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The Death Penalty: Should the Judge or the Jury Decide Who Dies?

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This article addresses the effect of judge versus jury decision making through analysis of a database of all capital sentencing phase hearing trials in the State of Delaware from 1977–2007. Over the three decades of the study, Delaware shifted responsibility for death penalty sentencing from the jury to the judge. Currently, Delaware is one of the handful of states that gives the judge the final decision-making authority in capital trials. Controlling for a number of legally relevant and other predictor variables, we find that the shift to judge sentencing significantly increased the number of death sentences. Statutory aggravating factors, stranger homicides, and the victim's gender also increased the likelihood of a death sentence, as did the county of the homicide. We reflect on the implications of these results for debates about the constitutionality of judge sentencing in capital cases.

I. INTRODUCTION

This article examines the impact of having the judge or the jury as the decisionmaker in capital trials. In *Woodward v. Alabama*, a dissent from a denial of certiorari, Supreme Court Justice Sotomayor, joined by Justice Breyer, questioned the constitutionality and the impact of employing judges as opposed to juries as the final arbiter of death sentences in the United States.¹ This article addresses the effect of judge versus jury decision making through analysis of a unique database of all capital sentencing phase hearing trials in the State of Delaware in the modern period of capital punishment, from 1977–2007. Delaware

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¹*Woodward v. Alabama*, 571 U.S. 405 (2013) (Sotomayor, J., dissenting from the denial of certiorari).

is one of a handful of states that currently gives the judge rather than the jury the final judgment in a capital case. Over the three decades of the study, Delaware shifted responsibility for death penalty sentencing from the jury to the judge. These different sentencing approaches provide a rare opportunity to contrast the operation of jury and judge decision making within a single state.

Other studies of judge versus jury death penalty sentencing have compared decisionmakers across jurisdictions, or have examined judicial overrides of jury decisions within a state.² Delaware's experience offers the chance to examine how a state's capital punishment system changes when judges or juries are the ultimate decisionmakers. This has significance not only for the State of Delaware, but also for other states that have modified their approaches or that are considering changing their sentencing schemes in capital cases. Moreover, it also bears on the question raised in Sotomayor's dissent from denial of certiorari: Does capital sentencing by judges violate the Sixth and Eighth Amendments?³

Although there is substantial research about the nationwide operation of capital punishment,⁴ empirical research on Delaware's death penalty is modest in amount.⁵ The

²John Blume, Theodore Eisenberg & Martin T. Wells, Explaining Death Row's Population and Racial Composition, 1 J. Empirical Legal Stud. 165 (2004) (comparing outcomes in states with judge vs. 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) (comparing the responses of capital jurors in jury sentencing vs. hybrid states); Michael Radelet, Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem, 2011 Mich. St. L. Rev. 793, 828 (2011) (describing judicial override patterns in Florida over time); Christopher Slobogin, The Death Penalty in Florida, 1 Elon L. Rev. 17, 47–50 (2009) (detailing problems with the majority decision rule, jury instructions, and judicial overrides of jury recommendations in Florida).

³Woodward v. Alabama, 571 U.S. 405 (2013) (reporting Alabama jury override data and questioning whether Alabama's practice of capital sentencing by judges violates the Sixth Amendment right to a jury trial, or is so arbitrary as to violate the cruel and unusual punishment clause of the Eighth Amendment).

⁴The empirical literature is substantial. See, e.g., David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990) (summarizing comprehensive empirical study of Georgia's capital sentencing); Raymond Paternoster, Robert Brame & Sarah Bacon, The Death Penalty: America's Experience with Capital Punishment (2007) (summary of empirical research findings); John J. Donohue III, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Stud. 637 (2014) (summarizing comprehensive study of Connecticut's capital sentencing).

⁵Empirical research includes two previous analyses of the Delaware death penalty: Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, The Delaware Death Penalty: An Empirical Study, 97 Iowa L. Rev. 1925 (2012) (analyzing death-sentencing rates), and Caisa E. Royer, Amelia C. Hritz, Valerie P. Hans, Theodore Eisenberg, Martin T. Wells, John H. Blume & Sheri Lynn Johnson, Victim Gender and the Death Penalty, 82 UMKC L. Rev. 429 (2014) (finding support for a female victim effect in Delaware capital cases). Other empirical projects include: Ross Kleinstuber, Hegemonic Individualism and Subversive Stories in Capital Mitigation (2014) (reporting and analyzing the results of interviews with Delaware capital jurors); Benjamin D. Fleury-Steiner, Kerry Dunn & Ruth Fleury-Steiner, Governing Through Crime as Commonsense Racism, 11 Punishment & Soc'y 5 (2009) (case study describing events surrounding the shift from jury to judge decision making); Glenn W. Samuelson, Why Was Capital Punishment Restored in Delaware? 60 J. Crim. L. & Criminology 148 (1969) (analyzing homicides before and after abolition and subsequent reinstatement of the death penalty in Delaware). See also Adam Gershowitz, Delaware's Capital Jury Selection: Inadequate Voir Dire and the Problem of Automatic Death Penalty Jurors, 2 Del. L. Rev. 235 (1999) (reviewing capital litigation in Delaware).

small size of the state and the relatively low number of homicides and individuals sentenced to death can make it difficult to discern statistical patterns in the operation of capital punishment. However, the low numbers also make it possible to examine in detail each homicide case leading to a capital trial and ensuing penalty phase over the three decades of the study period. Despite its small size, Delaware has a high death-sentencing rate relative to other states. Death-sentencing rates are calculated by dividing the number of death sentences by the number of homicides in a state, and Delaware has the third highest death-sentencing rate in the United States.⁶

Our previous research on the Delaware death penalty has analyzed death-sentencing rates in some detail.⁷ Controlling for national trends, and separating out Delaware death-sentencing rates into judge and jury sentencing eras, the analysis found substantially higher rates in the judge era as opposed to the jury era.⁸ There were also markedly higher death-sentencing rates in Delaware capital cases with black defendants and white victims, compared to the rates for cases with other race of defendant-race of victim combinations.⁹ In Delaware cases, the death-sentencing rate for black defendants who killed white victims was six times higher than for black defendants who killed black victims, and three times higher than for white defendants who killed black victims.¹⁰ In fact, when comparing Delaware to other states in which there was reliable race of defendant/race of victim data, Delaware has the highest death-sentencing rate in the country in black defendant/white victim cases.¹¹ A second article compared the likelihood of the death penalty in cases with male victims as compared to female victims; the analysis showed that capital cases with female victims were more likely to result in death sentences, even when controlling for other case factors.¹²

This article significantly extends the empirical work on the operation of the death penalty in Delaware. Our previous analysis of judge versus jury sentencing and of defendant and victim race took the first step, combining general information from the national homicide database with information about death sentences in Delaware and elsewhere. It did not take into account other features of Delaware capital cases that might help explain the death penalty decisions of judges and juries. It also did not undertake in-depth analysis of the Delaware capital cases that ended with a decision of life imprisonment. This article

⁶Blume et al., *supra* note 2.

⁷Johnson et al., *supra* note 5.

⁸*Id.* at 1945–51.

⁹*Id.* at 1939–41.

¹⁰*Id.* at 1940.

¹¹Blume et al., *supra* note 2.

¹²Royer et al., *supra* note 5 (finding support for a female victim effect in Delaware capital cases).

extends our previous work by considering both life and death cases. Importantly, the article reports analyses that control for aggravating, mitigating, and other features of the cases. Thus, the current analysis has the potential to evaluate how the decisionmaker—judge or jury—affects the outcome, taking multiple case factors into account.

We dedicate this article to the memory of our beloved and brilliant colleague and friend, Theodore Eisenberg, who died before the article was completed. His co-authorship reflects the central and substantial contributions that he made both to this article and to the entire research project. Ted was a tireless advocate for empirical research on important legal questions. The operation of the death penalty was one of his central concerns. Ted was an integral part of the Cornell Death Penalty Project, and before that, the Capital Jury Project. He provided statistical expertise and contributed his legal imagination to the project's scholarly endeavors, and when needed, served as an expert witness for the litigation arm of the project. His commitment to the abolition of the death penalty grew from the data he collected and analyzed as well as the implications of those data. As his colleagues, we owe him (and miss him) more than we can adequately describe.

II. HISTORICAL OVERVIEW OF THE DEATH PENALTY IN DELAWARE

A brief description of the history of the death penalty in Delaware reveals both the legislative role in retaining the death penalty and the importance of high-profile cases in death penalty reform. The death penalty has existed in Delaware since the early colonial period.¹³ In the middle of the 20th century, there were a number of efforts to eliminate capital punishment, which finally succeeded in 1958. Delaware became the second state, after Missouri, to abolish the death penalty.¹⁴ In 1961, however, following the highly publicized murder of an elderly white couple by an African-American man in southern Delaware, the Delaware legislature reinstated capital punishment. Delaware's Governor Elbert Carvel vetoed the bill, but the legislature overrode his veto.¹⁵ Like most jurisdictions at that time, Delaware's new death penalty statute required the jury to decide the issues of guilt and punishment in the same unitary proceeding and provided no standards for the jury to utilize in making the life or death decision.¹⁶

¹³Loren C. Meyers & Gayle P. Lafferty, *Capital Punishment, in Delaware Supreme Court: Golden Anniversary 1951–2001* 177 (Justice Randy J. Holland & Helen L. Winslow eds., 2001).

¹⁴Herbert L. Cobin, *Abolition and Restoration of the Death Penalty in Delaware*, in *The Death Penalty in America: An Anthology* 359, 360–64 (Hugo Adam Bedau ed., 1964); *History of the Death Penalty in Delaware*, <<http://www.doc.delaware.gov/deathrow/history.shtml>>.

¹⁵Cobin, *supra* note 14, at 366–71 (offering a detailed account of the legal change); *History of the Death Penalty in Delaware*, <<http://www.doc.delaware.gov/deathrow/history.shtml>>; Meyers & Lafferty, *supra* note 13; Samuelson, *supra* note 5, at 148, 150–51.

¹⁶Del. Code Ann. tit. 11, § 3901 (1972).

After *Furman v. Georgia* concluded that the death penalty, as then administered in the United States, violated the Eighth Amendment's ban on cruel and unusual punishment, the "mercy statute" that was a part of Delaware's death penalty scheme was invalidated.¹⁷ The Delaware Supreme Court concluded that because the mercy statute "delegates to jury and judge uncontrolled discretion in the imposition of the death penalty . . . there is room for that caprice, whim, and discrimination in the imposition of the death penalty that now stands condemned by the United States Supreme Court in *Furman*."¹⁸ That left a mandatory capital punishment statute in place,¹⁹ but Delaware's mandatory sentencing regime was short-lived. In 1976, the Supreme Court held in *Woodson v. North Carolina*²⁰ and *Roberts v. Louisiana*²¹ that mandatory capital sentencing schemes violated the Eighth Amendment. In *State v. Spence*, the Delaware Supreme Court responded to *Woodson* and *Roberts* by setting aside all nine mandatory death sentences.²²

In May 1977, the Delaware legislature enacted a new law modeled after the Georgia capital sentencing statute upheld by the Supreme Court in 1976 in *Gregg v. Georgia*.²³ This scheme provided for a bifurcated trial. In the first phase, the defendant's guilt or innocence of first-degree murder was decided. If the defendant was convicted, the jury would then determine the appropriate punishment in a separate penalty phase.²⁴ The new law identified specific aggravating circumstances for the factfinder to consider in deciding on the sentence. In the penalty phase, the system provided for the presentation of aggravating and mitigating evidence.²⁵ The jury could sentence the defendant to death only if it unanimously concluded, beyond a reasonable doubt, that at least one statutory aggravating circumstance existed, and that, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation, the aggravating circumstances found to exist outweighed the mitigating circumstances found to exist.²⁶ The jury's decision to sentence the defendant to death had to be unanimous and the jury's sentence determina-

¹⁷State v. Dickerson, 298 A.2d 761 (Del. 1973).

¹⁸Id.

¹⁹The new mandatory death penalty law represented a return to the mandatory nature of capital punishment prior to 1911. Meyers & Lafferty, supra note 13, at 177. The Delaware Supreme Court upheld the mandatory approach in *State v. Sheppard*, 331 A.2d 142 (Del. 1974).

²⁰428 U.S. 280 (1976).

²¹428 U.S. 325 (1976).

²²367 A.2d 983, 988 (Del. 1976).

²³428 U.S. 153 (1976).

²⁴395 A.2d 1082 (Del. 1978).

²⁵Meyers & Lafferty, supra note 13, at 181–82.

²⁶11 Del. Code § 4209(c)(3).

tion was binding.²⁷ If the jury could not reach a unanimous decision on the sentence, a life sentence was entered for the defendant. The new scheme also required the Delaware Supreme Court to conduct an automatic review, including a proportionality review, of each capital case.²⁸ The Delaware Supreme Court upheld the new law in *State v. White*.²⁹

Under this statute, Delaware juries made sentencing decisions in capital cases from 1977 until 1991. As documented in more detail below, very few defendants were sentenced to death during this period: only 11 total statewide, with most arising in Delaware's two southern counties, Kent and Sussex, even though homicides were much more numerous in the northern county of New Castle. In October 1991, however, a New Castle County capital jury decided the highly publicized case of four men from outside the state who killed two Brooks armored car guards during a robbery.³⁰ An interracial case with African-American defendants and white victims, the trial garnered extensive coverage in the Wilmington, Delaware media. All four defendants were convicted, but the jury could not agree unanimously on the death penalty for any of them. As the law required, they were all sentenced to life in prison without probation or parole.³¹ The public was reportedly outraged at the jury's failure to give death sentences in the case.³² Prosecutors voiced their strong objections to the jury trial's outcome: "We live in a terribly jaded society if we've come to accept that type of conduct without returning the death penalty."³³

Within days of the Brooks armored car verdict, and with the support of Delaware's then Attorney General Charles Oberly, the Delaware General Assembly passed a new bill that amended the death penalty statute, replacing the jury with the judge as the final decisionmaker in the penalty phase of capital trials.³⁴ Modeled after Florida's capital punishment system, the new law provided that if the jury convicted of first-degree murder,

²⁷Id.

²⁸Id.

²⁹395 A.2d 1082, 1097 (Del. 1978) (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").

³⁰*Robertson v. State*, 630 A.2d 1084 (Del. 1993). For a detailed account of how the case was employed in the effort to remove juries from capital sentencing, see Fleury-Steiner et al., *supra* note 5, at 11–15.

³¹630 A.2d at 1086.

³²Floor Debate of Delaware State House, audio tape 1 (Oct. 24, 1991) (hereinafter Floor Debate, on file with author) (identifying the case and public response to the jury's inability to decide unanimously as the impetus for the bill). See also Fleury-Steiner et al., *supra* note 5.

³³Fleury-Steiner et al., *supra* note 5, at 14 (citing prosecutor's statement quoted in Ted Caddell, Brooks Killers Get Life in Jail, News J., Oct. 23, 1991, at A1).

³⁴Del. Code Ann. tit. 11, § 4209 (1991).

a penalty phase ensued. The jury heard aggravating and mitigating evidence presented by the two sides, and voted on whether or not one or more statutory aggravating circumstances existed. It also voted on whether aggravating circumstances outweighed mitigating circumstances. However, the votes no longer had to be unanimous and, more importantly, were no longer binding on the trial judge. The judge, not the jury, was vested with ultimate sentencing authority.³⁵ The governor signed the bill on November 4, 1991, and it became effective immediately.³⁶ The new judge sentencing system was upheld by the Delaware Supreme Court in *State v. Cohen*.³⁷ Because the Delaware Supreme Court found that the change from jury to judge sentencing was merely procedural, it concluded that the new regime could be used in pending capital trials, even in cases where the crime occurred prior to the enactment of the new law, making it retroactive.³⁸

One other significant change to the death penalty sentencing scheme occurred in 2002 when the Supreme Court decided *Ring v. Arizona*, which applied the right to jury trial to capital sentencing proceedings for the first time.³⁹ In *Ring*, the Court held that factors that made a defendant eligible for the death penalty, for instance, the statutory aggravating circumstances, had to be found by a jury, unanimously and beyond a reasonable doubt. At the time of *Ring*, five states (Arizona, Colorado, Idaho, Montana, and Nebraska) gave the responsibility for death penalty decisions to judges.⁴⁰ These five laws were struck down in *Ring* as unconstitutional. The decision also raised the issue of the constitutionality of hybrid sentencing approaches. Delaware was one of four states at the time (Alabama, Florida, and Indiana being the others) with hybrid sentencing schemes in which the jury renders an

³⁵Id.; Floor Debate, supra note 32; see also Meyers & Lafferty, supra note 13, at 185; *State v. Cohen*, 604 A.2d 846 (Del. 1992).

³⁶Meyers & Lafferty, supra note 13, at 185.

³⁷*State v. Cohen*, 604 A.2d 846 (Del. 1992).

³⁸In six of the seven cases combined in *State v. Cohen*, the murders had occurred before the 1991 amendments were passed into legislation.

³⁹536 U.S. 584 (2002). The Court had previously rejected claims that jury participation in the capital sentencing process was required by the Sixth Amendment in *Walton v. Arizona*, 497 U.S. 639 (1990). Subsequent to *Walton*, however, in a line of noncapital sentencing cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that the Sixth Amendment right to jury trial requires that juries—not judges—find facts that enhance a sentence beyond the statutory maximum punishment. The Court applied this new line of cases to the capital sentencing in *Ring*. Because it is the finding of an aggravating circumstance that (potentially) enhances a defendant's punishment and makes him (or her) "eligible" for the death penalty, juries must decide the existence vel non of aggravating circumstances. The Court did not mandate, however, that the juries make the punishment decision, that is, that juries determine whether the death penalty is the appropriate punishment in a particular case, taking into account all of the aggravating and mitigating circumstances.

⁴⁰In *Ring*, 536 U.S. 584 n.6, Justice Ginsburg identified five states in which the fact finding and capital decision making was entirely the responsibility of judges. In addition to Arizona, the opinion listed these states as Colorado, Idaho, Montana, and Nebraska. See Colo. Rev. Stat. § 16-11-103 (2001) (decision made by three-judge panel); Idaho Code § 19-2515 (Supp. 2001); Mont. Code Ann. § 46-18-301 (1997); Neb. Rev. Stat. § 29-2520 (1995).

advisory verdict but the judge makes the ultimate sentencing determination. The constitutionality of this scheme was now open to question.⁴¹

States responded to *Ring* in different ways, with some judge sentencing states moving to jury sentencing and others adopting a hybrid approach in which the jury made the required determination of the presence of an aggravating factor beyond a reasonable doubt, but the judge retained the ultimate sentencing decision in those cases where the jury found an aggravating factor.⁴²

Delaware chose the latter approach. Delaware's legislature retained the judge as the final sentencer, and the jury's vote on whether aggravating circumstances outweigh mitigating circumstances is still only advisory to the judge. But to comply with *Ring*, the new law required that a jury must find at least one statutory aggravating factor unanimously and beyond a reasonable doubt.⁴³ Moreover, although the ultimate sentencing power still resides with the judge, the trial judge must give "appropriate consideration" to a jury's decision about whether the aggravating circumstances outweigh the mitigating circumstances.⁴⁴ Initially, the Delaware Supreme Court interpreted the statute as requiring judges to give the jury's recommendation "great weight."⁴⁵ However, in response to the *Sadiki Garden* case discussed below, in which the Delaware Supreme Court overturned a judge's death sentence in a case in which the majority of the jurors had recommended life, the Delaware legislature modified the language in the statute, with judges only needing to give the jury's recommendation whatever consideration the judge deemed appropriate.⁴⁶

The jury has a somewhat larger role in the hybrid model than in the judge sentencing approach that prevailed from 1991 through 2002, though less of a role than in the system prevailing from 1977 to 1991. Some might consider the necessity of the jury's arriving at a unanimous opinion about the presence of at least one aggravating factor beyond a reasonable doubt to be insignificant as a practical matter. The list of statutory aggravators is a long one, and most first-degree murder cases include patently obvious aggravation. However, the

⁴¹*Ring* also identified the four states with hybrid systems as Alabama, Delaware, Florida, and Indiana. See Ala. Code §§ 13A-5-46, 13A-5-47 (1994); Del. Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind. Code Ann. § 35-50-2-9 (Supp. 2001).

⁴²Marc R. Shapiro, Reevaluating the Role of the Jury in Capital Sentencing after *Ring v. Arizona*, 59 NYU L. Rev. 633 (2004).

⁴³Del. Code Ann. tit. 11, § 4209 (2002).

⁴⁴Del. Code Ann. tit. 11, § 4209(d)(1) ("The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating 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.") (bold emphasis added).

⁴⁵*Garden v. State*, 815 A.2d 327, 342 (Del. 2003) (remanding where Superior Court judge gave substantial consideration to the jury's recommendation of life, but imposed a sentence of death); *Garden v. State*, 844 A.2d 311 (Del. 2004) (remanding where a Superior Court judge failed to give "great weight" to the jury's recommendation of life, and where the jury's recommendation of life was supportable).

⁴⁶Del. Code Ann. tit. 11, § 4209.

new legal requirement resulted in the setting aside of a high-profile defendant's death sentence. Thomas Capano, a wealthy and politically connected lawyer, was convicted by a New Castle County jury of the murder of his former mistress, whose body he dumped at sea. His widely publicized capital trial began in 1998, during the judge sentencing regime. The trial judge sentenced Capano to death, but the jury's vote on whether an aggravating circumstance existed in his case was a nonunanimous 11–1.⁴⁷ The Delaware Supreme Court set aside his death sentence on *Ring* grounds, remanding it for a new penalty hearing.⁴⁸ However, the Attorney General declined to pursue a second penalty phase hearing for Capano.⁴⁹

In one sense, all the approaches that Delaware has taken to capital sentencing might be fairly characterized as hybrid in that both judge and jury are involved in the capital trial and play significant roles. However, the sentencing regimes can be distinguished in the importance they place on each factfinder and the binding nature of the decisions by the jury and the judge. The question is whether these different roles make a difference in the outcomes of capital cases.

A. *Judge Versus Jury Sentencing: Should it Make a Difference?*

What is the evidence that judges are more likely than juries to impose death sentences? Delaware's move from jury to judge sentencing in capital cases was motivated by the perception that juries were less likely than judges to give death sentences in appropriate cases. Speaking to the local press around the time of Delaware's legislative debate, House Speaker Terry Spence asserted: "Elected officials are tired of these juries that don't impose the death penalty."⁵⁰ About other states, Marc Shapiro writes: "State rationales for excluding juries at the sentencing phase varied. Prosecutors in Colorado argued that the implementation of a three-judge system would help increase the number of death sentences handed down in the state by 'tak[ing] sentencing in death penalty cases away from jurors . . . [because they] were 'too soft' to vote for death sentences in even the most heinous cases."⁵¹ In contrast, Arizona and Florida maintained that judges were better suited to the serious

⁴⁷Michael Janofsky, Death Penalty for Killing of Mistress, N.Y. Times, Mar. 17, 1999.

⁴⁸The Delaware Supreme Court wrote that it found "a constitutional flaw in its application to [*Capano*] under the new rule announced by the United States Supreme Court in *Ring*. A factual determination of eligibility for the death penalty must be found by a jury because under *Ring*, eligibility based upon the existence of a statutory aggravating circumstance is no longer merely a sentencing factor but, rather, is an element of the greater offense of capital murder. In Delaware, the elements of any criminal offense, including the greater offense of capital murder, must be found by a unanimous jury. Because Capano's eligibility for the death penalty was decided by the sentencing judge without a unanimous jury finding of a statutory aggravating circumstance, we must vacate his death sentence." *Capano v. State*, 889 A.2d 968, 973 (Del. 2006).

⁴⁹Capano died of natural causes in prison while serving his life sentence. Larry King, Convicted Delaware Killer Capano Dies in Prison, Sept. 19, 2011, <phillynews.com>.

⁵⁰Bill Would Let Judges Decide Death Penalty, New Orleans Times Picayune, Oct. 26, 1991, at A4.

⁵¹Shapiro, *supra* note 42, at 639.

assessment of whether a defendant should receive the death penalty, that juries were more apt to be influenced by emotion, and that a judicially dominated system would limit the number of death sentences.⁵²

What does previous research suggest about jury tendencies in sentencing as compared to those of judges? Jury sentencing in the United States is mostly limited to the capital punishment context. In other countries, professional and lay judges commonly decide on both guilt and sentence collaboratively, and studies generally find substantial overlap between professional and lay judges in both verdict and sentencing.⁵³ Nancy King reports, however, that in the handful of states with felony jury sentencing, prosecutors have successfully employed the specter of punitive and unpredictable juries to encourage felony defendant plea bargains.⁵⁴ In some of these states, juries are given little or no guidance about the typical sentences for felonies. As a result, jury sentences may be more variable (and possibly lengthier) than judicial sentences.

One body of work directly compares judges with juries: the judge-jury verdict agreement studies. That research shows substantial overlap in evaluation of evidence and the verdicts reached by judges and juries in criminal trials.⁵⁵ Research by Chris Guthrie, Andrew Martin, and Jeffrey Rachlinski has discovered that U.S. judges rely on many of the same heuristics and other cognitive shortcuts as people who do not have legal training.⁵⁶ Thus judges and juries are likely to overlap substantially in their *errors* in decision making. However, to the extent judges and juries differ, the judge-jury verdict agreement studies reveal that the judge is more inclined than the jury to convict the defendant. Juries seem to demand more evidence to convict than do judges, and also appear to interpret “beyond a reasonable doubt” more generously than do judges.⁵⁷

⁵²Id.

⁵³World Jury Systems (Neil Vidmar ed., 2000) (describing use of lay and professional judge decision making about guilt and sentencing in other countries); Valerie P. Hans, Jury Systems Around the World, 4 *Ann. Rev. L. & Soc. Sci.* 275 (2008) (describing use of lay and professional judge decision making about guilt and sentencing in other countries).

⁵⁴Nancy J. King & Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 *Vand. L. Rev.* 885 (2004) (analyzing jury sentencing in three states).

⁵⁵See Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 148–51 (2007). See also the discussions in Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel’s *The American Jury*, 2 *J. Empirical Legal Stud.* 171 (2005); Valerie P. Hans, What Difference Does a Jury Make? 3 *Yonsei L.J.* 36 (2012); Valerie P. Hans, Judges, Juries, and Scientific Evidence, 16 *J. L. & Pol’y* 19 (2007); Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: The American Jury’s Insights and Contemporary Understanding*, 39 *Crim. L. Bull.* 33 (2003).

⁵⁶Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 *Cornell L. Rev.* 777 (2001); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 *Cornell L. Rev.* 1 (2007).

⁵⁷Eisenberg et al., *supra* note 55, at 194–96.

However, these generalizations must be regarded with caution when applied to capital cases. Juries in capital cases must be “death-qualified.”⁵⁸ Thus, in theory, potential jurors who would never or always give a death sentence are not eligible to serve.⁵⁹ Empirical studies reveal that compared to the general public, death-qualified juries are more conviction-prone, more supportive of prosecutors’ arguments, and more suspicious of defense attorneys and their arguments.⁶⁰ They are also more reluctant to support some types of evidence and arguments such as insanity defense claims.⁶¹ On the basis of these studies, one might expect that the process of death qualification would produce juries that are more punitive than judges, but the work on death qualification has typically not compared death-qualified juries to judges.

Studies have also discovered that many capital jurors report deciding on the punishment during the guilt phase of the capital trial.⁶² They are often skeptical of mitigation arguments, and have difficulty understanding the complex jury instructions in capital penalty trials, including the all-important distinction between aggravating and mitigating factors.⁶³ Moreover, both examination of capital sentencing decisions and mock jury studies suggest that juries in capital cases are influenced by race, including both the race of the defendant and the race of the victim.⁶⁴

Looking more directly at state practices of capital decision making in the United States, evidence suggests that a jury capital sentencing regime may be more favorable to

⁵⁸*Lockhart v. McCree*, 476 U.S. 162 (1986).

⁵⁹*Id.*; *Wainwright v. Witt*, 469 U.S. 412 (1985). We say “in theory” advisedly because the empirical evidence suggests that significant numbers of jurors who actually serve in capital cases are what are referred to in death penalty parlance as ADP (automatic death penalty) jurors. John H. Blume, Sheri L. Johnson & A. Brian Threlkeld, Probing “Life Qualification” Through Expanded Voir Dire, 29 *Hofstra L. Rev.* 1209, 1220 (2001). An analysis of Capital Jury Project data, for example, revealed that between 14 percent and 30 percent of jurors in some states would always vote for the death penalty in cases where the defendant was found guilty of capital murder. *Id.* at 1222–23. And substantially more jurors believed that the law “required” them to impose the death penalty if the crime was “heinous or depraved.” *Id.* Given that all of these jurors had been through the death qualification voir dire and determined by a judge to be agnostic in the abstract on whether the death penalty was always or never appropriate, we are less than sanguine on the effectiveness of the process.

⁶⁰Phoebe C. Ellsworth, Raymond M. Bukaty, Claudia L. Cowan & William C. Thompson, The Death-Qualified Jury and the Defense of Insanity, 8 *Law & Hum. Behav.* 8 (1984).

⁶¹*Id.*

⁶²Bowers et al., *supra* note 2.

⁶³See Theodore Eisenberg & Martin Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 *Cornell L. Rev.* 1 (1993); Vidmar & Hans, *supra* note 55, at 260–62.

⁶⁴David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 *Cornell L. Rev.* 1638 (1997); John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, Post-*McCleskey* Racial Discrimination Claims in Capital Cases, 83 *Cornell L. Rev.* 1771 (1997); Sheri Lynn Johnson, Litigation for Racial Fairness After *McCleskey v. Kemp*, 39 *Colum. Hum. Rts. L. Rev.* 178 (2007); Laura Sweeney & Craig Haney, The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies, 10 *Behav. Sci. & L.* 179 (1992).

defendants than a judge sentencing approach. The frequency of judicial life-to-death overrides in hybrid states constitutes the strongest evidence. There is striking asymmetry that works to the disadvantage of capital defendants in judge sentencing cases. Justice Sotomayor's opinion in *Woodward* reported that 95 Alabama defendants were sentenced to death by judges after juries in their cases recommended life imprisonment, in contrast to nine cases in which judges imposed life after juries recommended a death sentence.⁶⁵ In Florida, where the jury also makes an advisory recommendation to the judge, who has the final say, Michael Radelet reports that judges have overridden jury recommendations for life to impose death 166 times.⁶⁶ Radelet points out, however, that these data may not reflect current differences between Florida judges and juries, as the last life-to-death override in Florida occurred in 1999.⁶⁷

In addition to the fact of asymmetrical judicial overrides of jury life recommendations, Capital Jury Project researchers have observed another problem with hybrid sentencing systems in which judge and jury share the decision making.⁶⁸ Their posttrial interviews with capital jurors revealed that when their decision was only advisory, jurors felt less responsible for the sentencing decision, and they reported deliberating more quickly and less thoroughly, compared to jurors whose decision was binding.⁶⁹

Thus, previous research offers a mixed picture. Some work raises concerns about the fairness and competence of death-qualified jurors. The judge-jury agreement studies suggest there is likely to be substantial overlap in judge and jury decisions, with judges tending to be harsher than juries when they disagree. Of course, even if jury sentencing may be more favorable to defendants in certain cases, there are other cases, perhaps those with highly unpopular defendants, or those involving mental illness or intellectual disability defenses, in which judicial determinations might be more favorable to defendants.⁷⁰

⁶⁵*Woodward v. Alabama*, 571 U.S. 405 n.1 (2013). Sotomayor's opinion updated with recent cases an original report by the Equal Justice Institute, which stated: "Since the death penalty was reinstated in 1976, Alabama judges have overridden 84 cases from life to death. In the same period, judges overruled death verdicts to life sentences in only a handful of cases. Of the 198 prisoners currently on Alabama's death row, 40 (20%) were condemned to death by a judge who threw out the jury's decision that death was not the appropriate punishment." Equal Justice Institute, Judicial Override Fact Sheet, <www.eji.org/. . . /03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf>. See also <<http://www.eji.org/eji/deathpenalty/override>> for a general discussion of judicial overrides in Alabama.

⁶⁶*Woodward v. Alabama*, 571 U.S. 405, 408 n.6 (2013); Radelet, *Overriding Jury Sentencing Recommendations*, *supra* note 2.

⁶⁷*Id.*

⁶⁸Bowers et al., *supra* note 2.

⁶⁹*Id.* at 954–60 (jurors in hybrid states felt less responsible than jurors in states in which their decision was binding); 973–77 (finding that jurors in hybrid states deliberated more rapidly, compared to states in which they made binding decisions).

⁷⁰John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, ___ Wm. & Mary Bill Rts. J. ___ (forthcoming 2014) (finding that jury determination of intellectual disability was less favorable than that of judges by several magnitudes); Leona D. Jochnowitz, *How Capital Jurors Respond to Mitigating Evidence of*

III. METHODOLOGY

A. The Delaware Capital Trials Data Set

The Delaware Capital Trials data set includes information from capital cases in Delaware during the modern era of capital punishment, beginning in 1977.⁷¹ Most cases in the data set concluded by 2007, although there are a handful that extend beyond that date. Information was compiled from legal and other documents in the homicide case files in the offices of the Delaware Prothonotary and in the Delaware Archives.

We wish to highlight three features of the data set. First, it includes only those cases in which a capital trial proceeded to a sentencing hearing. Prosecutorial decisions to charge capitally are not the central object of study, although those decisions are reflected in the pool of capital trials that the decisionmaker considers. Second, because of Delaware's unique history, the data set includes sentencing decisions by both juries and judges. Finally, we are able to consider case outcomes across Attorneys General regimes and across Delaware's three counties, controlling for other differences in the cases.

The database contains information from 146 capital cases that reached the sentencing phase in Delaware between 1977 and 2007. Cases were identified as meriting inclusion using the filing system of the Prothonotary's offices and by relying on other summaries of capital cases, including listings by the Delaware Supreme Court and the Office of the Public Defender. Nonetheless, it is conceivable that some Delaware capital cases that resulted in life imprisonment are not included in the database.

Trained coders created the database from information included in Superior Court files in the Delaware Archives and Prothonotary's offices in all three Delaware counties. A detailed questionnaire was used to code over 700 elements of the case, including information about the crime, defendants, and victims.⁷² Information about the cases was supplemented by other sources, including Delaware trial and appellate court opinions, Third Circuit and U.S. Supreme Court opinions, news reports, law review articles, and Delaware judges and attorneys. The case files vary in their completeness. The case files sometimes lacked detailed information about elements of the underlying crimes, what was presented at trial, and what factors were considered in the penalty phases of the trials.⁷³ The

Defendant's Mental Illness, Retardation and Situational Impairments: An Analysis of the Legal and Social Science Literature, 47 *Crim. L. Bull.* 839 (2011) (review of literature regarding jurors' responses to mental illness, intellectual disabilities, and situational impairments as mitigating factors); Amelia C. Hritz, *Intellectual Disabilities: Judge, Jury and Executioner?* unpublished manuscript, Cornell Law School (2014) (review of literature examining judge and jury decision making regarding claims of intellectual disability in capital cases).

⁷¹Johnson et al., *supra* note 5.

⁷²The questionnaire was adapted from one created by David Baldus and his collaborators; see Baldus et al., *supra* note 4, at 512–48.

⁷³Despite dogged efforts to collect complete information on these cases, reliance on multiple sources, and excellent cooperation from the Delaware Superior Court and the Prothonotary's offices, some files have significant missing information. The variables in the regression equations, however, are based on largely complete information.

variables included in the regression analyses for the 146 cases, however, are largely complete, with the exception of potentially mitigating factors. Information about the specific mitigation that was presented, especially in penalty phase hearings that ended with a life verdict, was sometimes lacking.

The database includes basic information about the case, background information about the defendant and the victim, presence of aggravating or mitigating circumstances, and demographic information about the victim and the defendant. In addition to analyzing these factors, several scales tapped potential defendant, victim, and case characteristics that might influence punishment decisions. In cases with multiple victims, the race, gender, and other characteristics of the primary victim were employed in regression analyses.

The statutory aggravating factors scale was designed to assess how many statutory aggravators the crime contained. The scale was made by adding together the crime and defendant characteristics that were identified as potentially aggravating factors in Delaware's capital punishment statute.⁷⁴ These factors include whether the murder was committed against a person held as a shield or hostage, whether the crime involved the death of multiple victims, whether the defendant was previously convicted of another murder/manslaughter/felony involving violence, whether the murder was committed during the defendant's engagement in another crime, and other items. For each aggravating factor that was suggested or explicitly stated in the case file, the case received a point on the statutory aggravators scale.⁷⁵ It is worth noting that in contrast to the practice of many other states, Delaware judges and juries are not limited to the list of statutory aggravators in their overall consideration of the deathworthiness of the case. Attorneys may argue and factfinders may take both statutory and nonstatutory aggravating factors into account in making the sentencing decision.

The heinousness scale was modeled after a scale used by Phillips and colleagues.⁷⁶ Although the initial scale created by Phillips included the number of aggravating factors in a case minus the number of mitigating factors in a case, the heinousness scale developed for this study only looked at potential aggravators and excluded factors already included in the statutory aggravating factors scale. The scale was designed to provide additional information about aggravating features of the case, beyond the statutory aggravating factors scale that was designed to look at the legislatively identified aggravating factors in a case. The heinousness scale combined a number of items, including whether the defendant continued a painful attack after it was apparent the victim was dying, whether the victim was bound or gagged, and whether the victim pleaded for his or her life. For each relevant

⁷⁴See 59 Del. Laws 943 (1974) (codified as amended at Del. Code Ann. tit. 11, §§ 636, 4209 (2011)).

⁷⁵Each relevant item that is present in a case (and that was identified as a statutory aggravator at the time of the defendant's trial) adds one point to the case's scale score. We recognize that some items may have been more influential to the sentencer than others. Nonetheless, our scales are designed to compare the total aggregate number of items across cases. Scores on the statutory aggravating factors scale ranged from 0 to 8 ($M = 2.59$, $SD = 1.29$).

⁷⁶Scott Phillips, Laura P. Haas & James E. Coverdill, *Disentangling Victim Gender and Capital Punishment: The Role of Media*, 7 *Feminist Criminology* 136 (2012).

factor that was suggested or expressly stated in the case file, the case received a point on the heinousness scale.⁷⁷

The mitigating factors scale was designed to assess how many mitigating factors the crime contained. The scale was made from an aggregate of a number of crime and defendant characteristics identified in the Baldus study, and by other researchers, as potentially mitigating factors.⁷⁸ The scale included items such as an absence of prior criminal activity, whether the victim consented to the defendant's conduct, and whether the defendant expressed remorse for the crime. For each mitigating factor that was suggested or explicitly stated in the case file, the case received a point on the mitigating factors scale.⁷⁹

B. Supplemental Homicide Reports

To provide a measure of death penalty seeking and to assess whether and how it varied by sentencing era, one set of analyses employed the FBI's Supplementary Homicide Reports (SHR) for the State of Delaware.⁸⁰ The FBI's SHR contains information on the vast majority of murders in the United States.⁸¹ For each murder, the data include the year of the offense, the race, sex, and age of both the victim and the defendant arrested for the offense, the county in which the offense occurred, and information about the nature of the murder, including whether it was committed in the course of certain crimes such as robbery, rape, burglary, or larceny.⁸² Two reports indicate that there was some underreporting of Delaware homicides in the SHR data during the three decades of our study period.⁸³ However,

⁷⁷Scores on the heinousness scale ranged from 0 to 12 ($M = 3.06$, $SD = 2.24$).

⁷⁸59 Del. Laws 943 (1974) (codified as amended at Del. Code Ann. tit. 11, §§ 636, 4209 (2011)) does not specifically list potentially mitigating factors; instead, the decisionmaker may take any mitigating factors into account.

⁷⁹Scores on the mitigating factors scale ranged from 0 to 10 ($M = 3.35$, $SD = 2.30$).

