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# The Delaware Death Penalty: An Empirical Study

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# The Delaware Death Penalty: An Empirical Study<sup>†</sup>

*Sheri Lynn Johnson,\* John H. Blume,\*\* Theodore Eisenberg,\*\*\* Valerie P. Hans\*\*\*\*  
& Martin T. Wells\*\*\*\*\**

*We are grateful for the invitation to participate in a symposium that honors a great scholar and great man, a quiet man with a strong passion for justice, Professor David C. Baldus. David was deeply admired in the academic community in which all of us participate, but in the death penalty litigation community to which two of us, John and Sheri, belong, he was almost worshipped. Unlike many experts, whom capital defense lawyers sometimes try to cajole, bully, or buy, David was valued for his steadfast pursuit of the facts. We knew from the start that he was going to track down the truth, and then tell it.*

*In fact, the reverence for his work, as well as his integrity, may be why in the death penalty litigation community he was known as “David” rather than “Dave”; the nickname would have seemed insufficiently respectful. That reverence did not, however, make David self-important. When Sheri first met David at Airlie (where he was presenting his findings to a group of death penalty litigators), he just introduced himself by his first name, talked about what he was working on, asked her ideas, and inquired about her own work. Later, someone whispered to her, “Did you know that was David Baldus?” and she was embarrassed to have been so unmindful of his stature*

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† Financial support for this research project was provided by the Cornell Death Penalty Project, <http://www.lawschool.cornell.edu/research/death-penalty-project/About.cfm>, and by Cornell Law School’s faculty research funds to Valerie Hans. This paper benefited from helpful audience feedback at Northwestern University Law School’s Rosenthal Lectures (Eisenberg and Johnson); a presentation to Delaware lawyers (Johnson), a presentation to Delaware’s Superior Court judges (Hans), the Conference on Empirical Legal Studies (Blume), the American Bar Foundation (Hans), and the Law & Society Association conference (Hans).

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while spouting her half-baked theories. As it turns out, that was a common experience; three other people told her similar stories. If David knew how monumental his contribution was, he never let on. He just kept on.

But it was monumental. As Ted and Valerie, who are co-editors of the *Journal of Empirical Legal Studies*, observed, no empirical study has had as great an impact on the law in this country as David Baldus's project analyzing Georgia's death penalty sentencing regime. Its extraordinary influence is particularly remarkable given that it did not produce a legal victory.<sup>1</sup> Even though the Georgia study featured unparalleled sophistication and detail, the Court disparaged the significance of those findings in *McCleskey v. Kemp*.<sup>2</sup>

Not content with one monumental contribution, David kept on. He refined his methodology and continued to work on analyzing the operation of the death penalty in other jurisdictions. David's painstaking work on the Pennsylvania death penalty, where he added blind independent ratings of aggravation and mitigation—and found even larger race effects—set a standard that has not yet been matched, or even approached. The same can be said for his work on the death penalty in other states, as well as on the death penalty in the military. What follows does not meet the standard David set. Were he here, he would no doubt urge us to wait until the last part of our study is complete and our analysis more refined to publish anything. But we publish this now in acknowledgement of the vast influence he had on this study,<sup>3</sup> and over much of our past work. We are grateful for his lead and are grateful to have known him.

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1. *McCleskey v. Kemp*, 481 U.S. 279 (1987). There is some reason, however, to hope that it will eventually do so. Justice Powell, the author of and fifth vote in *McCleskey*, later expressed his regret. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994). The only other case in which Powell regretted his vote, *Bowers v. Hardwick*, 478 U.S. 186 (1986), has since been reversed by *Lawrence v. Texas*, 539 U.S. 558 (2003). Should the day come when *McCleskey* too is relegated to the dustbin of history, much of credit will be due to David's pioneering work.

2. *McCleskey*, 481 U.S. 279.

3. David's influence on this study was not merely inspirational. He generously gave us coding instruments he used when studying other states. We adapted his coding instrument for use in Delaware.

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## INTRODUCTION

For the last five years, we have conducted an empirical study of the “modern era” of capital punishment in Delaware. By “modern era,” we refer to the time period after the Supreme Court’s 1972 decision in *Furman v. Georgia*,<sup>4</sup> which invalidated all then-existing state death penalty regimes. Some readers might ask, “Why Delaware?” They might observe that it is a small state and is not a significant national player in terms of death sentences imposed or death row inmates executed. While both are true, several features of Delaware’s capital punishment system intrigue us. First, Delaware has a high death sentencing rate. Prior studies revealed that in relation to the number of murders, Delaware has the third-highest death sentencing rate in the United States.<sup>5</sup> Studying the Delaware experience allows us to explore the factors that may account for the relatively high rate of capital punishment in the state. Second, it is not a Southern state. Most (though not all) previous empirical studies have focused on Southern jurisdictions.<sup>6</sup> Third, Delaware has used jury sentencing as well as different judge-sentencing schemes in capital cases. Studies of judge versus jury death penalty sentencing have typically compared decision-makers across jurisdictions, or have examined judicial overrides of jury decisions within a state.<sup>7</sup> Comparison of Delaware’s capital trial experiences under these diverse sentencing approaches offers a rare opportunity to contrast the operation of jury and judge capital sentencing within a single state. Finally, no previous systematic empirical studies of the death penalty in Delaware have been conducted. Thus, for both theoretical and practical reasons, we determined that it would be a worthwhile capital punishment jurisdiction to examine.

In this Article we present our findings to date.<sup>8</sup> After reviewing the modern history of the Delaware death penalty and describing our

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4. *Furman v. Georgia*, 408 U.S. 238 (1972).

5. John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row’s Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 172 (2004).

6. See, e.g., John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the “Modern” Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2002).

7. See Blume et al., *supra* note 5, at 177–78 (comparing states with judge versus jury sentencing schemes); William J. Bowers, Wanda D. Foglia, Jean E. Giles & Michael E. Antonio, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931 (2006) (contrasting the views and experiences of capital jurors in jury sentencing states versus states with hybrid judge-jury sentencing systems); Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 47–50 (2009) (describing problems with Florida’s judicial override of jury sentencing recommendations in capital cases).

8. This Article presents our findings on the cases in which death was sought in Delaware. We anticipate follow-up articles that examine these cases in more detail. Although it is challenging to obtain full information on homicide cases that do not proceed to capital trial, it would also be of substantial interest to examine the state’s selection of cases in which to seek the death penalty from the universe of death-eligible cases.

methodology, we will describe our findings regarding geographical patterns, racial disparities, judge–jury sentencing differences, and reversal rates. We leave to others to discuss what, if any, legal or policy implications might arise from our findings.

### I. A BRIEF HISTORY OF THE DELAWARE DEATH PENALTY

As noted above, in 1972, the Supreme Court effectively held in *Furman* that the death penalty, as then administered in the United States, violated the Eighth Amendment’s ban on cruel and unusual punishment.<sup>9</sup> Like most jurisdictions, the death penalty statute in existence in Delaware at the time of *Furman* required the jury to decide the issues of guilt and punishment in the same unitary proceedings and provided no standards for the jury to utilize in making the life-or-death decision.<sup>10</sup> In 1973, in *State v. Dickerson*, the Delaware Supreme Court held that the Delaware scheme was invalid under *Furman*.<sup>11</sup>

The Delaware legislature quickly enacted a new capital punishment statute.<sup>12</sup> Since *Dickerson* interpreted *Furman* as forbidding “the uncontrolled discretion of juries and judges in imposing the death penalty,”<sup>13</sup> the 1974 Delaware statute called for mandatory death sentences for anyone convicted of first-degree murder.<sup>14</sup> The Delaware Supreme Court upheld the new law in *State v. Sheppard*,<sup>15</sup> and the death penalty in Delaware was back in business. Over the next two years, nine individuals were sentenced to death under the mandatory regime.<sup>16</sup>

But Delaware had backed the wrong constitutional horse. In 1976, the Supreme Court held in *Woodson v. North Carolina*<sup>17</sup> and *Roberts v. Louisiana*<sup>18</sup> that mandatory capital-sentencing schemes violated the Eighth Amendment. In *State v. Spence*, the Delaware Supreme Court concluded, as it had to, that

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9. *Furman*, 480 U.S. 238.

10. DEL. CODE ANN. tit. 11, § 3901 (1953). In 1958, Delaware abolished capital punishment. *Death Row FAQs*, DELAWARE.GOV, [http://doc.delaware.gov/information/deathrow\\_history.shtml](http://doc.delaware.gov/information/deathrow_history.shtml) (last updated Feb. 2, 2012). It was the second state to do so. *Id.* In 1961, however, the Delaware legislature reinstated capital punishment. *Id.* Then-Governor Elbert Carvel vetoed the legislation, but the legislature overrode the veto. *Id.*

11. *State v. Dickerson*, 298 A.2d 761 (Del. 1973). For a list of the nine defendants whose death sentences were overturned in *Dickerson*, see *infra* Appendix A.

12. 59 Del. Laws 943 (1974) (codified as amended at DEL. CODE ANN. tit. 11, §§ 636, 4209 (2011)).

13. Loren C. Meyers & Gayle P. Lafferty, *Capital Punishment*, in DELAWARE SUPREME COURT: GOLDEN ANNIVERSARY 1951–2001, at 179 (Randy J. Holland & Helen L. Winslow eds., 2001).

14. DEL. CODE ANN. tit. 59, § 284 (1974).

15. *State v. Sheppard*, 331 A.2d 142 (Del. 1974).

16. *See State v. Spence*, 367 A.2d 983, 986 (Del. 1976).

17. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

18. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

the 1974 scheme did not pass constitutional muster and set aside all nine sentences imposed under that scheme.<sup>19</sup>

In May 1977, the legislature enacted a new law modeled after the Georgia capital-sentencing statute upheld by the Supreme Court in 1976 in *Gregg v. Georgia*.<sup>20</sup> This scheme provided for a bifurcated trial at which the defendant's guilt or innocence would be decided in the first phase. If the defendant was convicted, the jury would then determine the appropriate punishment in a separate sentencing proceeding.<sup>21</sup> The new system allowed for the presentation of aggravating and mitigating evidence at the penalty phase.<sup>22</sup> The jury could only sentence the defendant to death if it unanimously concluded that the prosecution had proven, beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance.<sup>23</sup> The jury's decision to sentence the defendant to death had to be unanimous and the jury's sentence determination was binding on the judge.<sup>24</sup> The new scheme also provided for automatic appellate review by the Delaware Supreme Court to determine "whether the evidence supported the finding of a statutory aggravating circumstance, whether imposition of the death penalty was arbitrary or capricious, and whether the death sentence was proportionate to the penalty imposed in similar cases."<sup>25</sup> Finally, the 1977 statute required preparation of the entire trial transcript, specific identification of the aggravating circumstances found by the jury, a complete report by the trial judge, and "administrative assistance in compiling information on the universe of cases to be reviewed by the Court in performing its proportionality review."<sup>26</sup> The Delaware Supreme Court concluded the new regime satisfied the Eighth Amendment in *State v. White*.<sup>27</sup>

The jury-sentencing regime was in place from 1977 until 1991. In October of 1991, a New Castle County jury decided the highly publicized case of four African-American men from outside the state who, in the process of committing a robbery of a Brooks armored car in Wilmington, fatally shot the two Brooks guards.<sup>28</sup> The jury convicted all four defendants,

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19. *Spence*, 367 A.2d at 988.

20. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

21. *State v. White*, 395 A.2d 1082, 1086 (Del. 1978).

22. Meyers & Lafferty, *supra* note 13, at 181-82.

23. *Id.* at 182.

24. *Id.*

25. *Id.*

26. *Id.* (citing *White*, 395 A.2d at 1092-96).

27. *White*, 395 A.2d at 1097 (holding that the 1977 statute was constitutional, "except for the aggravating circumstances identified as 'elderly' and 'defenseless' victims . . . which provisions are declared unconstitutional and are severed from the Statute").

28. See *Robertson v. State*, 630 A.2d 1084, 1086-87 (Del. 1993). For a detailed account of the public response to the case and its importance in the effort to reduce the jury's role in Delaware's capital-sentencing scheme, see Benjamin D. Fleury-Steiner, Kerry Dunn & Ruth

Kenneth Rodgers, James Llewellyn, Christopher Long, and Paul Robertson, and a penalty hearing ensued. After a short deliberation of two and a half hours, the jury could not agree unanimously on the death penalty for any of the men. So, all four were sentenced to life in prison without probation or parole.<sup>29</sup> Responding to the public outcry, the Delaware legislature amended the death penalty statute in November of 1991 to eliminate jury sentencing.<sup>30</sup> Under the new scheme, modeled after Florida's capital punishment system, the jury's recommendation of death was no longer binding on the trial judge; the court, not the jury, was vested with ultimate sentencing authority.<sup>31</sup> The Delaware Supreme Court in *State v. Cohen* upheld the new judge-sentencing system.<sup>32</sup> Finding the change merely procedural, the Court also upheld the new statute against a challenge that that the new regime could not be used in capital trials where the crime occurred prior to the enactment of the new law.<sup>33</sup>

Delaware's current capital punishment scheme was enacted in 2002. Earlier that year, the United States Supreme Court decided *Ring v. Arizona*.<sup>34</sup> In *Ring*, the Court held that the factors that made a defendant eligible for the death penalty, such as the elements of capital murder or the statutory aggravating circumstances, had to be found by a jury.<sup>35</sup> Thus, in July 2002, the Delaware legislature again revised the method for determining how defendants are sentenced to death.<sup>36</sup>

The current system retains the jury's advisory sentencing role as to whether aggravating circumstances outweigh mitigating circumstances, but requires that a jury must unanimously and beyond a reasonable doubt find at least one statutory aggravating circumstance.<sup>37</sup> While the ultimate sentencing power still resides with the judge,<sup>38</sup> the Delaware Supreme Court has determined that the trial judge must give "appropriate consideration"<sup>39</sup> to a jury's assessment of whether aggravation outweighs mitigation:

The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating

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Fleury-Steiner, *Governing Through Crime as Commonsense Racism*, 11 PUNISHMENT & SOC'Y 5, 11-15 (2009).

29. *Robertson*, 630 A.2d at 1086.

30. Fleury-Steiner et al., *supra* note 28, at 15.

31. DEL. CODE ANN. tit. 11, § 4209 (2011); *State v. Cohen*, 604 A.2d 846 (Del. 1992); *see Meyers & Lafferty*, *supra* note 13, at 177.

32. *Cohen*, 604 A.2d 846.

33. *Id.* In six of the seven cases combined in *Cohen*, the murders had occurred before the 1991 amendments were passed into legislation. *Id.*

34. *Ring v. Arizona*, 536 U.S. 584 (2002).

35. *Id.* at 609.

36. DEL. CODE ANN. tit. 11, § 4209.

37. *Id.*

38. *Id.*

39. *Garden v. State*, 815 A.2d 327, 345 (Del. 2003).

circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court.<sup>40</sup>

## II. METHODOLOGY

To examine capital punishment in Delaware, our project relies on three different sets of data. To place Delaware's experience with its capital punishment system in a national context, we employed two national databases. The first is a Bureau of Justice Statistics ("BJS") database, Capital Punishment in the United States, which includes defendants sentenced to death during the time period of 1973–2007.<sup>41</sup> A second national dataset is the FBI's Supplementary Homicide Reports ("SHR"), which provide data about murders nationwide.<sup>42</sup> Finally, we developed the Delaware Capital Trials dataset based on our research team's coding of the information in legal documents as well as in homicide case files in the offices of the Delaware Prothonotary and in the Delaware Archives, supplemented by information from news coverage and Delaware judges and attorneys.

### A. THE BUREAU OF JUSTICE STATISTICS DATABASE

The BJS database "Capital Punishment in the United States" tracks every person sentenced to death from 1973 to 2007.<sup>43</sup> To avoid the effects of early uncertainty in the post-*Furman*<sup>44</sup> modern death penalty era, the sample is limited to defendants sentenced after 1976, when the Supreme Court in *Gregg v. Georgia* established the foundation for the modern death penalty era.<sup>45</sup> The BJS data contain 8701 observations, 7603 of which are

40. DEL. CODE ANN. tit. 11, § 4209(d)(1). Previously, judges were required to give "great weight" to the jury's recommendation. *Garden v. State*, 844 A.2d 311, 314, 318 (Del. 2004) (remanding where a Superior Judge failed to give "great weight" to the jury's recommendation of life and the jury's recommendation of life was supportable); *Garden*, 815 A.2d at 342–43. (remanding where a Superior Judge gave substantial consideration to the jury's recommendation of life, but instead imposed a sentence of death). The Delaware legislature subsequently revised the language in 2003 to require only "such consideration as deemed appropriate." 74 Del. Laws 425 (2003).

41. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT IN THE UNITED STATES, 1973–2007 (2009) [hereinafter BJS dataset], available at <http://icpsr.umich.edu/icpsrweb/NACJD/studies/24961>.

42. JAMES A. FOX & MARC L. SWATT, UNIFORM CRIME REPORTS [UNITED STATES]: SUPPLEMENTARY HOMICIDE REPORTS, WITH MULTIPLE IMPUTATION, CUMULATIVE FILES, 1976–2007 (2000), available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/24801>.

43. BJS dataset, *supra* note 41.

44. *Furman v. Georgia*, 408 U.S. 238 (1972).

45. *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court approved several new death penalty statutes after *Gregg*, on the ground that they addressed the problems of arbitrariness and

death sentences imposed from 1977 to 2007, inclusive. Federal death sentences and death sentences in New York's never-fully-implemented modern capital punishment system are excluded.<sup>46</sup> Those individuals who entered the death row data set, exited from it (perhaps because of a favorable court decision), and then reentered the sample are limited to one observation. This leaves a sample of 7109 individual state death row defendants from thirty-six states with capital punishment. The BJS death row data include the state, year of sentence, year of arrest, race of the defendant, and other information.<sup>47</sup>

### B. THE FBI SUPPLEMENTAL HOMICIDE REPORTS

The FBI SHR contains information on the vast majority of murders in the United States.<sup>48</sup> Using murder data and comparing it to capital prosecutions or death sentences measures the “death-proneness” of a state’s entire criminal justice process.

For each murder, the data include the year of the offense, the race, sex, age of the victim and of the defendant arrested for the offense, the county in which the offense occurred, and data about the nature of the murder, including whether it was committed in the course of certain crimes such as robbery, rape, burglary, or larceny.<sup>49</sup> Crime analysts have concluded that

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discrimination identified in *Furman*. See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976) (finding Texas’ death penalty system constitutional); *Proffitt v. Florida*, 428 U.S. 242 (1976) (finding Florida’s death penalty statute constitutional). New Jersey’s post-*Furman* death penalty statute became effective in 1982, N.J. STAT. ANN. § 2C:11-3 (West 2011), New Mexico’s in 1979, N.M. STAT. ANN. § 30-2-1 (A) (2009), and Oregon’s in 1978, OR. REV. STAT. § 163.095(e) (2009).

46. See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

47. An alternative source of death row inmate information is the NAACP’s Death Row U.S.A. The NAACP data also do not contain the race of victim for those inmates on death row who have not been executed. NAACP LEGAL DEF. & EDUC. FUND., INC., DEATH ROW U.S.A. (Winter 2011), available at [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2011.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2011.pdf). The NAACP list does not include a cumulative listing of all those who have entered death row. The BJS list has been said to miscount commutations. See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 292 n.12 (1993). But the discrepancy seems minimal in revised BJS data. Hugo Adam Bedau, *Background and Developments*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 25 n.26 (Hugo Adam Bedau ed., 1997).

48. FOX & SWATT, *supra* note 42.

49. *Id.* For a discussion of the quality of the SHR data, see generally James Alan Fox & Marc L. Swatt, *Multiple Imputation of the Supplementary Homicide Reports, 1976–2005*, 25 J. QUANTITATIVE CRIMINOLOGY 51 (2009). For Florida, Kansas, Kentucky, and Montana, SHR data were missing for one or more years of this study. For Florida we used the number of murders from the Florida Department of Law Enforcement for the years 1989 through 2007. *Florida Statewide Murders by Firearm*, FLA. DEP’T OF LAW ENFORCEMENT (2012), [www.fdle.state.fl.us/Content/getdoc/332e1b3d-2648-4b06-8be5-d322f340c95d/1971\\_fwd\\_murder\\_firearms.aspx](http://www.fdle.state.fl.us/Content/getdoc/332e1b3d-2648-4b06-8be5-d322f340c95d/1971_fwd_murder_firearms.aspx). For 1988, we used the average number of murders for the two surrounding years, 1987 and 1989. *Id.* To estimate the number of murders in Kansas for the years 1999 through 2000, we used information from the Disaster Center. *Kansas Crime Rates 1960–2010*, THE DISASTER CENTER, <http://www.disastercenter.com/crime/kncrime.htm> (last visited May, 8, 2012). The

despite some imperfections, the murder data are among the most reliable crime data.<sup>50</sup>

The SHR include unsolved homicides, and recent iterations of the data include imputed information for missing data.<sup>51</sup> In this study, we use the non-imputed data. The non-imputed data have been reported to contain approximately 90% of murders, with some variation over time.<sup>52</sup> If the data lack the offender's sex, we treat the case as unsolved, as not producing a candidate for the death sentence, and eliminate it from the death sentence rate calculations.<sup>53</sup> To the extent that arrests are followed by releases, the data overstate the number of offenders at risk of a death sentence. Since the primary purpose for which we use the SHR data is to facilitate interstate comparisons, rather than to ascertain the absolute level of death sentence rates, erroneous murder arrests are of concern only to the extent they vary unevenly across states.

The SHR data allow for reasonable estimates of the number of solved murders in each state in each year. For comparison with the 1977 to 2007 death row population data, we use the SHR for 1976 through 2007, except for Kansas, New Jersey, New Mexico, Oregon, and South Dakota. Kansas's post-*Furman* death penalty statute became effective in 1994.<sup>54</sup> New Jersey's post-*Furman* death penalty statute became effective in 1982.<sup>55</sup> New Mexico's

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data were adjusted to reflect differences in the Kansas source data and the SHR data for the years in which SHR data were available. For Kentucky we used the average of SHR-reported murders for 1987 and 1989 to estimate the number of murders in 1988. For Montana, we used the average of SHR reported murders for 1986 and 1988 to estimate the number of murders in 1987 and the average of SHR reported murders for 1995 and 1997 to estimate the number of murders in 1996.

50. See John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423, 1425 (1998); John J. Donohue & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 14 (1998); Robert J. Cottrol, *Hard Choices and Shifted Burdens: American Crime and American Justice at the End of the Century*, 65 GEO. WASH. L. REV. 506, 517 (1997) (book review). But see Michael Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 675-81 (1989). The data exclude negligent manslaughters and justifiable homicides. FOX & SWATT, *supra* note 42.

51. FOX & SWATT, *supra* note 42.

52. *Id.* at 53.

53. Offender sex is missing for 26.8% of SHR observations after 1976, with a low of 21.1% in 1978 and a high of 30.2% in 1992. These rates are reasonably consistent with a report of unsolved homicides ranging from just below 20% in 1976 to just over 30% in the mid-1990s. *Id.* at 54. Missing data for unsolved murders are not a concern for this study because unsolved murders do not produce candidates for death row.

54. Kansas, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/kansas-1> (last visited June 30, 2012).

55. N.J. STAT. ANN. § 2C:11-3 (2005); New Jersey, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-jersey-1> (last visited June 30, 2012). New Jersey abolished capital punishment in late 2007, largely after the period covered by this study. N.J. STAT. ANN. § 2C:11-3b (2008); Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES (Dec. 17, 2007), <http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html>.

and South Dakota's became effective in 1979,<sup>56</sup> and Oregon's became effective in 1978.<sup>57</sup> For these states, we limit the SHR murder data to the years corresponding to the potential exposure of murder defendants to the death penalty.<sup>58</sup>

By comparing death row sizes with murder populations, one can estimate states' relative propensities to impose the death penalty. Murder is clearly the crime category from which the vast majority of death sentences emerge. In 2008, the Supreme Court ruled in *Kennedy v. Louisiana* that the death penalty is unconstitutional for child rape and for other crimes that do not result in the death of the victim.<sup>59</sup> Even before *Kennedy*, capital punishment in non-murder cases was rare.

### C. THE DELAWARE CAPITAL TRIALS DATABASE

The database contains information from Superior Court files at the Delaware Archives and the Prothonotary's offices in all three counties. Trained coders went through the files on site and used a detailed questionnaire, adapted from that used in David Baldus's research, to code over 700 elements of the cases, crimes, defendants, and victims.<sup>60</sup> File information was supplemented by other sources of information about the cases, including Delaware trial and appellate court opinions, Third Circuit and U.S. Supreme Court opinions, news reports, law review articles, and the personal knowledge of Delaware judges and attorneys. The data include basic case information (defendant name, dates of offense and proceedings, attorneys and judges, trial and penalty-phase outcomes, and outcomes of appellate proceedings); background information about the defendant and the victim; presence or absence of potentially aggravating circumstances;

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56. New Mexico abolished capital punishment in 2009, after the period covered by this study. *New Mexico*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-mexico-1> (last visited June 30, 2012); see also N.M. STAT. ANN. § 31-18-14 (2009). For South Dakota, see *South Dakota*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/south-dakota-0> (last visited June 30, 2012); see also S.D. CODIFIED LAWS §23A-27A-1 to -44. (1979). Illinois abolished capital punishment in 2011, also after the period covered by this study. *Illinois*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/illinois-1> (last visited June 30, 2012); see also 725 ILL. COMP. STAT. 5/119-1 (2012).

57. OR. REV. STAT. § 163.095(e) (2001); *Oregon*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/oregon-1> (last visited June 30, 2012).

58. In New Jersey, we use SHR data from 1982 through 2007. Oregon's post-*Furman* statute became effective on December 7, 1978, so we limit its SHR data to 1979 through 2007. New Mexico's post-*Furman* statute became effective July 1, 1979, so we limit its SHR data to 1980 through 2007.

59. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

60. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 512 (1990); see also David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in HANDBOOK OF PSYCHOLOGY AND LAW 251 (D.K. Kagehiro & W.S. Laufer eds., 1992).

presence or absence of potentially mitigating circumstances; and written case summaries that offer a narrative perspective on the case.<sup>61</sup>

### III. GEOGRAPHY

We examined the distribution of death sentences by county and observed some intriguing geographical patterns. Although the numbers are small when cases and sentences are broken down by county and the differences do not reach traditional levels of statistical significance, we believe it's important to describe the patterns we have observed. Twenty-nine persons (59% of the total) were sentenced to death in New Castle County, fourteen (29%) were sentenced to death in Kent County, while only six (12%) of the persons sentenced to death in the modern era under the guided discretion statutes were sentenced to death in Sussex County.<sup>62</sup>

That New Castle County produces the most death sentences is not surprising. It is by far the largest county and has the most murders. During the time period 1976–2007, there were 753 murders in New Castle County (67% of the state's total).<sup>63</sup> The Kent–Sussex disparity is more difficult to explain, however. During the time period 1976–2007, the number of murders in Sussex County (200, or 18% of the murders in the state) exceeded the number in Kent County (178, or 16% of the total).<sup>64</sup> But capital trials and death sentences showed a reverse pattern.

Both a willingness to proceed with capital trials and the decision-makers' tendency to choose a death sentence appear to contribute to the geographical pattern. According to the capital trial records obtained from the State Prothonotary's offices, Kent County had proportionately more penalty-phase trials (twenty-eight overall) than might have been expected given the homicide numbers, and half of those resulted in death

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61. Despite excellent cooperation from the Delaware Superior Court and the Prothonotary's offices that house and manage the Superior Court files, obtaining accurate and complete information for the defendants in the database has presented challenges. The case files vary in their completeness. Police reports, especially valuable because they frequently include race information, are often missing. The death cases are the most complete and the most accurate, in part because death cases are automatically appealed, and as part of the review process, the penalty-phase hearing is transcribed in its entirety. Post-trial litigation of death cases is extensive, and we are able to cross-check case-file information with judicial reports and appellate opinions. Information about the nature of the crime and the defendant's background is less well-developed in the files of life cases.

62. The numbers would be even more stark were it not for the fact that four of the last five individuals sentenced to death in Delaware involved crimes that occurred in Sussex County. *See infra* Appendix A. Prior to 2007, there had been only two Sussex County death cases. *See infra* Appendix A. In our initial analyses and talks to the Delaware bar, we reported the very low numbers.

63. FOX & SWATT, *supra* note 42. According to the Supplementary Homicide Reports, from 1976 to 2007, Kent County had 178 murders, New Castle County had 753 murders, and Sussex County had 200 murders. *Id.*

64. *Id.*

sentences.<sup>65</sup> The other two counties appeared to be less likely than might have been expected, based on the homicide numbers, to proceed to full capital trials; furthermore, judges and juries in New Castle and Sussex counties selected death sentences in only about one-third of the cases.

Other traditional county characteristics that explain geographic disparity are also missing. Delaware has a single elected Attorney General, who then appoints the State Prosecutor and the County Prosecutors,<sup>66</sup> and it uses a centralized system for determining whether to seek death in a particular case. Thus, the answer is not likely to be found in differences in the death-seeking behavior of elected county prosecutors, as has been the case in some other states.

Sussex County has a smaller African-American population than Kent (12.7% v. 24%),<sup>67</sup> and the average incomes and education levels, factors that have been noted in other studies to explain geographical differences in death sentencing, are not significantly different.<sup>68</sup> In short, Kent County has 16% of the state's murders, but produces 29% of the state's death sentences. New Castle County has 67% of the state's murders and 59% of the state's death sentences. Sussex County has 18% of the state's murders, but, as noted above, only six persons (12% of the death sentences) were sentenced to death for crimes committed in Sussex County.

We perhaps should not overanalyze the geographical patterns; because of the small numbers, the differences across counties do not reach traditional levels of statistical significance. Nonetheless, they raise the possibility that homicides in the three counties could be qualitatively different. Alternatively, or in addition, there may be distinctive local cultures in the three Delaware counties with respect to the death penalty. We have

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65. The analysis was limited to capital trials that proceeded to a penalty phase between 1976 and 2007. Note that the two most recent Sussex County death sentences fall outside this time frame. See *infra* Appendix A (Powell and Small). For this analysis, only the first trial or first penalty hearing was counted in cases with multiple trials or penalty phases for the same homicide (hence, the second trials or penalty phases for David Dawson, James Riley, and Frank Whalen were not included in the calculations). However, the multiple trials of Steven Pennell were included because they covered different homicides.

66. See *Preventing Crime*, STATE OF DEL., <http://attorneygeneral.delaware.gov/crime/crimeprevent.shtml> (last updated Feb. 27, 2012) (explaining the organization of criminal prosecution in Delaware).

67. See *State and County Quickfacts*, U.S. CENSUS BUREAU (Jan. 17, 2012), <http://quickfacts.census.gov/qfd/states/10000.html>.

68. See Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 348, 359 (2005). The median household income in Sussex County is approximately \$51,000 a year and the median income in Kent is approximately \$53,000, while the percentage of persons below the poverty level is 11.7% and 12.5%, respectively. *State and County Quickfacts*, *supra* note 67. Similarly, the percentage of high school graduates (85.2% Sussex, 84.9% Kent) and of persons with a bachelor's degree or higher (21.2% Sussex, 20% Kent) are also very similar. *Id.*

no strong hypotheses for these geographical patterns but report them because there may be others who do.

#### IV. RACE

The influence of race upon death sentences has been the subject of many studies, including, of course, the extraordinary work of David Baldus. Here, we report racial disparities measured in several ways.

##### A. DEATH SENTENCES IMPOSED BY RACE

Fifty-eight persons—fifty-seven of them men<sup>69</sup>—have been sentenced to death in the “modern” era of the Delaware death penalty.<sup>70</sup> Since nine of those death sentences were imposed under the initial mandatory scheme, and were therefore automatically invalidated,<sup>71</sup> we will focus on the forty-nine defendants sentenced to death using one of the three guided discretion statutes. Of those forty-nine, only nineteen, or 39%, were white. Twenty-six, or 53%, were black, and four, or 8%, were Hispanic or Native American. In contrast, 69% of the Delaware population is white, 21% is black, and (as is proportionate) 8% are Hispanic.<sup>72</sup> The starkness of the black–white disparity is increasing rather than decreasing over time; all of the last eight death sentences in Delaware were imposed upon African-American defendants. The last white defendant to be sentenced to death in Delaware was Linda Charbonneau in 2004.<sup>73</sup>

Thirty-three of the forty-nine cases, or 67%, involve a white victim.<sup>74</sup> Moreover, half of the fourteen black-victim cases involved more than one victim, while only 15% of the thirty-three white-victim cases involved more than one victim, suggesting that the black-victim cases that do result in death sentences are more aggravated than are the white victim death cases.<sup>75</sup>

##### B. THE RACIAL COMPOSITION OF DELAWARE’S DEATH ROW

There are currently fifteen men on Delaware’s death row.<sup>76</sup> Four (27%) are white, eight (53%) are African-American, and three (20%) are

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69. Only one woman, Linda Charbonneau, has been sentenced to death in the modern era. Her convictions and sentence were reversed on direct appeal, *Charbonneau v. State*, 904 A.2d 295 (Del. 2006), and she was subsequently resentenced to twenty years. *State v. Charbonneau*, Def. ID # 0207003810, 2010 WL 3516430, at \*1 (Del. Super. Ct. Sept. 9, 2010).

70. For a complete list of persons sentenced to death in Delaware since 1972, see *infra* Appendix A.

71. *State v. Spence*, 367 A.2d 983, 988 (Del. 1976).

72. *State and County Quickfacts*, *supra* note 67.

