declaration required by this subdivision willfully states as true any material fact that he or she knows to be false, he or she shall be subject to a civil penalty not exceeding ten thousand dollars (\$10,000). The requestor shall be informed in writing of this penalty. An action to impose a civil penalty under this subdivision may be brought by any public prosecutor and shall be enforced as a civil judgment.

(3) Any personal information obtained from the probation reports pursuant to this subsection is confidential and the receiving person shall not disclose its contents. It is not a violation of this statute to disseminate statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed.

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