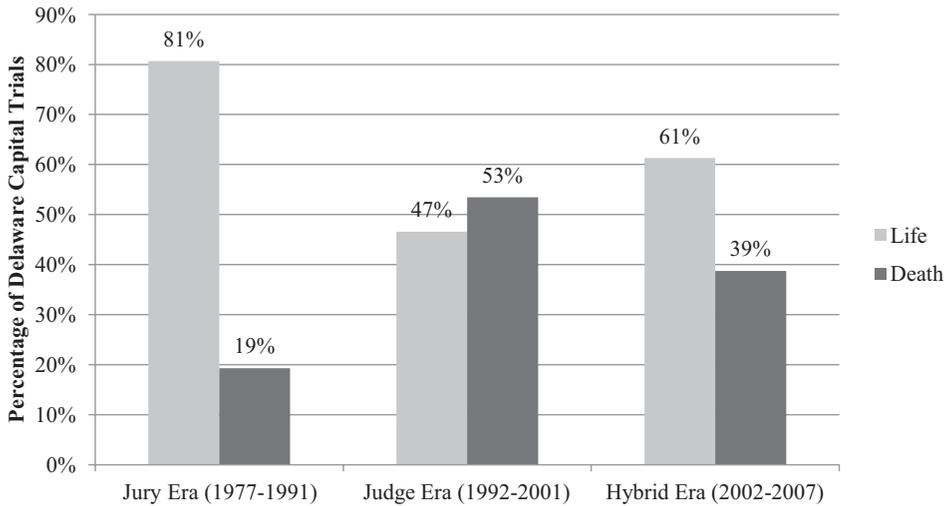
⁸⁰James A. Fox & Marc L. Swatt, Uniform Crime Reports [United States]: Supplementary Homicide Reports, with Multiple Imputation, Cumulative Files 1976–2007 (2000), available at <<http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/24801>>.

⁸¹Id.

⁸²Id. For a discussion of the SHR data quality, see generally James Alan Fox & Marc L. Swatt, Multiple Imputation of the Supplementary Homicide Reports, 1976–2005, 25 *J. Quantitative Criminology* 51 (2009).

⁸³We located two relevant assessments of the completeness of Uniform Crime Reports (UCR) that presented separate information about Delaware. First, a government report identified some missing UCR data from Delaware in 1995, but concluded: "Aside from occasional lapses, Delaware's UCR reporting has been consistently strong." Michael D. Maltz, *Bridging Gaps in Police Crime Data 7* (Discussion Paper, BJS Fellows Program, National Institute of Justice, 1999). An unpublished Ph.D. thesis also identified some missing UCR data in Delaware during the early 1990s. Joseph Robert Targonski, *A Comparison of Imputation Methodologies in the Offenses-Known Uniform Crime Reports 105* (Ph.D. thesis, University of Illinois at Chicago, 2011). We include this information in the present article so that readers can take the information into account as they consider our results. We used nonimputed data only in the two analyses that employ SHR homicide rates. In analyses not reported here, however, we conducted the same analyses with imputed data, and there were no meaningful differences.

Figure 1: Percentage of life and death sentences during each era ($n = 146$).



NOTE: The figure displays the percentage of Delaware capital trials that resulted in death sentences within each sentencing era. These include 57 jury era cases, 58 cases in the first judge era, and 31 cases in the hybrid judge-jury era.

crime analysts have concluded that despite some imperfections, the murder data are among the most reliable crime data.⁸⁴ We treated a case that did not include the offender's sex as unsolved and removed the case from the death sentence rate calculations.⁸⁵

IV. RESULTS

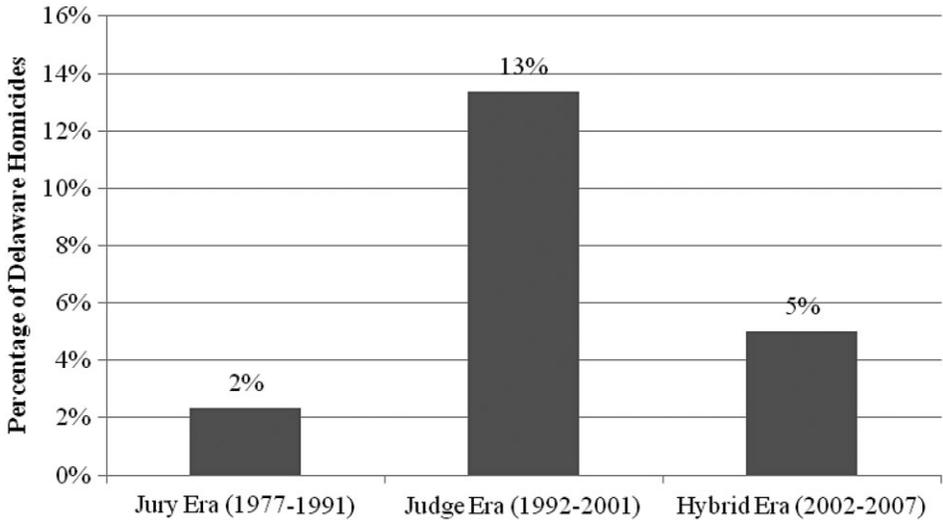
Of the 146 cases that were death-penalty eligible and reached the sentencing phase of a capital trial, 54 resulted in a death sentence. As Figure 1 shows, whether a case resulted in a death sentence was strongly influenced by whether the punishment was decided during the judge or jury eras. Judges were significantly more likely to give a defendant the death sentence than were juries.⁸⁶ Figure 1 shows that of the 57 cases decided during the jury era,

⁸⁴See 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 82, at 60.

⁸⁵Missing data for unsolved murders are not a concern for this study because unsolved murders do not produce candidates for death row.

⁸⁶Judges were more likely than juries to sentence a defendant to death, $X^2(1, N = 144) = 13.28, p < 0.001$.

Figure 2: Death-sentencing rates in Delaware homicides by sentencing era.



NOTE: The figure displays the percentage of death sentences per homicide within each sentencing era in Delaware.

only eleven (19 percent) received death sentences (including one death sentence by a judge). Decisions made during the judge era were nearly evenly split, with 31 (53 percent) cases receiving death sentences and 27 (47 percent) receiving life sentences. The post-*Ring* hybrid sentencing scheme fell in between, with 39 percent of cases resulting in death sentences.

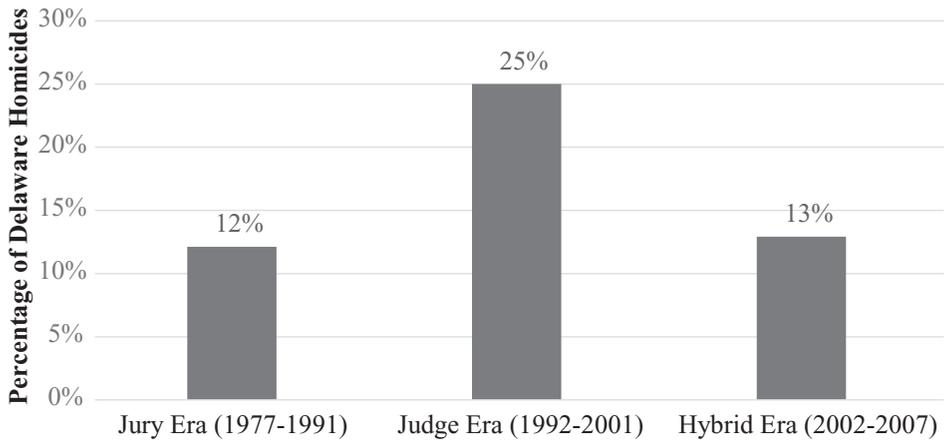
A. External Factors Explaining Judge and Jury Differences

Because the sentencing eras in Delaware occurred during different time periods, and other factors relevant to the criminal justice system such as crime rates or prosecutorial decisions may also have varied across these time periods, it is prudent to examine, to the extent we can determine, whether relevant external factors varied and might be driving the observed judge-jury differences in sentencing.

B. Crime Rates

One possible explanation of the judge-jury differences in death sentencing is that the crime rates differed in these eras. Judges could sentence more people to death in response to greater numbers of murders and increased public concern about crime in a particular time period. To investigate this possibility, SHR data were used to calculate the proportion of death sentences per reported homicides in each of the eras, which controls for the overall number of homicides in any one era. The results, shown in Figure 2, confirm that judges give proportionately more death sentences than juries. The highest proportion is for homicides occurring during the first judge era (between 1992 and 2001) in which 13

Figure 3: Death-seeking rates in Delaware homicides by sentencing era.



NOTE: The figure displays the percentage of capital cases per homicide within each sentencing era in Delaware.

percent of the homicides resulted in a death sentence at trial. The lowest proportion is for homicides occurring during the jury era (between 1977 and 1991), in which 2 percent of the homicides led to a death sentence at trial. The proportion for homicides occurring between 2002 and 2007 fell in between the other two eras at 5 percent.

C. Case Selection

Another possible explanation for judge-jury differences in sentencing is that prosecutors were more selective in the cases they brought before judges, and thus judges saw more aggravated cases. To determine if the cases brought before judges were more selective, homicide data from the SHR were used to calculate death-seeking rates. We used the existence of a case in our database as evidence that the death penalty was sought.

This likely understates prosecutors' pursuit of the death penalty because cases that were charged capitally but that did not result in a capital murder conviction and a subsequent penalty trial were not included in our database. There are many reasons a case may not have reached the penalty phase and thus was not included in our study. The homicide case may have concluded in a plea bargain. The defendant may have been acquitted, found guilty of a lesser-included offense for which the death penalty was not a legally permissible punishment, or been acquitted of a related offense that was the death-eligible statutory aggravating circumstance.

For both the Delaware SHR homicide data and the Delaware Capital Trials data, we calculated the numbers for each sentencing era separately to assess whether prosecutors sought death differentially across the eras. Results indicated that they did. Figure 3 displays, for time periods corresponding to each sentencing era, the percentage of homicides that resulted in a capital trial with a penalty phase hearing.

Figure 3 reveals that the death penalty was sought the most during the first judge era and the least during the jury era. During the first judge era, approximately a quarter of the Delaware homicides resulted in a capital trial that reached the penalty phase. In contrast, 13 percent of cases during the hybrid era and just 12 percent of the cases during the jury era led to a capital trial that reached the penalty phase. Thus, considering the overall pattern of homicides in Delaware, we see that the death penalty was sought less often when juries decided the sentences. This suggests that the cases brought before judges were not more selective and in fact were less selective than cases brought before juries.

Attorneys General differed in the number of capital trials they pursued during their terms of office, as shown in Appendix 1. The greatest number of capital trials and death sentences occurred during the terms of Democrat Charles Oberly and Republican Jane Brady. This is not surprising given their long tenures (12 and 10 years, respectively). Both Oberly's and Brady's periods of service bridged the eras. About half the capital trials Oberly and Brady pursued during the first judge era resulted in death sentences, with lower proportions of death sentences in the jury era for Oberly and in the hybrid era for Brady.