73. See *supra* note 69 and accompanying text.

74. See *infra* Appendix A.

75. See *infra* Appendix A.

76. See *infra* Appendix B; see also <http://doc.delaware.gov/information/deathrow.shtml> (last updated Apr. 23, 2012).

Hispanic.<sup>77</sup> The combined minority population thus is 73%. The overall pattern (and racial disparity) is more stark than that observed nationally, where, of more than three thousand death sentenced inmates, 44% are white, 41% are black, 12% are Hispanic, and 2% are reported as other races.<sup>78</sup>

Of the current death row inmates, 60% (nine) were convicted of murdering whites and 40% (six) were convicted of murdering African Americans.<sup>79</sup> Three of the six black-victim cases involved multiple victims, but all of the current death row inmates sentenced to death in white-victim cases involved a single-victim homicide.<sup>80</sup>

### C. RACE AND EXECUTIONS

There have been sixteen modern-era executions in Delaware, the most recent of which was in April of 2012. Of the sixteen death row inmates who were executed, eight (50%) were white, seven (44%) were African American, and one (6%) was Native American. Eleven (69%) of the executed inmates were sentenced to death for killing one or more white victims, and five (31%) were executed for the murder of one or more black victims.<sup>81</sup>

### D. RACE AND DEATH-SENTENCING RATES

The death sentence rate—the proportion of all murders that result in a death sentence—measures “death-proneness” in a jurisdiction. In the next section, we consider changes over time in the death sentence rate in Delaware. But death sentence rates can also be used as a measure of racial disparity. Comparisons between the population and death sentences, such as those reported above, can be striking—as they are in Delaware—but, standing alone, must be interpreted cautiously. Racial discrimination might explain such disparities, but so might differences in underlying offense rates. Examination of death sentence rates for various race-of-defendant and race-of-victim combinations, if it reveals large disparities, is less likely to stem from differences in criminal behavior.

The results of examining Delaware’s death sentencing rate by race of defendant and victim are dramatic. Figure 1 shows the death sentence rate for Delaware as a function of the race of defendant and victim.

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77. For a complete list, including the race of the defendant and victim of each individual currently on death row in Delaware, see *infra* Appendix B.

78. *Death Row Population Size and Characteristics*, DEATH PENALTY FOCUS, [www.deathpenalty.org/article.php?id=86](http://www.deathpenalty.org/article.php?id=86) (last visited May 8, 2012).

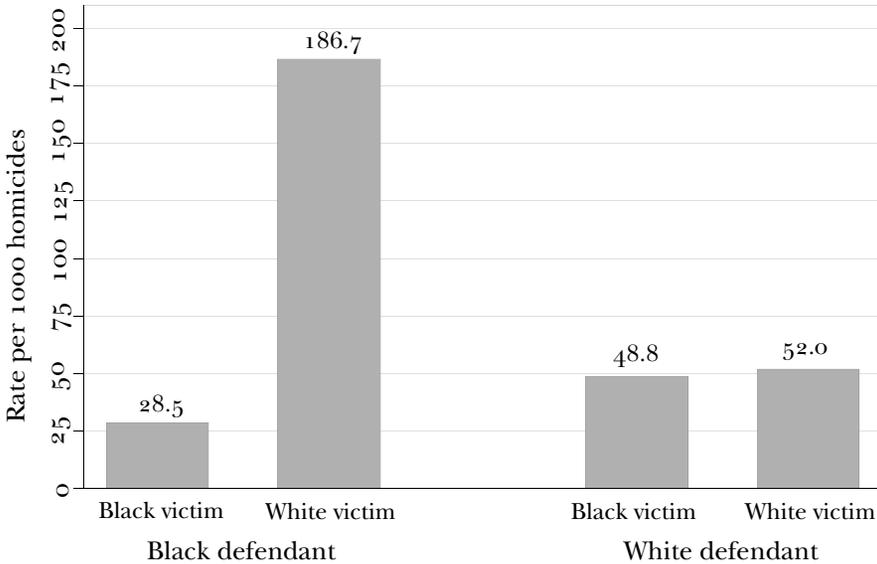
79. See *infra* Appendix B.

80. See *infra* Appendix B.

81. For a list of the individuals executed in Delaware, see *infra* Appendix D. Four of the eleven white-victim cases involved multiple killings, and three of the five black-victim cases involved multiple killings.

FIGURE 1

DELAWARE'S DEATH SENTENCING RATE PER 1000 HOMICIDES  
BY RACE OF DEFENDANT AND RACE OF VICTIM, 1977-2011



Note: Data for Delaware cover those sentenced to death from 1977 to 2011 and homicides from 1976 through 2008.

From almost any perspective, it is hard to imagine what would cause such stark disparities. Black defendants who kill white victims are more than six times as likely to receive the death penalty as are black defendants who kill black victims (186.7 per thousand as compared to 28.5 per thousand). Moreover, black defendants who kill white victims are more than three times as likely to be sentenced to death as are white defendants who kill white victims (186.7 per thousand as compared to 52.0 per thousand). Interestingly, white defendants who kill white victims are about as likely to receive a death sentence as white defendants who kill black victims (52.0 per thousand as compared to 48.8 per thousand). The rate that stands out, however, is the rate for black defendants who kill white victims.

Of course, it is theoretically possible that although these comparisons control for differences in murder *rates*, they fail to capture differences in *kinds* of murders. Is it plausible that African Americans systematically commit—and whites systematically are victims of—*worse* murders? This seems highly unlikely, but in the final stage of our study of Delaware, we hope to conclusively resolve this question in true Baldus fashion, by examining aggravation and mitigation in capital cases, as well as in death-eligible murders. In the meantime, a comparison with death sentencing rates in other jurisdictions is instructive. Table 1 includes the Delaware data

from Figure 1 and adds data from seven other states for the time period between 1977 and 2000.<sup>82</sup>

TABLE 1

HOW DOES DELAWARE COMPARE TO OTHER STATES DEATH SENTENCING RATES?  
Rate of Death Sentences per 1000 Homicides, by Race of Defendant and Victim

State	Black Defendant/ Black Victim	Black Defendant/ White Victim	White Defendant/ White Victim	White Defendant/ Black Victim
Delaware	28.5	186.7	52.0	48.8
Georgia	4.5	99.2	41.7	21.4
Indiana	5.6	42.3	21.6	0
Maryland	2.4	52.2	14	7.3
Nevada	24.9	101.1	37	12.5
Pennsylvania	17.7	48.6	22.2	11.9
South Carolina	2.9	67.8	27.1	50.3
Virginia	3.6	64.5	18.3	23

Note: Data for Delaware cover those sentenced to death from 1977 to 2011 and homicides from 1976 through 2008. Periods of included death sentences and homicides for the other states are reported in Blume et al., *supra* note 5, at 195 tbl.7, and generally cover death sentences from 1977 through 2001 and homicides from 1976 through 1998.

Even when compared to Southern states, the Delaware death sentencing rate for black defendants with white victims is extremely high; it is 75% higher than the closest contenders, Georgia and Nevada, more than twice as high as that of South Carolina and Virginia, and more than three times as high as that of its near neighbors, Maryland and Pennsylvania. One problem in comparing these states to Delaware is that the figures cover somewhat different time periods. However, because, as we show below, the death penalty has declined nationwide over time, the table's comparison is likely to *understate* the disparities between Delaware and other states. Thus, the racial disparities in the Delaware death sentencing rates are remarkable.

#### V. DEATH SENTENCING RATES AND JUDGE-JURY DIFFERENCES

One benefit of describing the national pattern of death sentence rates over time is that the national trend can then provide a background rate, a

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82. The data for the seven other states can be found in Blume et al., *supra* note 5, at 195-97.

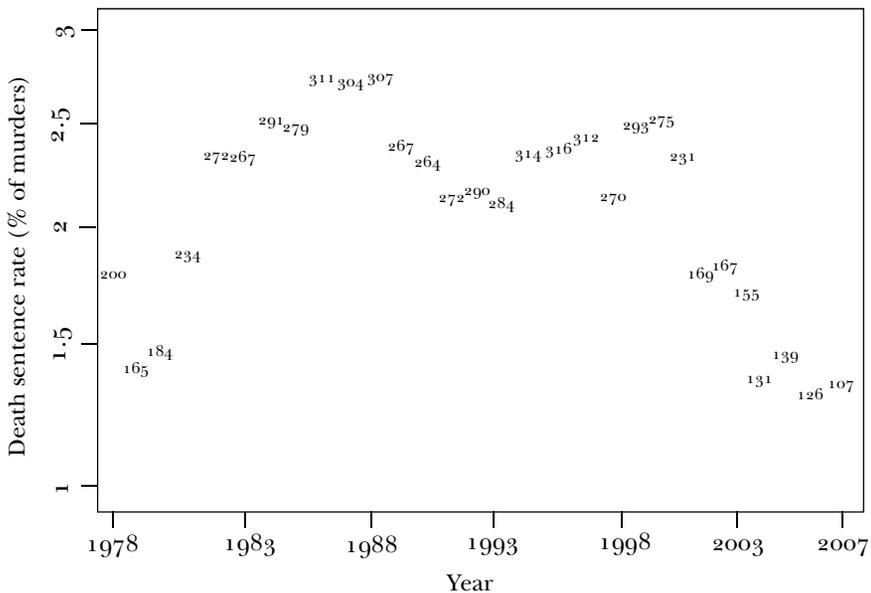
kind of quasi-control group, against which to evaluate change over time in particular states, such as Delaware. Our strategy is first to describe the national pattern of changes over the time period, and then to identify the Delaware-specific factors that we want to investigate, and are able to explore with these data.

#### A. NATIONAL DEATH SENTENCE RATES

Figure 2 shows the pattern of death sentence rates and the number of death sentences over time. The numbers representing the data points are the number of death sentences in a year. The figure shows a steady increase in death sentence rates in the first decade of the modern capital punishment era, a decline in the late 1980s and early 1990s, a near-steady rate from the early 1990s to about 2000, and a sharp drop beginning at about the turn of the century. The death sentence rate in the most recent years is less than half of its peak from 1986 through 1988. The number of death sentences was fairly steady, about 200 to 300, for well over a decade, from the early 1980s through about 2000. A sharp drop in the number began in 2001 and continued through 2006–07, and in the most recent data we use, is only about 100 per year.

FIGURE 2

DEATH SENTENCE RATE AND NUMBER OF DEATH SENTENCES OVER TIME



Explaining this national pattern is methodologically challenging due to interstate variation in death penalty statutes, variation in law enforcement

processes, and likely changes over time in the factors that influence death sentence rates. One wants to account for both factors that change over time, such as the time from arrest to sentence discussed below, as well as for any underlying global change associated with time. Capturing both a global time trend as well as the influence of time-varying factors can be difficult.

One important development is the emerging recognition that innocent people are convicted of crimes. Indeed, as this article goes to press, the Death Penalty Information Center lists 140 death row inmates as having been exonerated.<sup>83</sup> News coverage of death row exonerations is substantial,<sup>84</sup> with a peak in 2000 when Illinois Governor George Ryan announced a moratorium on executions in Illinois unless he could be convinced that no innocent person would be executed.<sup>85</sup> Increased concern over sentencing an innocent individual to death might well affect the frequency of death sentences.

Another likely factor in the rate decline is the increased cost of processing capital cases. One proxy for that cost is the time between arrest and imposition of a death sentence. The available BJS data allow assessing the elapsed time between arrest and death sentence of the period studied, subject to the limitation of substantial missing arrest-year data in the early years. Figure 3 shows a notable change over time in the period between arrest and sentencing. The figure's solid line shows the mean time between arrest and death sentence for all states combined. The mean time grew from about eleven months in 1980 to about thirty-eight months in 2007. So the pool of murders leading to death sentences in the early years of this study is closer in time to the year of the death sentence than is the pool of murders for more recent years. The missing arrest data, noted above, do not lead to a materially different trend in the earlier years. But the last few decades indicate that defining the pool of murders using a uniform one-year lag may oversimplify the temporal relation between murders and death sentences. The other lines in Figure 3 show the time trend by state for the three states with the largest death rows, California, Florida, and Texas. The increasing trend over time is not solely a function of these states, and the trend in these states is consistent with the overall trend.

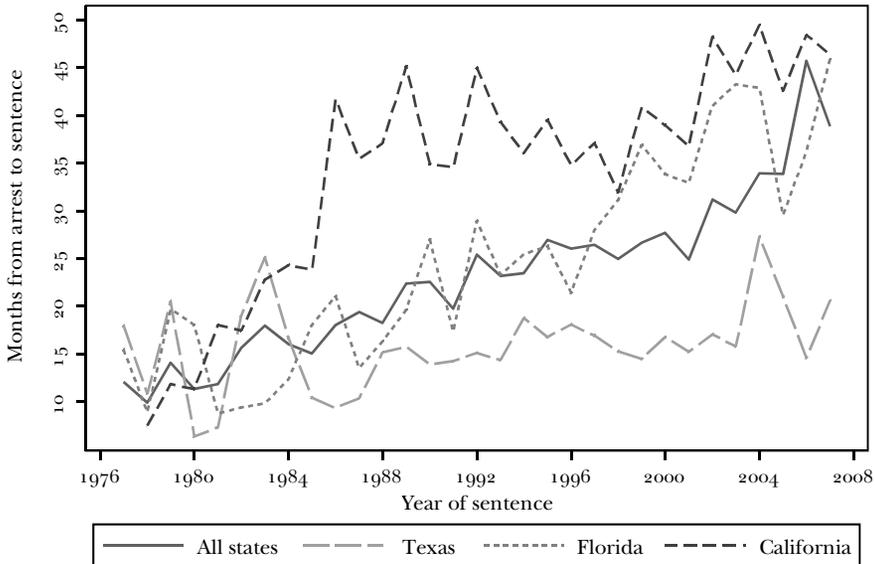
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83. See *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last updated Feb. 7, 2012).

84. FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 52 (2008).

85. *Id.* at 67.

FIGURE 3  
MEAN TIME FROM ARREST TO DEATH SENTENCE



For death sentences from 1977 through 1994, the median arrest year was about one year earlier. For death sentences imposed from 1995 through 2005, the median year of arrest was about two years earlier. For death sentences imposed in 2006 and 2007, the median arrest year was about 2.5 years earlier.

There are several other reasons why the number of death sentences may be declining. One is that life without parole is now an option in every death penalty jurisdiction.<sup>86</sup> The availability of life without parole makes both prosecutors less likely to seek death and juries less likely to impose the death penalty.<sup>87</sup> The decline in death sentences is also almost certainly attributable, at least in part, to declining public support for capital punishment. Over the last decade, the number of Americans who are in favor of the death penalty has dropped to its lowest level in fifty years.<sup>88</sup> According to recent polling data, 61% of the American people support the

86. John H. Blume, *"The Times They Are A-Changin'" (or are they?)*, CORNELL L. F., Spring 2010, at 18, 20.

87. *Id.* Prosecutors are less likely to seek death because issues of future dangerousness are greatly reduced if it is virtually certain the person will never be released back into society. Additionally, it is easier for prosecutors to persuade a surviving victim's family members to agree to a negotiated settlement of the case and avoid a capital trial when they can be assured that the perpetrator will die in prison.

88. *Id.* at 18.

death penalty.<sup>89</sup> However, when offered alternatives to capital punishment, including life without parole, public support drops to 49%.<sup>90</sup> This changing view of capital punishment would logically tend to influence both prosecutorial and jury behavior since, in most jurisdictions, the jurors have to unanimously agree that the death penalty is the appropriate punishment.<sup>91</sup> Additional factors that might be associated with change in death sentence rates are Supreme Court rulings regarding the constitutionality of the execution of juveniles and those suffering from mental retardation, but neither of these affected a large number of death sentences.<sup>92</sup>

*B. DELAWARE-SPECIFIC STATUTORY CHANGES AND THEIR INFLUENCE ON DEATH SENTENCE RATES*

Many factors are likely at work at the state and local level which cannot be fully accounted for due to difficulty in quantitatively representing them as well as limitations on knowledge of the factors. In any particular state, however, detailed institutional knowledge can supply additional factors for comparison to the national rate. In this analysis, we consider Delaware's changes in capital-sentencing laws over the time period, in particular, the statutory changes in judge versus jury capital sentencing. We now seek to evaluate the impact of these statutory shifts on the death sentence rate by using the national pattern we have identified. Whatever the complex factors shaping the national pattern, Figure 2 shows the resulting rises and falls in death sentencing rates. One can think of this time pattern as representing all influences on death sentence rates, even if we cannot identify or observe the influences individually. If we can reasonably assume that Delaware experienced roughly the same influences shaping the national pattern, by accounting for the Figure 2 pattern in models, we can then explore how Delaware-specific variations may have influenced changes in Delaware death sentence rates.

Figure 4 shows death penalty sentencing rates over time, both nationally and in specific states, including Delaware. The sentencing rate calculates the number of death sentences over the number of homicides in the time period and in the state. Figure 4 displays the death sentence rate over the

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89. *Death Penalty*, GALLUP, [www.gallup.com/poll/1606/death-penalty.aspx](http://www.gallup.com/poll/1606/death-penalty.aspx) (last visited May 8, 2012).

90. *Id.*

91. *See, e.g.*, S.C. CODE ANN. § 16-3-20(C) (2011).

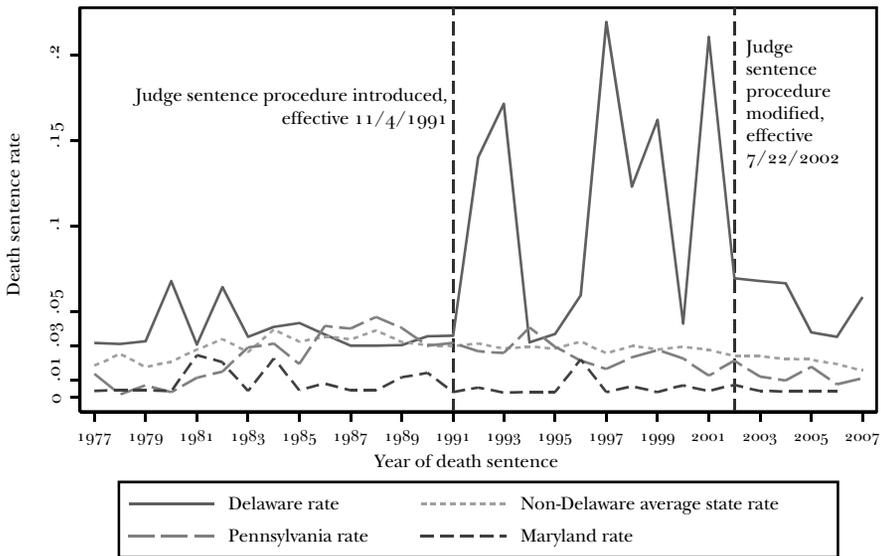
92. This is true because prior to the Court's decisions establishing categorical bans, a majority of death penalty states had abolished the practice of sentencing juveniles or persons with mental retardation to death. *Roper v. Simmons*, 543 U.S. 551, 564–66 (2005); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002). Even in those jurisdictions which still allowed the practice, death sentences were rarely imposed on individuals in those two categories. *Roper*, 543 U.S. at 564–65; *Atkins*, 536 U.S. at 316.

years of the modern death penalty era through 2007. The line represented by the shortest dashes represents the death sentence rate for all states other than Delaware. The rate has remained between 1% of murders and about 3% of murders throughout the modern era.

In addition to excluding Delaware, this line differs from the pattern shown in Figure 2 in a few ways. The Figure 4 line is in a figure that includes a much broader range of death sentence rates than the range in Figure 2. The 1% to 3% range adequate for the national pattern is inadequate to describe Delaware's annual death sentence rates. In some years, the Delaware death sentence rate exceeded 20%, though some of this volatility likely stems from Delaware being a small state with a correspondingly small number of murders. The need to expand the scale of the y-axis makes the national trend line in Figure 4 appear to be much smoother than the national pattern as represented in Figure 2.

Figure 4 includes the death sentence rate over time for two states other than Delaware. We chose Pennsylvania and Maryland because both border Delaware and have capital punishment. Thus, we consider the pattern in those states to evaluate the possibility that some regional factor explains Delaware's deviation from the national pattern. Figure 4 includes vertical lines for 1991 and 2002 that represent the two major statutory changes in Delaware's death penalty law described above.

FIGURE 4  
ALL STATES, DELAWARE, PENNSYLVANIA, AND MARYLAND  
DEATH SENTENCE RATES, BY YEAR



The Delaware-specific story suggested by Figure 4 is that, until the shift to greater judge involvement in sentencing in 1991, Delaware's death sentence rates did not materially differ from those of other states. Delaware's rate was higher from 1977 to 1985, then dipped below the national rate until 1990, and slightly exceeded it in 1991. Corresponding to the adoption of increased judicial involvement in capital sentencing, Delaware's rate both rose and became volatile through 2002. The volatility was largely unidirectional in the sense that Delaware's rate rarely dipped below the national death sentence rate and, on average, was much higher. Delaware's rate calmed down in 2002 but still generally remained above the national rate. Figure 4's Pennsylvania and Maryland lines support the impression created by comparing the national line with Delaware's line; Delaware's rate jumped compared to those two states in 1991 as well, and, on average, has remained well above both states' rates ever since.

### C. REGRESSION MODELS OF DELAWARE SENTENCING RATES

Although Figure 4 is compelling and gives us a sense that the statutory changes in decision maker roles were associated with changes in death sentencing rates, one limitation of Figure 4 is that it cannot establish the statistical significance of Delaware's death sentence rate. To explore whether the pattern suggested by Figure 4 is statistically significant, we employ regression models. In those models, we wish to account for the national "background" time pattern of death sentence rates reflected in Figure 2. The background rate can be thought of as capturing all non-Delaware-specific factors, whatever they are, that produce Figure 2's time pattern.

A simple time term cannot adequately represent time and the background national trend because it is obviously nonlinear. Several techniques exist to capture and control for nonlinear trends.<sup>93</sup> We use fractional polynomial models, which are often employed to model a nonlinear pattern when primary interest is in the covariates, but time must be controlled for.<sup>94</sup>

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93. Alternatives to the approach we employ (fractional polynomial models) include using time (year) polynomial terms with multiple powers. It appears from Figure 2 that a polynomial of degree five would be needed to capture the various inflection points. Other approaches include splines (which fit different lines to the data at obvious breakpoints) and partial linear models.

94. E.g., David A.M. Peterson, Lawrence J. Grossback, James A. Stimson & Amy Gangl, *Congressional Response to Mandate Elections*, 47 AM. J. POL. SCI. 411 (2003); Patrick Royston, Gareth Ambler & Willi Sauerbrei, *The Use of Fractional Polynomials To Model Continuous Risk Variables in Epidemiology*, 28 INT'L J. EPIDEMIOLOGY 964 (1999).