D. Case Differences Impacting Death Sentences: Logistic Regression Analyses

The death-seeking rate differences described previously indicate that the cases brought before judges were not more selective than the cases brought before juries. Another possible explanation for the judge and jury differences is that there were different types of crime during the different eras. For example, if murders associated with drug trafficking were more common during the judge era, there might have been a greater proportion of murders that were particularly heinous and included additional felonies. To test this possibility, we considered whether there were significant differences in the cases during the different sentencing eras that may be related to sentencing outcomes at trial. Therefore, we estimated multiple logistic regression models predicting the likelihood of a defendant receiving a death sentence.

Descriptive statistics separated by sentencing era for all variables used in the analyses are reported in Table 1, including statistics for both the total sample and the cases resulting in a death sentence.

Of the 146 cases in the database, 43 different judges presided over the trials.⁸⁷ While many of the judges only presided over one case, several presided over multiple cases, with a range from 1 to 13. Generalized logistic regression models were used with robust standard errors clustered by the sentencing judge to correct the variance estimates due to the

⁸⁷Information about the identity of the sentencing judge in 10 of the 146 trials was missing. For the purposes of the regression analyses, each of these cases was treated as having a unique judge, which is included in the total number of 43 judges.

Table 1: Descriptive Statistics of Variables ($N=146$)

<i>Variable</i>	<i>Jury Era</i> n (%)	<i>Judge Era</i> n (%)	<i>Hybrid Era</i> n (%)
Sentence			
Life	46 (80.7)	27 (46.6)	19 (61.3)
Death	11 (19.3)	31 (53.4)	12 (38.7)
Victim Gender			
Male	33 (57.9)	39 (67.2)	23 (74.2)
Female	24 (42.1)	19 (32.8)	8 (25.8)
Victim Race			
White	45 (78.9)	33 (56.9)	14 (45.2)
Nonwhite	12 (21.1)	25 (43.1)	17 (54.8)
Defendant Race			
White	27 (47.4)	22 (37.9)	5 (16.1)
Nonwhite	30 (52.6)	36 (62.1)	26 (83.9)
Victim-Defendant Relationship			
Paramour	9 (15.8)	10 (17.2)	5 (16.1)
Family, friend, or neighbor	7 (12.3)	12 (20.7)	4 (12.9)
Rival or acquaintance	20 (35.1)	10 (17.2)	12 (38.7)
Stranger	21 (36.8)	26 (44.8)	10 (32.3)
<hr/>			
<i>Scale</i>	M (SD)	M (SD)	M (SD)
Statutory aggravating factors	1.65 (1.27)	1.91 (1.06)	1.45 (1.06)
	2.18 (1.17)	2.13 (1.02)	1.92 (1.44)
Statutory mitigating factors	1.42 (1.78)	5.79 (2.85)	5.87 (3.77)
	1.73 (2.14)	6.23 (2.32)	5.83 (4.51)
Heinousness	2.61 (1.81)	2.50 (1.88)	2.61 (1.94)
	2.91 (2.38)	3.13 (2.00)	3.08 (2.31)

NOTE: Numbers in bold are cases that resulted in a death sentence.

presence of conditional dependence from the multiple cases with the same judge in our data set. The modest number of cases in the database meant that the number of predictor variables that we were able to consider simultaneously was limited. Table 2 displays the estimates of the raw scores of the predictor variables on sentence and standard errors.

The first model in Table 2 (Model 1, All Cases) included all of the 146 cases in our data set. Instead of comparing across the three eras, this analysis looked at who made the sentencing decision (judge or jury). We also employed a small number of theoretically important predictor variables, including the sentencer (judge vs. jury), aggravating and mitigating factors, heinousness, whether the murder was committed by a stranger or nonstranger, and the county of the murder. We chose these variables based on theory and prior research about the factors that influence capital sentencing, and variables for which there was minimal missing data.

We examined the goodness of fit of the models using the c -statistic. The c -statistic is routinely used to compare the goodness of fit of logistic regression models; values for this measure range from 0.5 to 1.0. A value of 0.5 indicates that the model is no better than chance at making a prediction of classification to a group and a value of 1.0 indicates that

Table 2: Logistic Regression Models of Death Sentences at Capital Trials

	1			2			3		
	All Cases	Judge Cases	Jury Cases	All Cases	Judge Cases	Jury Cases	All Cases	Judge Cases	Jury Cases
Judge sentencer (vs jury sentencer)	3.09** (1.00)	—	—	3.41*** (0.99)	—	—	3.94*** (1.22)	—	—
Aggravating factors	0.57** (0.19)	0.47* (0.23)	0.78* (0.37)	—	—	—	0.67*** (0.16)	0.51* (0.17)	0.90* (0.36)
Mitigating factors	0.00 (0.07)	0.00 (0.08)	-0.15 (0.22)	—	—	—	0.00 (0.07)	0.00 (0.08)	-0.29 (0.20)
Heinousness	0.20+ (0.10)	0.30* (0.13)	-0.43 (0.41)	—	—	—	0.17 (0.15)	0.29+ (0.16)	-0.87* (0.35)
Stranger (vs. nonstranger)	0.98* (0.41)	0.78+ (0.48)	1.50 (0.99)	—	—	—	0.92* (0.44)	0.53 (0.54)	1.66* (0.66)
Kent County (vs. other counties)	3.19*** (0.93)	0.29 (0.54)	4.19*** (1.26)	3.13*** (0.95)	-0.12 (0.62)	4.98* (2.40)	3.68*** (1.08)	-0.10 (0.59)	6.06* (2.74)
County * Sentencer	-2.83* (1.13)	—	—	-3.22*** (1.21)	—	—	-3.76*** (1.30)	—	—
White defendant (vs. nonwhite defendant)	—	—	—	-0.22 (0.89)	0.65 (0.81)	-3.46 (2.50)	-0.51 (0.92)	0.16 (0.83)	-2.57+ (3.20)
White victim (vs. nonwhite victim)	—	—	—	0.92 (0.67)	0.86 (0.67)	2.29 (1.77)	0.58 (0.74)	0.56 (0.77)	1.30 (1.83)
White defendant * White victim	—	—	—	-1.81 (0.76)	-1.02 (1.23)	2.14 (1.48)	0.45 (0.86)	-0.47 (1.11)	3.09 (2.60)
Female victim (vs. male victim)	—	—	—	1.11* (0.51)	0.95+ (0.50)	2.02* (1.51)	1.10* (0.60)	0.98 (1.00)	2.01* (1.00)
Intercept	-5.11*** (1.04)	-1.99* (0.74)	-3.07+ (1.83)	-4.42*** (0.78)	-0.90* (0.39)	-5.78* (2.98)	-6.22*** (1.31)	-2.43*** (0.66)	-6.21* (3.08)
c-statistic	0.82	0.73	0.90	0.79	0.67	0.90	0.85	0.77	0.93

NOTES: *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$; + $p < 0.1$. Logistic regression models with robust clustered standard errors took into account the existence of multiple cases with the same sentencing judge. Standard errors are in parentheses. There were 43 distinct judges across all cases ($N = 146$), 26 in judge decided cases ($n = 90$), and 25 in jury decided cases ($n = 56$). Positive associations reflect increase in the likelihood of a death sentence. The County * Sentencer interaction contrasted judge and jury sentencing in Kent County versus the other two counties combined. The White defendant * White victim interaction further contrasts those cases against other race of victim-race of defendant combinations.

the model perfectly identifies those within a group and those not. Model fits are typically considered strong when the *c*-statistic exceeds 0.8, as is the case in five of the nine models.⁸⁸

Considering all the predictor variables in Table 2's Model 1, All Cases, whether judges or juries were the sentencers was one of the most powerful influences on the likelihood of a death sentence. Judges were significantly more likely to sentence defendants to death than were juries, even controlling for the amount of aggravation and mitigation in the case. Indeed, the impact of judge sentencing exceeded the impact of these legally relevant variables. Homicides with a greater number of statutory aggravating factors, homicides between strangers, and homicides that took place in Kent County (vs. New Castle and Sussex counties) were also significantly more likely to result in a death sentence. Homicides that were more heinous were marginally more likely to result in a death penalty as well.

In the next two models in Table 2 (Model 1, Judge Cases, and Model 1, Jury Cases), we examined separately the impact of our predictors for sentences decided either by judges or by juries. There are slight differences between the number of cases in the jury era and the number of cases decided by a jury because in one case during the jury era, the sentencing decision was made by a judge. Thus, these analyses include 90 judge cases and 56 jury cases. The modest number of cases in the separate Model 1, Judge Cases and Model 1, Jury Cases makes it more difficult to detect statistically significant patterns. Nonetheless, the side-by-side comparison offers an opportunity to see whether the same or different factors predict the sentences reached by these different decisionmakers.

Across Table 2, examining the patterns in judge and jury decided cases, one can observe a fair amount of overlap in the way in which many of the factors appear to influence decision making by judges and juries. Even when the relationships between predictor variables and death sentences are not significant, they often move in the same direction for judge and jury cases. For instance, comparing Model 1's judge and jury cases, we see that aggravating factors similarly increased the likelihood of a death sentence for both judges and juries.

However, there were some noteworthy differences. Heinousness of the crime led to more death sentences in judge cases but not in jury cases. There were also striking differences between judge and jury by the county of the homicide, as reflected in the statistically significant interaction between the county of the homicide and the sentencer. For jury decided cases, there were strong county differences, such that murders in Kent County were much more likely to result in death sentences than were those that occurred in the other two Delaware counties, even controlling for the legally relevant factors. When judges made the binding decision, there was no county effect.

The Model 2 columns of Table 2 retained the sentencer and county, but replaced the other predictor variables with the race of the defendant, race of the victim, the interaction between defendant race and victim race, and the gender of the victim. These analyses allowed us to look separately at the effects of the characteristics of the victim and the defendant on the likelihood of death sentences in Delaware. The Model 2, All Cases regression analysis showed that both sentencer and county remained statistically significant.

⁸⁸David W. Hosmer & Stanley Lemeshow, *Applied Logistic Regression* (2d ed. 2000).

In addition, defendants who killed female victims were significantly more likely to receive the death penalty. In Model 2, Judge Cases and Model 2, Jury Cases one can observe both similarity and divergence. Female victim cases lead to more death sentences, although it is marginal in the judge cases and statistically significant in the jury cases.