On the issue of lags, the change over the time period of this study in the time between arrest and death sentence complicates estimating death sentence rates. Computing death sentence rates by associating death sentences with murders in a single prior year (the year preceding sentence, for example) is not fully satisfactory. Figure 3 shows a notable change over time in the period between arrest and sentencing. The pool of murders leading to death

In addition to accounting for time, we include in our regression models variables that seek to assess any of Delaware's distinctive effects. Since Delaware allowed judges to sentence in 1991, we want to assess Delaware's death sentence rate while accounting for any effect that may be distinctive to the sentencing role it gives to judges, but is not unique to Delaware. That is, we want to assess whether Delaware's death sentence rates are a generic consequence of its use of judges or more specific to Delaware. To do this, we characterized the death sentencing scheme of all states with an eye towards the role of the judge in sentencing.<sup>95</sup>

A third variable we have included in our model is exonerations.<sup>96</sup> To pick up state-level exoneration effects, we include a variable that includes

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sentences in the early years of this study is closer in time to the year of death sentence than is the pool of murders for more recent years. The last few decades show that defining the pool of murders using a uniform one-year lag may oversimplify the temporal relation between murders and death sentences. To reflect the changing elapsed time between arrest and sentence, we use a pool of murders that reflects this shifting pattern. We inspected the pattern of arrest years for each death sentence year and employ the following algorithm for constructing a measure of the pool of murders from which death sentences were drawn. For each year of death sentences we calculate a death sentence rate using murder arrests from previous years or the current death sentence year that accounts for at least 75% of the year's death sentences with known arrest years. For death sentences imposed from 1977 through 1982, we use the average number of murders in the death sentence year and the prior year as the denominator (the pool of murders) in calculating death sentence rates. For death sentences imposed from 1983 through 1987, we use the average annual number of murders in the present year plus the two prior years. For death sentences from 1988 through 1994, we use the average number of murders in the three prior years. For 1995 through 2004, we use the average number of murders in the four prior years. For death sentences in 2005, 2006, and 2007, we use the average annual number of murders in the prior five years.

95. Of the judicial-sentencing states most directly affected by *Ring v. Arizona*, 536 U.S. 584 (2002), Arizona and Colorado implemented jury sentencing after *Ring*. For example, Arizona requires full jury participation in capital sentencing. ARIZ. REV. STAT. ANN. § 13-703.01(D) (2012). Idaho also moved to full jury participation. IDAHO CODE ANN. § 19-2515 (2011). Montana enacted anticipatory legislation in 2001 making it a hybrid state, which prohibits the judge from increasing a sentence in criminal cases tried before a jury unless the jury unanimously finds that "the enhancing act, omission, or fact occurred beyond a reasonable doubt." MONT. CODE ANN. § 46-1-401 (2011).

Of the hybrid states, Florida, the largest capital punishment state seemingly affected by *Ring*, has done nothing. See generally Slobogin, *supra* note 7. Florida continues to employ its pre-*Ring* system despite repeated constitutional challenges, all of which have been rejected by the Florida Supreme Court. *E.g.*, *Hodges v. State*, 55 So.3d 515, 540-41 (Fla. 2010) (holding *Ring* inapplicable). So Florida continues to be a hybrid state in the Supreme Court's taxonomy. The same appears true for Alabama. *E.g.*, *Doster v. State*, 72 So.3d 50, 105 (Ala. Crim. App. 2010). Indiana amended its statute in 2002 so that the jury now has to find the presence of aggravating circumstances beyond a reasonable doubt and the judge must follow the jury's unanimous recommendation as to death, life, or term of years. IND. CODE § 35-50-2-9(e) (2011). As of 2002, therefore, Indiana should be characterized as a jury-sentencing state. Delaware changed its statute in 2002 as described above and remains a hybrid state. See *supra* notes 36-40 and accompanying text.

96. We include this variable despite the fact that there have been no official exonerations in Delaware to date because, as noted above, exonerations have played a major role in

the number of death sentence exonerations in each state in each year. An exoneration in a particular year might not be expected to have its maximum effect on death sentences in that year, since the death sentencing process now takes multiple years and is shaped by prosecutorial decisions as well as by judge and jury adjudication. Preliminary analysis suggests the strongest association between exonerations four years before the year of sentencing. Other scholars have also justified a four-year lag.<sup>97</sup> We therefore use a four-year lag of exonerations in our regression models.

Finally, we wish to account for changes in Delaware law. To account for changes in the decision-maker, we include three dummy variables in the regression models: The first variable accounts for Delaware law up to 1991 and is equal to one for Delaware for years prior to 1991; the second variable accounts for Delaware's initial judge-sentencing regime and equals one for the period 1991 through 2002; and the third variable accounts for the 2002 statutory change and equals one for the period after 2002.

A further complication is introduced by the fact that each state in our data is observed multiple times (one death sentence rate for each state for each year), so we also need to account for the non-independence of multiple observations of the same state. The dependent variable, the number of death sentences in a state in a year, is binomial in that a death sentence is imposed or not imposed in each murder case. We therefore need to use a model that accounts for the number of events (murders) from which death sentences might be drawn. To implement all these features, we use appropriate generalized estimating equations with the state as an identifier variable. A fractional polynomial of degree three was used to model background time effects.

Table 2 reports the results. Model (1) includes the Delaware dummy variables, a variable representing lagged exonerations, and the nonlinear time term (not reported). Model (2) adds a variable representing states with hybrid sentencing systems, and model (3) adds a variable for states with judge-sentencing systems.

Since the Delaware dummy variables span the time period of the data, the coefficients on those variables are in comparison to states other than Delaware. Thus, the coefficient on the "Delaware to 1991" variable indicates, in all three models, that Delaware's death sentence rate was not significantly different from that of other states up to 1991. Some caution is in order because the number of cases in Delaware is relatively small overall, and a failure to find statistical significance could be due to the low numbers. Even so, the coefficient on the "Delaware 1991 to 2002" variable is highly

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reshaping perceptions of the death penalty and likely help shape the national time pattern in Figure 2.

97. BAUMGARTNER ET AL., *supra* note 84, at 207 ("[I]t will take about four years for effects [on death sentences] to reach their full impact.").

statistically significant in all models. This supports the theory that the 1992 Delaware change to judge sentencing led to Delaware's death sentence rate increasing relative to that of other states. The coefficient on the "Delaware post-2002" variable is not statistically significant, suggesting that the law change in 2002 (or some coincident event) brought Delaware's death sentence rate back down relative to that of other states. Note that the positive sign on this coefficient corresponds to the elevated location of Delaware's line in Figure 3, which remained above that of other states after 2002.

Also of interest are the within-Delaware effects. The highly significant "Delaware 1991 to 2002" coefficient and the consistent negative sign on the "Delaware to 1991" coefficient suggest a statistically significant difference within Delaware for these two time periods. This is consistent with Figure 4's sharp visual difference between these two time periods. Other within-Delaware effects can be assessed using the probabilities reported in Table 2's last two rows. The last row tests the hypothesis that the coefficient for Delaware to 1991 equals the coefficient for Delaware after 2002. That difference is significant or near significant in all three models. The reduced effect in models (2) and (3) likely is due to the inclusion in those models of the hybrid dummy variable, which is coded one for Delaware as of 1991. The hybrid dummy likely is picking up some of the within-Delaware effect since Delaware was not a hybrid state until 1991. The penultimate row tests the hypothesis that the coefficient for "Delaware 1991 to 2002" differs from that for Delaware after 2002. The difference is statistically significant in model (3) but not in the other two models. Since model (3) only adds a variable (insignificant) for judge-sentencing states, it is not clear what the interpretation of that difference should be.

It is interesting to observe that the exonerations variable is statistically significant in all three models. The (lagged) effect of exonerations in a state is associated with a reduction in death penalty sentences.

TABLE 2  
BINOMIAL REGRESSION MODELS OF THE NUMBER OF INMATES ON DEATH ROW

	(1)	(2)	(3)
Variables	Dependent variable = number of inmates on death row		
Delaware to 1991	-0.605	-0.345	-0.338
	(1.151)	(1.009)	(1.005)
Delaware 1991 to 2002	1.468***	1.238***	1.239***
	(0.495)	(0.469)	(0.468)
Delaware post-2002	0.874	0.671	0.672
	(0.743)	(0.684)	(0.683)
Hybrid judge-jury sentencing state		0.377***	0.379***
		(0.093)	(0.093)
Judge-sentencing state			0.023
			(0.129)
Exonerations in state, by year, lagged	-0.053**	-0.060**	-0.059**
	(0.024)	(0.023)	(0.023)
Nonlinear time trend variables	Not shown		
Observations	1021	1021	1021
Number of states	36	36	36
Prob. Delaware 1991 to 2002 = Delaware post-2002	0.179	0.173	0.0170**
Prob. Delaware to 1991 = Delaware post-2002	0.0270**	0.0939*	0.0945*

Note: The regression models cover death sentences from 1978 to 2007 and the observations for each year are at the state level. Standard errors are in parentheses. \* $p < .1$ ; \*\*  $p < .05$ ; \*\*\* $p < .01$

## VI. APPEALS AND ERROR RATES

The Delaware Supreme Court has decided fifty-five cases on direct appeal,<sup>98</sup> reversing the conviction in four cases and the sentence in eleven more, and the United States Supreme Court ordered resentencing in an additional case after the judgment was affirmed by the Delaware Supreme Court. The combined error rate on direct appeal was thus 29%. Twelve of those sixteen individuals were subsequently resentenced to life in prison or a prison sentence, and two were subsequently resentenced to death and ultimately executed. One is currently on death row, and the other was retried and his sentencing is pending.<sup>99</sup>

Four death sentenced inmates obtained new trials, either as to guilt or penalty, in state post-conviction proceedings, and two were successful in federal post-conviction proceedings. This yields an overall error rate of 40%.<sup>100</sup> Of the four inmates who prevailed in state post-conviction, three of the four were resentenced to death; of the two inmates who prevailed in federal habeas corpus, both were resentenced to life imprisonment.<sup>101</sup>

While clemency is not, technically speaking, part of the appellate process, it is relevant to the question of error rates. There has been only one grant of clemency. Robert Gattis was recently granted executive clemency in a high-profile decision heralded in a New York Times editorial.<sup>102</sup> Delaware

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98. The number of appeals is greater than the number of persons sentenced to death under the guided discretion statute because some persons had their convictions or sentence reversed and then were resentenced to death and appealed again. For a list of all the cases decided on direct appeal, see *infra* Appendix E.

99. See *infra* Appendix E.

100. According to Professors James Liebman, Andrew Gelman, and their colleagues' Broken System Studies, across the United States at least one error is found in 68% of capital cases. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000) [hereinafter BROKEN SYSTEM I]; JAMES S. LIEBMAN ET AL., WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002) [hereinafter BROKEN SYSTEM II]; Andrew Gelman et al., *A Broken System: The Persistent Pattern of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 217 (2004).

101. For a chart establishing the types of errors found in Delaware cases, see *infra* Appendix F. We would also note that two things of significance have not happened in Delaware. The Delaware Supreme Court has not found that any death sentence imposed by a jury or judge was disproportionate to the offense or to the sentence imposed in a similar case, and there have been no official exonerations in the state to date. We also examined whether the error rates were different in the three capital sentencing schemes that Delaware has used. During the jury sentencing era, the overall error rate (including direct appeal and post-conviction) was 60%. In the judge sentencing era, the overall error rate is 33% to date with some cases still pending. Under the current scheme, where the judge determines death eligibility and the judge sentences, the overall error rate to date is also 33%, but all cases affirmed on direct appeal are still pending elsewhere in the capital appeals process. For a list of inmates sentenced to death in Delaware by capital sentencing scheme, see *infra* Appendix C.

102. Gattis was granted clemency on January 17, 2012. Sean O'Sullivan, *Markell Spares Gattis the Death Penalty*, NEWS J. (Jan. 17, 2012), [http://www.bishop-accountability.org/news2012/01\\_02/2012\\_01\\_17\\_OSullivan\\_MarkellSpares.htm](http://www.bishop-accountability.org/news2012/01_02/2012_01_17_OSullivan_MarkellSpares.htm); Editorial, *A Death Penalty Commutation*, N.Y.