The Model 3 regressions in Table 2 combined all the variables in one analysis. A number of the factors found to predict death sentences in Models 1 and 2 remained statistically significant predictors. For the Model 3, All Cases regression, whether a judge or jury sentences, the number of statutory aggravating factors, stranger cases, female victim cases, and the county in which the murder occurred were all statistically significant predictors of death sentences. For the Model 3, Judge Cases, statutory aggravating factors significantly increased and heinousness marginally increased the likelihood of a death sentence. Within cases decided by juries (Model 3, Jury Cases), death sentences were significantly more likely with a greater number of statutory aggravating factors, when the homicide occurred between strangers, in female victim cases, and when the homicide occurred in Kent County.

Two other factors in Model 3, Jury Cases deserve mention. One is heinousness, the characteristics of a case, such as a lengthy attack or gagging a victim, that fall outside the list of statutory aggravators but should increase the likelihood of a death sentence. The negative relationship indicates that even juries in the most heinous cases were inclined to give life sentences. By way of illustration, the case of serial killer Steven Pennell was assessed as the most heinous in the database, but the jury could not agree unanimously on a death sentence. In a subsequent trial, Pennell waived his right to a jury and a judge gave him a death sentence.

Finally, in Table 2's Model 3, Jury Cases, there was a negative relationship between the defendant's race and the likelihood of juries deciding on death, although it did not reach statistical significance. White defendants were marginally more likely to receive life sentences than nonwhite defendants. Looking at the jury cases only, 22 of 26 (85 percent) white defendants received life sentences, compared to 24 of 30 (80 percent) of nonwhite defendants. The small number of death sentences in the jury era, combined with the modest difference between nonwhite and white defendants, suggest we should not overinterpret this finding.

Finally, Model 4 (shown in Table 3) employed all of the cases and changed the dichotomous judge or jury sentencer to a set of comparisons between (1) the jury versus the first judge era and (2) the jury versus the post-*Ring* hybrid era. This allowed us to explore whether the legal change following *Ring* modified the impact of the judge sentencing era (as compared with the jury sentencing era), and whether the effects of other predictor variables remained the same. The Model 4 results show that cases during the jury era were significantly less likely to result in a death sentence than cases in both of the subsequent eras in which the sentencing was done by the judge. The influence of the other predictor variables in Models 3 and 4 were generally similar.

E. Additional Analyses

We also undertook several additional sets of analyses to shed light on the operation of Delaware's death penalty sentencing system.

Table 3: Logistic Regression Model Predicting Death Sentence at Capital Trial by Sentencing Era

	β	SE
Compared to jury era		
Judge era	3.57***	0.98
Hybrid era	2.28**	1.19
Aggravating factors	0.63***	0.16
Mitigating factors	0.00	0.08
Heinousness	0.24*	0.12
Stranger (vs. nonstranger)	1.03*	0.47
Kent County (vs. other counties)	3.40***	0.95
Compared to jury era		
Kent * Judge	-3.64**	1.24
Kent * Hybrid	-2.95+	1.63
White defendant	-0.62	0.84
White victim	0.44	0.66
White defendant * White victim	0.77	0.81
Female victim	0.95+	0.58
Intercept	-5.90***	1.24

NOTES: *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$; + $p < 0.1$; c statistic = 0.85. Logistic regression models with robust clustered standard errors took into account the existence of multiple cases with the same sentencing judge. Standard errors are in parentheses. There were 43 distinct judges across all cases ($N = 146$). Positive associations reflect increase in the likelihood of a death sentence. The Kent * {Judge, Hybrid} interaction terms contrast jury sentencing with judge and hybrid sentencing in Kent County versus the other two counties combined. The White defendant * White victim interaction further contrasts those cases against other race of defendant-race of victim combinations.

F. Unanimity and Judge-Jury Agreement

As part of the current hybrid sentencing scheme in Delaware, the jury votes on whether the aggravating factors outweigh the mitigating factors in each capital case. This vote does not need to be unanimous. The judge must then consider the jury recommendation and make the ultimate sentencing decision. We used data from the jury votes in 82 of the judge sentencing cases in our database. In five cases, the defendant waived the right to a jury trial or to jury participation in sentencing and in the other cases the defendant became ineligible for a death sentence following the jury's votes. These data allow us to examine the relationship between jury votes and judge sentencing decisions within the same cases in Delaware.

Table 4 shows that, in this subset of cases, the jury was unanimous for death in only 10 (12 percent) of the penalty trials, whereas judges gave 41 death sentences overall. It seems obvious that the requirement of jury unanimity during the jury era is a key explanatory factor in the difference between the judge and jury eras.

As illustrated in Table 4, Delaware judges followed unanimous juries in every case. Judges gave death sentences in all 10 cases in which the jury unanimously found that aggravating circumstances outweighed mitigating circumstances. Judges also followed unanimous votes in the two cases in which all jurors reached the opposite conclusion.

Table 4: Comparison of Jury Votes and Judge Sentences During Judge Eras ($n = 82$)

Jury Vote	Death–Life	0–12	1–11	2–10	3–9	4–8	5–7	6–6	7–5	8–4	9–3	10–2	11–1	12–0
Judge’s decision	Death	0	0	0	1*	0	0	0	3	5	6	8	8	10
	Life	2	5	1	3	5	5	3	7	3	4	2	1	0

*The sole judicial override of a majority vote favoring life occurred in the *Sadiki Garden* case. The judge’s death sentence was twice set aside by the Delaware Supreme Court.

Judges gave death sentences only when it was recommended by a majority of the jury in every case except that of *Sadiki Garden*, the death penalty decision that was subsequently overturned by the Delaware Supreme Court.⁸⁹ Thus, with a single exception, Delaware judges did not override jury majorities when they recommended life sentences.

Judges were strongly inclined to follow the jury in 10–2 and 11–1 death recommendations, deviating from the jury’s majority recommendation in only three of the 19 cases. As might be expected, the greatest deviation came in cases in which smaller majorities favored death and the case created more substantial opposition on the jury: in 9–3, 8–4, and 7–5 cases in which the jury’s majority recommended death, judges followed the jury’s recommendations just half the time.

Table 4 shows that in death cases, judges appear less likely to give death as the jury’s votes that aggravating factors outweigh mitigating factors decline from 12 to 7. Below that bottom threshold, with the exception of the single judge override case, there are no judicial decisions for death. The pattern is confirmed by a trend analysis. Applying a nonparametric test for trends across ordered groups to these data, we find a significant trend for the judge’s death decision ($p = 0.002$).⁹⁰ In other words, the trend analysis supports the strong impression from Table 4 that judicial decisions to give a death sentence are linked to jury votes.

G. *The Role of Judicial Experience and Other Judicial Characteristics*

Judges frequently mention that it is likely to be difficult for the members of a jury when they encounter for the first time the tremendous responsibility to decide whether a defendant should live or die. In 1997, Delaware Judge Gebelein addressed the issue of Delaware juries’ reluctance to unanimously decide on death: “The jurors, just as the judge, live through a murder trial for several weeks or perhaps even months. They get to know the defendant as a human being in the courtroom. . . . It is not then a natural human occurrence to decide in a cold, logical, deductive process to kill an individual whom you have come to know as a human being.”⁹¹

⁸⁹*Garden v. State*, 815 A.2d 327, 342 (Del. 2003); *Garden v. State*, 844 A.2d 311 (Del. 2004).

⁹⁰Jack Cuzick, A Wilcoxon-Type Test for Trend, 4 *Stat. in Med.* 87 (1985).

⁹¹Richard Gebelein, A Judge’s View of the Death Penalty, in *Society’s Final Solution* 43, 44–45 (Laura E. Randa ed., 1997).

Table 5: Descriptive Measures of Judicial Characteristics

<i>Variable</i>	<i>All Cases</i> n (%)	<i>Life</i> n (%)	<i>Death</i> n (%)
Woman judge	12 (8.70)	9 (10.23)	3 (6.00)
Prosecutorial experience	60 (48.00)	35 (43.75)	25 (56.82)
Judge's first case	16 (18.39)	9 (20.00)	7 (16.67)
<i>Other Judicial Experience</i>	M (SD)	M (SD)	M (SD)
Case number	5.06 (3.40)	4.96 (3.31)	5.12 (3.55)
Years appointed	10.53 (6.07)	10.37 (5.80)	10.62 (6.47)
Term ends	6.16 (2.98)	5.63 (3.33)	6.65 (2.46)

NOTES: Judge's first case is a categorical variable indicating whether it is the first capital case presided over by a judge. Case number refers to the number of capital trials presided over by a judge (range: 1–13). Years appointed refers to the number of years since the judge was appointed (range: 1.55–27.27). Term ends refers to the number of years until the end of the judge's current term (range: 0.04–11.31). Cases with missing judge information were excluded from the analysis.

It is possible that experience with homicide cases may make it less difficult for judges to give death sentences. To explore the impact of judicial experience on the likelihood of giving a death sentence, we compared the sentences in judges' first capital sentencing case versus their later cases. We also examined the number of capital trials judges had presided over, including the current case, and the average years of their judicial service, for judges who made life or death decisions. Finally, we contrasted the number of years left in the judge's current term for judges who made life or death decisions. Table 5 shows that, overall, there were few differences in sentence outcomes on any of these variables measuring judicial experience.

During the study's time period, most of the superior court judges were white men. Women judges decided just 9 percent of the capital cases over the time period. Close to half the judges had previous experience as a prosecutor. Although there were insufficient numbers of nonwhite judges in the database to do a comparison by the judge's race, we compared the proportion of life and death decisions made by women versus men judges, and by judges with or without prosecutorial experience (see Table 5). Death sentences were proportionately more common in cases with judges who had prosecutorial backgrounds. Few other differences were apparent.

We entered these judicial characteristics into the Model 3, Judge Cases regression equation to assess the extent to which these judicial characteristics were linked to case outcomes, controlling for other predictor variables.⁹² In the expanded analysis, both the gender of the judge and the fact that it was the judge's first death penalty case in the database significantly decreased the likelihood of a death sentence. Other judicial

⁹²Judges' career histories and terms of office were found using Superior Court History: Our Judicial Officers, Delaware State Courts Website (2014), <<http://courts.delaware.gov/superior/AboutUs/history3.stm>>.

characteristics were not significant predictors of the sentence.⁹³ Aggravating factors remained a significant predictor. Heinousness, which was only a marginal predictor in the original equation, became a statistically significant predictor of judges' sentences, and mitigating factors became a marginally significant predictor.⁹⁴ Adding the judicial characteristics to the Model 3, Judge Cases analysis boosted the *c*-statistic, a measure of the goodness of fit of the model, from 0.77 to 0.87. The results linking certain judicial characteristics to sentencing are intriguing, but we cannot rule out the possibility that they are caused by other factors such as changes over time.

V. DISCUSSION

In 1991, the Delaware legislature moved the central responsibility for capital sentencing away from juries to judges. Legislators were motivated to do so because, in their view, Delaware juries were overly reluctant to give death sentences in appropriate cases. They anticipated that replacing the jury with the judge would increase the likelihood that capital murders would be punished by death sentences. Our findings confirm that they were right.

Capital sentencing by judges in Delaware is associated with a substantially greater likelihood of death sentences. The analyses reported here indicate that judge-jury differences in sentencing are unlikely to be explained by differences in the cases they face. Although we are mindful that SHR homicide data are imperfect measures of the amount of crime in Delaware, the examination of homicide rates over time suggested that crime rates did not differ substantially across the judge and jury sentencing eras, and that prosecutors did not appear to be more selective in capital litigation in the judge eras. If anything, prosecutors sent a greater proportion of cases to capital penalty trials when they knew that judges rather than juries would be the final arbiter of death. In addition, our statistical models show that after controlling for important legally relevant factors and other predictor variables, judge-jury differences continued to be statistically significant and substantial.

Our article explores a number of different reasons why judges may give proportionately more death sentences than juries. The requirement in the jury era that the members of the jury unanimously recommend death is surely a very significant factor. The decisions of unanimous juries, whether the recommendation favored life or death, were always followed by Delaware judges. However, juries reached a unanimous decision to recommend life or death in only a fraction of the cases they considered. Juries unanimously found that aggravating factors outweighed the mitigating factors in just 10 (12 percent) of the 82 judge era cases for which we have jury vote data. That number is not far off from the number of death sentences during the jury era.

⁹³For the gender of the judge, $\beta = -2.51$, $SE = 1.12$, $p = 0.025$ (women judges less likely to give death sentences); for a judge's first versus subsequent death penalty case, $\beta = 2.42$, $SE = 0.72$, $p = 0.001$ (judges with previous case in database more likely to give death sentences).

⁹⁴For heinousness, $\beta = 0.29$, $SE = 0.14$, $p = 0.04$ (greater heinousness increased death sentences); for mitigating factors, $\beta = 0.21$, $SE = 0.12$, $p = 0.077$ (greater number of mitigating factors associated with a marginal increase in death sentences).

Of course, the jury decisions in the jury and judge eras are not directly comparable because in the jury era a unanimous binding decision was required and in the judge eras, juries make advisory decisions that do not need to be unanimous. Research in other contexts shows that jury deliberations under unanimity and majority decision rules differ significantly.⁹⁵ Juries deliberating under unanimity tend to discuss the case longer and to have more thorough and robust deliberations. This may help explain the fact that juries in hybrid capital sentencing approaches in other states, who are less likely to be required to make a unanimous recommendation, report deliberating more quickly and less thoroughly, compared to jurors whose decision is binding.⁹⁶

That said, there is a clear link between what jury majorities recommend and what judges decide. The Delaware statute requires appropriate consideration, if not great weight as in the earlier years of judge sentencing. And, of course, both judge and jury observe the same cases. With some exceptions, the facts of the crime and the characteristics of the defendant appear to affect them similarly, as we found when we contrasted results in the Judge Cases and Jury Cases models. In this way our data reinforce the judge-jury agreement studies that find substantial overlap in decisions reached by lay and professional factfinders.

That a judicial sentencing approach in Delaware has led to increases in death sentences is also in line with the judge-jury agreement studies finding that in cases in which judges and juries disagree, the jury is apt to be more lenient. However, Delaware judges do not show the same tendency to regularly override majority or unanimous jury recommendations for life sentences, as had been the case in Florida and is currently the practice in Alabama. And the regression analyses confirm that a key legally relevant variable, the statutory aggravating factors in the case, is a significant predictor of both judge and jury sentencing.

Nonetheless, some other results suggest a degree of arbitrariness in who receives the death penalty in Delaware. Killing a woman, all else equal, is more likely to result in a death sentence than killing a man.⁹⁷ One of the strongest predictors of jury death sentences was the county in which the homicide occurred. Kent County juries were much more apt to give death than juries in the other two Delaware counties. Judges in Kent County did not show the same effect. The county effect is baffling. Although Kent County is home to Dover Air Force Base, the population is not noticeably more politically conservative, judging by voting patterns over the three decades of the study period. Many of the factors that help explain

⁹⁵Dennis J. Devine, *Jury Decision Making: The State of the Science* 44–46 (2012); Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 *Nw. U. L. Rev.* 201 (2006); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 *Del. L. Rev.* 1 (2001). In a realistic jury simulation experiment that varied whether juries had to be unanimous or could decide under majority rule, unanimous decision rule juries brought up more facts, discussed important facts more thoroughly, corrected errors more frequently, and had more participation by jurors favoring minority views. Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* (1983).

⁹⁶Bowers et al., *supra* note 2.

⁹⁷Royer et al., *supra* note 5.

regional disparities in death sentences in other states do not appear to vary in the expected ways between Kent and the other two Delaware counties.⁹⁸

The continuing evidence that race plays a role in Delaware's death penalty is disturbing. We note that the two cases that were driving forces in capital punishment legislative change—the reinstatement of capital punishment in the 1960s and the Brooks armored car case in 1991—were cases in which black defendants killed white victims. The *Sadiki Garden* case, which ultimately led the Delaware legislature to reduce the weight judges are required to give to the jury's recommendation, also involved a black defendant and a white victim. Our earlier analysis of Delaware death sentencing rates by race of defendant and race of victim showed that the highest rates were in black defendant-white victim cases.⁹⁹ Indeed, we found that the race of victim differences in death-sentencing rates were stronger in Delaware than in any other state. The victim race results from the Delaware system of capital punishment echo racial patterns found in a number of other jurisdictions.¹⁰⁰

Comparisons of death-sentencing rates, however, do not pinpoint the stage at which race of victim effects are created. In the models reported here, we find that narrowing the lens to those cases that reach the penalty phase of a capital trial did not show statistically significant victim race effects, suggesting that much of the overall disparity is attributable to discrimination in the decision to seek death.

Judge Barron, who sentenced five people to death in Delaware during his career, earning him the nickname the “hanging judge,” voiced concern over the arbitrariness of the death penalty in Delaware on the basis of his judicial experiences. Judge Barron stated that “having personally observed the exercise of the death penalty statute over the past two decades, I now conclude that the process under the law is flawed . . . [I]t is impossible to justify why some murderers receive the death penalty while others, whose crimes are arguably worse in degree or savagery, do not.”¹⁰¹

We wish to close with some reflections about the constitutionality of judge sentencing. Justice Sotomayor's dissent from the denial of certiorari in *Woodward v. Alabama* called into question the constitutionality of judge sentencing in capital cases for two reasons, both of which are applicable to Delaware. First, the small handful of states that allow judges—rather than juries—to impose the ultimate punishment leaves the practice subject to challenge under the Eighth Amendment's ban on cruel and unusual punishment. In analyzing capital sentencing practices under the Eighth Amendment, the Court (as it reaffirmed last term in *Hall v. Florida*¹⁰²) has looked for consensus in state practices to determine whether a state

⁹⁸See discussion of county effects in Johnson et al., *supra* note 5, at 1936–38.

⁹⁹Johnson et al., *supra* note 5.

¹⁰⁰See, e.g., Baldus et al. (Georgia), *supra* note 4; Raymond Paternoster, Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina, 74 J. Crim. L. & Criminology 754, 767 tbl. 1 (1983) (South Carolina); Michael Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981) (Florida).

¹⁰¹Norman Barron, Costs of Imposing Death Penalty Outweigh Benefits, Delaware Online, Apr. 23, 2013.

¹⁰²572 U.S. ___ (2014).

capital sentencing scheme is out of step with “evolving standards of decency.” The fact that only a few states currently allow judges to impose death sentences renders the practice suspect on that basis. Our research shows that the replacement of juries by judges has a strong and significant impact, increasing the likelihood of death sentences. This is also out of step with the dwindling number of death sentences imposed by juries.

Second, as noted previously, the Court has held that the Sixth Amendment requires juries—and not judges—to find facts making a person eligible for the death penalty. Although the Delaware legislature concluded that a defendant is “death-eligible” when the jury finds the existence of a statutory aggravating circumstance, thus allowing for judges to then impose the ultimate sentence, that conclusion is dubious as a matter of Delaware practice and constitutional law. The Delaware capital sentencing scheme only allows a death sentence to be imposed by the trial judge if the aggravating circumstances outweigh the mitigating circumstances. If they do not (if the mitigating circumstances outweigh the aggravating circumstances or the two are in equipoise), the defendant must be sentenced to life imprisonment. Justice Sotomayor’s dissent in *Woodward* argues—we think with some force—that it is not until the conclusion of the weighing process that a capital defendant in Alabama (and thus in Delaware) is “death-eligible.” If this is correct, then the Sixth Amendment requires that juries—not judges—determine whether a capital defendant should live or die.

APPENDIX 1: CAPITAL TRIALS AND DEATH SENTENCES FOR ATTORNEY GENERAL BY ERA

<i>Era</i>	<i>Capital Trials*</i>	<i>Death Sentences[†] (Percent of Cases)</i>
Jury Era		
Richard R. Wier (Jan. 1975–Jan. 1979)	8	2 (25.0)
Richard S. Gebelein (Jan. 1979–Jan. 1983)	18	5 (27.8)
Charles M. Oberly (Jan. 1983–Nov. 1991)	32	4 (12.5)
Judge Era		
Charles M. Oberly (Nov. 1991–Jan. 1995)	30	16 (53.3)
M. Jane Brady (Jan. 1995–Jun. 2001)	28	15 (55.6)
Hybrid Era		
M. Jane Brady (Jun. 2001–Dec. 2005)	26	10 (38.5)
Carl Danberg (Dec. 2005–Jan. 2007)	3	1 (33.3)
Joseph R. Beau Biden II (Jan. 2007–end of study period)	1	1 (100)

*The number of capital cases that reached the sentencing phase of trial.

†The number of death sentences compared to the total number of capital trials during the time period.