Governor Jack Markell's decision followed an unusual four-to-one recommendation in favor of clemency by the state's Board of Pardons.<sup>103</sup> Governor Markell based his decision on the fact that the jury that sentenced Gattis to death did not hear a full presentation of the mitigating evidence regarding his family background.<sup>104</sup> As a result, Gattis's death sentence was commuted to life imprisonment without the possibility of parole, conditional upon his willingness to forego any future challenges to his conviction and life sentence.

The implications of high error rates are open to dispute. Some might argue that a high error rate indicates the appellate review system is working, while others might say that high error rates reflect the fallibility of the system, and that a system charged with determining who should live and who should die should not make substantial numbers of mistakes. Another way to look at this question is to consider whether the results after retrial validate the original decision to impose death. Here the answer is clearer: In Delaware, 68% of the individuals whose death sentences were reversed have been resentenced to life imprisonment.<sup>105</sup> Indeed, more than a third of all individuals sentenced to death in Delaware during the period under study eventually were resentenced to life imprisonment.<sup>106</sup>

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TIMES (Jan. 17, 2012), <http://www.nytimes.com/2012/01/18/opinion/a-death-penalty-commutation.html>.

103. Jack Markell, Governor, State of Del., Statement of Governor Jack Markell Regarding the Commutation of Sentence of Robert Gattis (Jan. 17, 2012), *available at* <http://news.delaware.gov/2012/01/17/statement-of-governor-jack-markell-regarding-the-commutation-of-sentence-of-robert-gattis/>. The Board of Pardons cited several reasons for the majority's recommendation. The defendant's significant history of childhood sexual abuse and possible mental illness had not been fully presented to the judge and jury that decided his punishment. Board of Pardons, State of Del., Board of Pardons Recommendation to Governor Markell Regarding Clemency of Robert Gattis (Jan. 15, 2012), *available at* <http://news.delaware.gov/2012/01/15/board-of-pardons-recommendation-regarding-clemency-of-robert-gattis/>. Furthermore, Board members noted that the jury had not been unanimous in its punishment recommendation (it had voted in favor of aggravating factors outweighing mitigating factors by a ten to two split), and they expressed concern "that our death penalty statute permits the imposition of death on the basis of a non-unanimous verdict." *Id.* The Board's statement also expressed worry about observed disparities in the sentences meted out for comparable crimes in Delaware. *Id.*

104. *See* Jack Markell, *supra* note 103. Markell concluded: "After my review, I find myself in agreement with the four members of the Board of Pardons who concluded the mitigating evidence here is sufficiently substantial that an act of clemency on my part is warranted. In doing so, I am committed to the fact that Mr. Gattis will spend his remaining life in prison and will pose no threat to public safety." *Id.*

105. *See infra* Appendix A.

106. Since most death sentenced inmates in Delaware still have appeals pending, the number who eventually leave death row exonerated or with lesser sentences will inevitably be higher.

## CONCLUSION

Our conclusions are limited to three main observations. First, Delaware's reversal rate of 40%, while considerable, is also substantially lower than that of other jurisdictions. This may not be surprising given that jury verdicts offer more opportunities for reversal, and indeed, reversal rates during the jury-sentencing period approximate the national average.<sup>107</sup>

Our second observation is that judge-sentencing results in more death sentences. This may surprise no one; indeed, the presumption that judges would be more willing than juries to impose capital punishment appeared to motivate the statutory change to judge sentencing.<sup>108</sup> Whether the mechanism behind greater judicial harshness is the absence of a need for unanimity, political pressure, or something else, our model reveals that judge sentencing produces more death sentences. Moreover, this effect is more pronounced in Delaware than in other states. Thus, putting aside whether the Delaware Supreme Court was right as a legal matter that judge sentencing could be retroactively applied to cases where the crime occurred during a jury-sentencing regime, the change it labeled "procedural" affected the likelihood of receiving a death sentence in a statistically significant way.

Finally, we find a dramatic disparity of death-sentencing rates by race, one substantially more pronounced than in other jurisdictions. This finding calls for more investigation, and also serves as a fitting conclusion to this Article's tribute to David Baldus. As he told us more than a quarter of century ago, race matters in capital sentencing, and we need to continue to pursue knowledge about where, when, and how.

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107. See *supra* notes 100–01.

108. Fleury-Steiner et al., *supra* note 28.

## APPENDIX A

## DELAWARE DEATH SENTENCES

## COMPLETE LIST OF THOSE SENTENCED TO DEATH 1976 THROUGH AUGUST 2012

Name	Def.'s Race & Sex	Victim's Race & Sex	County of Conviction	Original Sentence Date	Final Result
Richardson, Roy	W/M				Resentenced to Life Imprisonment
Eaton, Phillip	W/M				Resentenced to Life Imprisonment
Shields, Linwood (Juvenile)	B/M				Resentenced to Life Imprisonment
Foraker, Franklin	W/M				Resentenced to Life Imprisonment
Carpenter, Allen	W/M				Resentenced to Life Imprisonment
Golson, Robert	B/M				Resentenced to Life Imprisonment
Hooks, Clarence	B/M				Resentenced to Life Imprisonment
Johnson, Wilbur	B/M				Resentenced to Life Imprisonment
Hobbs, Sterling (AKA Raymond Vanderburg)	B/M				Resentenced to Life Imprisonment
Whalen, Frank	W/M	W/F	Kent	4/28/78	Resentenced to Life Imprisonment
Flamer, William	B/M	B/M B/F	Kent	2/15/80	Executed
Bailey, Billy	W/M	W/M W/F	Kent	3/10/80	Executed
Rush, David	W/M	W/M	New Castle		Resentenced to Life Imprisonment
Deputy, Andre	B/M	B/M B/F	Kent	4/1/80	Executed
Riley, James	B/M	W/M	Kent	12/20/82	Resentenced to Life Imprisonment
Deshields, Kenneth	B/M	W/F	Sussex	4/4/86	Executed
Sanders, Reginald	B/M	W/M	Kent	Oct-86	Resentenced to Life Imprisonment
Dawson, David	W/M	W/F	Kent	7/24/88	Executed
Pennell, Steven	W/M	W/F W/F	New Castle	Aug-91	Executed
Red Dog, James	NA/M	W/M	New Castle	4/16/92	Executed
Sullivan, Willie	B/M	W/M	Kent	10/30/92	Executed

Name	Def.'s Race & Sex	Victim's Race & Sex	County of Conviction	Original Sentence Date	Final Result
Gattis, Robert	B/M	B/F	New Castle	10/29/92	Sentence Commuted to Life Imprisonment
Wright, Jermaine	B/M	W/M	New Castle	10/29/92	Pending
Hameen, Abdullah (AKA Cornelius Ferguson)	B/M	B/M	New Castle	12/7/92	Executed
Jackson, Robert	W/M	W/F	New Castle	4/28/93	Executed
Shelton, Nelson	W/M	W/M	New Castle	4/30/93	Executed
Shelton, Steven	W/M	W/M	New Castle	1/12/92	Resentenced to Life Imprisonment
Oутten, Jack	W/M	W/M	New Castle	4/30/93	Resentenced to Life Imprisonment
Lawrie, David	W/M	W/M W/F W/F	Kent	7/9/93	Executed
Weeks, Dwayne	B/M	B/M B/F	New Castle	7/9/93	Executed
Clark, James	W/M	W/M W/F	New Castle	1/5/95	Executed
Steckel, Brian	W/M	W/F	New Castle	1/8/97	Executed
Stevenson, David	B/M	W/M	New Castle	1/10/97; 2/3/06	Pending
Manley, Michael	B/M	W/M	New Castle	1/10/97; 2/3/06	Pending
Zebroski, Craig	W/M	B/M	New Castle	8/18/97	Pending
Barnett, Jermaine	B/M	W/M	New Castle	2/3/98	Resentenced to Life Imprisonment
Barrow, Hector	B/M	W/M	New Castle	2/3/98	Resentenced to Life Imprisonment
Ashley, Robert	W/M	B/M	New Castle	3/19/99	Resentenced to Life Imprisonment
Capano, Thomas J.	W/M	W/F	New Castle	3/16/99	Resentenced to Life Imprisonment
Flonnory, Freddie	B/M	B/F B/F	New Castle	2/19/04; 7/22/04	Resentenced to Life Imprisonment
Garden, Sadiki	B/M	W/F	New Castle	3/25/01	Resentenced to Life Imprisonment
Taylor, Milton	B/M	B/F	New Castle	7/6/01	Pending
Norcross, Adam	W/M	W/M	Kent	10/3/01	Pending
Swan, Ralph	W/M	W/M	Kent	10/3/01	Pending

Name	Def.'s Race & Sex	Victim's Race & Sex	County of Conviction	Original Sentence Date	Final Result
Cabrera, Luis	H/M	B/M B/M	New Castle	3/14/02	Pending
Reyes, Luis	H/M	B/M B/M	New Castle	3/14/02	Pending
Williams, Joseph	B/M	B/F	New Castle	8/3/01	Resentenced to Life Imprisonment
Ortiz, Juan J.	H/M	W/F	Kent	9/26/03	Pending
Ploof, Gary	W/M	W/F	Kent	8/22/03	Pending
Charbonneau, Linda	W/F	W/M W/M	Sussex	6/4/04	Resentenced to Imprisonment for Term of Years
Starling, Chauncy	B/M	B/M B/M	New Castle	6/10/04	Pending
Sykes, Ambrose	B/M	W/F	Kent	9/20/06	Pending
Cooke, James E., Jr.	B/M	W/F	New Castle	6/6/07	Pending
Norman, Allison	B/M	B/M	Sussex	Jun.-07	Resentenced to Life Imprisonment
Johnson, Shannon	B/M	B/M	New Castle	9/5/08	Executed
Taylor, Emmett, III	B/M	B/F	Sussex	1/12/10	Pending
Powell, Derrick	B/M	W/M	Sussex	5/20/11	Pending
Small, Leslie	B/M	W/F	Sussex	7/22/11	Pending

## APPENDIX B

## DELAWARE'S CURRENT DEATH ROW

Name	Def.'s Race & Sex	Victim's Race & Sex	County of Conviction	Original Sentence Date
Stevenson, David	B/M	W/M	New Castle	1/10/97; 2/3/06
Manley, Michael	B/M	W/M	New Castle	1/10/97; 2/3/06
Zebroski, Craig	W/M	B/M	New Castle	8/18/97
Taylor, Milton	B/M	B/F	New Castle	7/6/01
Norcross, Adam	W/M	W/M	Kent	10/3/01
Swan, Ralph	W/M	W/M	Kent	10/3/01
Cabrera, Luis	H/M	B/M B/M	New Castle	3/14/02
Reyes, Luis	H/M	B/M B/M	New Castle	3/14/02
Ortiz, Juan J.	H/M	W/F	Kent	9/26/03
Ploof, Gary	W/M	W/F	Kent	8/22/03
Starling, Chauncy	B/M	2B/M	New Castle	6/10/04
Sykes, Ambrose	B/M	W/F	Kent	9/20/06
Taylor, Emmett, III	B/M	B/F	Sussex	1/12/10
Powell, Derrick	B/M	W/M	Sussex	5/20/11
Small, Leslie	B/M	W/F	Sussex	7/22/11

## APPENDIX C

NUMBER OF INDIVIDUALS SENTENCED IN MODERN ERA CATEGORIZED BY  
STATUTORY SCHEME

<u>1977 Statute</u> • Jury Sentences	<u>1991 Amendment</u> • Judge Sentences; and • Jury Recommends	<u>2002 Amendment</u> • Judge Sentences; • Jury Recommends; and • Jury Must Unanimously Agree on One Aggravating Factor
1977–Nov. 1991	Nov. 1991–June 2002	June 2002–Present
Whalen, Frank*	Red Dog, James	Ortiz, Juan J.
Flamer, William	Sullivan, Willie	Ploof, Gary
Bailey, Billy	Gattis, Robert*	Charbonneau, Linda*
Rush, David*	Wright, Jermaine**	Starling, Chauncy
Deputy, Andre	Hameen, Abdualah (AKA Cornelius Ferguson)	Sykes, Ambrose
Riley, James*	Jackson, Robert	Norman, Allison*
Deshields, Kenneth	Shelton, Nelson	Cooke, James E., Jr.**
Sanders, Reginald*	Shelton, Steven*	Johnson, Shannon
Dawson, David	Outten, Jack*	Taylor, Emmett, III
Pennell, Steven***	Lawrie, David	Powell, Derrick
	Weeks, Dwayne	Small, Leslie
	Clark, James	
	Steckel, Brian	
	Stevenson, David	
	Manley, Michael	
	Zebroski, Craig	
	Barnett, Jermaine*	
	Barrow, Hector*	
	Flonnory, Freddie*	
	Ashley, Robert*	
	Capano, Thomas J.*	
	Garden, Sadiki*	
	Taylor, Milton	
	Norcross, Adam	
	Swan, Ralph	
	Cabrera, Luis	
	Reyes, Luis	
	Williams, Joseph*	

- \* Indicates the individual was resentenced or the sentences was commuted to life in prison or term of years  
\*\* Indicates pending new trial or new sentencing  
\*\*\* While Pennell was sentenced (by a judge) before the 1991 amendment took effect, his appeals came after the amendment

## APPENDIX D

DELAWARE EXECUTIONS  
1976 THROUGH AUGUST 2012

Name	Def.'s Race & Sex	Victim's Race & Sex	County of Conviction	Sentence Date	Execution Date	Method of Execution	Other
Flamer, William	B/M	B/M B/F	Kent	2/15/80	Executed 1/30/1996	Lethal Injection	
Bailey, Billy	W/M	W/M W/F	Kent	3/10/80	Executed 1/25/1996	Hanging	
Deputy, Andre	B/M	B/M B/F	Kent	4/1/80	Executed 6/23/1994	Lethal Injection	
Deshields, Kenneth	B/M	W/F	Kent	4/4/86	Executed 8/31/1993	Lethal Injection	
Dawson, David	W/M	W/F	Kent	7/24/88	Executed 4/26/2001	Lethal Injection	
Pennell, Steven	W/M	W/F W/F	New Castle	Oct-91	Executed 3/14/1992	Lethal Injection	Volunteer
Red Dog, James	NA/M	W/M	New Castle	4/16/92	Executed 3/3/1993	Lethal Injection	Volunteer
Sullivan, Willie	B/M	W/M	Kent	10/30/92	Executed 9/24/1999	Lethal Injection	
Hameen, Abdullah (AKA Cornelius Ferguson)	B/M	B/M	New Castle	12/7/92	Executed 5/25/2001	Lethal Injection	
Shelton, Nelson	W/M	W/M	New Castle	4/30/93	Executed 3/17/1995	Lethal Injection	Volunteer
Lawrie, David	W/M	W/M W/F W/F W/F	Kent	7/9/93	Executed 4/23/1999	Lethal Injection	
Weeks, Dwayne	B/M	B/M B/F	New Castle	7/9/93	Executed 11/17/2000	Lethal Injection	
Clark, James	W/M	W/M W/F	New Castle	1/5/95	Executed 4/19/1996	Lethal Injection	Volunteer
Steckel, Brian	W/M	W/F	New Castle	1/8/97	Executed 11/4/2005	Lethal Injection	
Jackson, Robert	W/M	W/F	New Castle	4/28/93	Executed 7/29/2011	Lethal Injection	
Johnson, Shannon	B/M	B/M	New Castle	9/5/08	Executed 4/20/2012	Lethal Injection	Volunteer

## APPENDIX E

## DELAWARE DIRECT APPEAL CASES

1982–2011

CASE NAME	RESULT	CURRENT STATUS
Whalen v. State, 434 A.2d 1346 (Del. 1980), <i>cert. denied</i> , 455 U.S. 910 (1982).	Reversed-S	Life in Prison
Flamer v. State, 490 A.2d 104 (Del. 1983), <i>cert. denied</i> , 464 U.S. 865 (1983).	Affirmed	Executed
Bailey v. State, 490 A.2d 158 (Del. 1983), <i>cert. denied</i> , 464 U.S. 867 (1983); Bailey v. State, 503 A.2d 1210 (Del. 1984), <i>cert. denied</i> , 474 U.S. 873 (1985).	Affirmed	Executed
Rush v. State, 491 A.2d 439 (Del. 1985).	Reversed-S	Life in Prison
Riley v. State, 496 A.2d 997 (Del. 1985), <i>cert. denied</i> , 478 U.S. 1022 (1986).	Affirmed	Life in Prison
Deputy v. State, 500 A.2d 581 (Del. 1985), <i>cert. denied</i> , 480 U.S. 940 (1987).	Affirmed	Executed
DeShields v. State, 534 A.2d 630 (Del. 1987), <i>cert. denied</i> , 486 U.S. 1017 (1988).	Affirmed	Executed
Dawson v. State, 581 A.2d 1078 (Del. 1990), rev'd and remanded, 503 U.S. 159 (1992), 608 A.2d 1201 (1992).	Reversed-S	Executed
Sanders v. State, 585 A.2d 117 (Del. 1990).	Reversed-S	Life in Prison
Pennell v. State, 604 A.2d 1368 (Del. 1992).	Affirmed	Executed
Red Dog v. State, 616 A.2d 298 (Del. 1992).	Affirmed	Executed
Sullivan v. State, 636 A.2d 931 (Del. 1994), <i>cert. denied</i> , 513 U.S. 833 (1994).	Affirmed	Executed
Dawson v. State, 637 A.2d 57 (Del. 1994).	Affirmed	Executed
Gattis v. State, 637 A.2d 808 (Del. 1994), <i>cert. denied</i> , 513 U.S. 843 (1994).	Affirmed	Granted Clemency 01/17/2012
Wright v. State, 633 A.2d 329 (Del. 1993).	Affirmed	Pending
Ferguson v. State, 642 A.2d 772 (Del. 1994), <i>cert. denied</i> , 519 U.S. 1014 (1996).	Affirmed	Executed
Lawrie v. State, 643 A.2d 1336 (Del. 1994), <i>cert. denied</i> , 513 U.S. 1048 (1994).	Affirmed	Executed
Jackson v. State, 643 A.2d 1360 (Del. 1994), <i>cert. denied</i> , 513 U.S. 1136 (1995).	Reversed-S	Executed
Outten v. State, 650 A.2d 1291 (Del. 1994), <i>cert. denied</i> , 515 U.S. 1145 (1995) (for Steven Shelton and Outten).	Affirmed	Life in Prison
Shelton v. State, 650 A.2d 1291 (Del. 1994).	Affirmed	Executed
Weeks v. State, 653 A.2d 266 (Del. 1995).	Affirmed	Executed

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Whalen v. State, 492 A.2d 552 (Del. 1985).	Reversed-S	Life in Prison
Wright v. State, 671 A.2d 1353 (Del. 1996), <i>cert. denied</i> , 517 U.S. 1249 (1996).	Affirmed	On Row
Clark v. State, 672 A.2d 1004 (Del. 1996).	Affirmed	Executed
Jackson v. State, 684 A.2d 745 (Del. 1996), <i>cert. denied</i> , 520 U.S. 1171 (1997).	Affirmed	Executed
Manley v. State, 709 A.2d 643 (Del. 1998), <i>cert. denied</i> , 525 U.S. 893 (1998).	Affirmed	On Row
Stevenson v. State, 709 A.2d 619 (Del. 1998), <i>cert. denied</i> , 525 U.S. 967 (1998).	Affirmed	On Row
Steckel v. State, 711 A.2d 5 (Del. 1998).	Affirmed	Executed
Zebroski v. State, 715 A.2d 75 (Del. 1998).	Affirmed	On Row
Barrow v. State, 749 A.2d 1230 (Del. 2000) (for Barnett and Barrow).	Reversed-S	Life in Prison
Capano v. State, 781 A.2d 556 (Del. 2001), <i>cert. denied</i> , 536 U.S. 958 (2002).	Affirmed	Life in Prison (deceased)
Flonnery v. State, 778 A.2d 1044 (Del. 2001).	Reversed-NT	Life in Prison
Ashley v. State, 798 A.2d 1019 (Del. 2002).	Reversed-NT	Life in Prison
Williams v. State, 818 A.2d 906 (Del. 2002).	Reversed-S	Life in Prison
Garden v. State, 815 A.2d 327 (Del. 2003).	Reversed-S	Life in Prison
Norcross v. State, 816 A.2d 757 (Del. 2003), <i>cert. denied</i> , 540 U.S. 833 (2003).	Affirmed	On Row
Reyes v. State, 819 A.2d 305 (Del. 2003), <i>cert. denied</i> , 540 U.S. 862 (2003) (for Reyes and Cabrera).	Affirmed	On Row
Swan v. State, 820 A.2d 342 (Del. 2003), <i>cert. denied</i> , 540 U.S. 896 (2003).	Affirmed	On Row
Taylor v. State, 822 A.2d 1052 (Del. 2003), <i>cert. denied</i> , 540 U.S. 931 (2003).	Affirmed	On Row
Garden v. State, 844 A.2d 311 (Del. 2004).	Reversed-S	Life in Prison
Ploof v. State, 856 A.2d 539 (Del. 2004).	Affirmed	On Row
Ortiz v. State, 869 A.2d 285 (Del. 2005), <i>cert. denied</i> , 546 U.S. 832 (2005).	Affirmed	On Row
Starling v. State, 882 A.2d 747 (Del. 2005), <i>cert. denied</i> , 546 U.S. 1216 (2006).	Reversed-S	On Row
Charbonneau v. State, 904 A.2d 295 (Del. 2006).	Reversed-NT	Prison Term
Starling v. State, 903 A.2d 758 (Del. 2006), <i>cert. denied</i> , 549 U.S. 1324 (2007).	Affirmed	On Row

CASE NAME	RESULT	CURRENT STATUS
Manley v. State, 918 A.2d 321 (Del. 2007), <i>cert. denied</i> , 550 U.S. 971 (2007) (2 defendants – Manley and Stevenson).	Affirmed	On Row
Sykes v. State, 953 A.2d 261 (Del. 2008), <i>cert. denied</i> , 555 U.S. 969 (2008).	Affirmed	On Row
Norman v. State, 976 A.2d 843 (Del. 2009), <i>cert. denied</i> , 130 S.Ct. 561 (2009).	Reversed-S	Life in Prison
Cooke v. State, 977 A.2d 803 (Del. 2009), <i>cert. denied</i> , 130 S.Ct. 1506 (2010).	Reversed-NT	Sentence Pending After Retrial
Johnson v. State, 985 A.2d 904 (Del. 2009), <i>cert. denied</i> , 131 S.Ct. 77 (2010).	Affirmed	Executed
Taylor v. State, 28 A.3d 399 (Del. 2011).	Affirmed	On Row

