

APPENDIX 1: DEATH SENTENCES HAVE ALWAYS BEEN RARE IN THE MODERN ERA

I. INTRODUCTION: MOST DEATH-ELIGIBLE CASES HAVE ALWAYS AVOIDED DEATH SENTENCES²⁵⁷

“There is no nationwide database that tracks all the potential death penalty cases pending in the trial courts around the country,”²⁵⁸ and there is no comprehensive historical survey of death sentences imposed in death-eligible cases. “The statistical snapshots that can be found are for the most part in academic and journalistic studies focused on other issues, such as the impact of race and geography, relative rates of judge and jury sentencing . . . comparison of military and civilian systems,” and deterrence.²⁵⁹ Professor Jeffrey Fagan (who holds appointments in law and epidemiology at Columbia’s law school and school of public health) and colleagues attempted to estimate the number of homicide cases nationally that might have been prosecuted capitally in the period

257. A summary of articles documenting how the majority of capital cases avoid the death penalty appeared in Stetler & Wendel, *supra* note 81, at 686-93. Much of that research is incorporated herein. The author is also grateful to Mark Warren, a Canadian legal researcher who specializes in the application of treaty law and international human rights standards to U.S. death penalty cases. He compiled additional studies in connection with his consultations for the Mexican Capital Legal Assistance Program. The wise advice and meticulous assistance of my colleague Maria McLaughlin has been invaluable, as always. Two British researchers, Kate Hare and Fraser Muir, also provided pro bono assistance through the U.K.-based charity Amicus in identifying additional publications with relevant data. Although many cases of course avoid the death penalty through deauthorization or negotiated dispositions rather than jury (or judge) determinations after sentencing proceedings, the importance of mitigation investigation in the process of persuading prosecutors (and clients) that non-death dispositions are appropriate should not be ignored. *See* Stetler, *supra* note 167, at 1160-61, 1163-65.

258. Stetler & Wendel, *supra* note 81, at 684.

259. *Id.* at 688. Stetler and Wendel also noted:

The datasets in these snapshots are not uniform. Statutes vary in terms of death eligibility, notice requirements, eligibility for capitally qualified counsel, etc. Even the seemingly simple task of counting the number of death sentences imposed requires metric conventions about how to count the outcomes of resentencing proceedings. The number of “cases” sometimes refers to trials, rather than defendants. Nonetheless, even with all their limitations, the available studies consistently indicate that most death-eligible cases avoid death sentences.

Id.

of 1976 to 2003.²⁶⁰ Using case characteristics data in the FBI Supplemental Homicide Reports, they estimated that there had been 123,485 cases where capital punishment might have been sought.²⁶¹ Canadian legal researcher Mark Warren found that 6,642 death sentences were imposed in this period (or about 5.4% of the cases).²⁶² However, Warren also pointed out that the macro-survey by Fagan and colleagues included homicides in states that did not have the death penalty, and it used broad parameters for death-eligibility, rather than the actual statutory criteria of individual states.²⁶³

Professor Brandon L. Garrett has discussed at length the decline in death sentencing in the twenty-first century.²⁶⁴ He notes first how “murder rates began a remarkable drop across the country in the mid-1990s—the Great American Crime Decline as law professor Franklin Zimring has called it. . . . This dramatic decline came just before death sentences dropped.”²⁶⁵ Professor Garrett succinctly describes the result as follows:

What remains of the American death penalty is concentrated in a few dozen scattered counties, typically larger ones, with an entrenched pattern of seeking the death penalty. These are also counties that tend to have large black populations. Overzealous prosecutors in large counties obtain death sentences that add up to disturbing patterns of racial bias: such patterns have defined the local geography of the death

260. Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEXAS L. REV. 1803, 1810-14 (2006).

261. *Id.* at 1818-19 tbl. 1 (“Capital-eligible homicides, all states”).

262. E-mail from Mark Warren to Russell Stetler (July 24, 2017, 8:18 AM) (on file with author); see N. J. DEATH PENALTY STUDY COMM’N REPORT 24 (2007), http://www.njleg.state.nj.us/committees/dpsc_final.pdf (finding that “[t]here were approximately 16,000 murders in the United States in 2005,” a year in which “125 defendants were sentenced to death” and “60 were executed”). Thus, the number of people sentenced to death that year represented fewer than one percent of those who committed homicide, and fewer than half of that number were executed. See Blume & Vann, *supra* note 165, at 215 & fig. 6, 216 fig. 7 (estimating that the average number of death sentences nationally for all death penalty jurisdictions for the period 1977 to 2013 was 1.5 per 100 murders, citing murder statistics from the FBI Uniform Crime Reports (available at: <http://www.disastercenter.com/crime/uscrime.htm>) and death sentences per year reported by the Death Penalty Information Center).

263. E-mail from Warren to Stetler, *supra* note 262.

264. GARRETT, *supra* note 11, at 79-81.

265. *Id.* at 8. Professor Garrett adds:

The best available data show a stunning decline in homicides in the early 1990s and continuing for more than two decades. . . . There are occasional spikes—for example, in 2001 due to the 9/11 attacks—and there was a rise in 2006–2007. There was a spike again in 2015, with more murders in some large cities but not others. However, the long-term trend is consistent. Murders declined from almost 25,000 in 1991 to 16,000 in 2004 and under 13,000 by 2010.

Id. at 86-87 (citations omitted).

penalty for decades. The handful of counties that engage in death sentencing do respond to murder rates, but they sentence more people to death if they experience more murders with white victims. A form of “muscle memory” dominates death sentencing: counties that sentence people to death are far more likely to keep doing so. The flip side is that once counties stop death sentencing, they are also likely to remain free of death sentences. These deepening trends, as fewer counties impose death sentences, seem likely to stay fixed in place.²⁶⁶

Professor Garrett concluded:

There were never many death sentences per murder, and today there are fewer than *three* death sentences per *thousand* murders. Given that there are now over 15,000 murders a year and only a few death sentences a year, any relationship between murders and death sentences is not very clear. While murders have declined modestly since 2000 (by about 10 percent), annual death sentences have fallen by 90 percent since their peak in the 1990s.²⁶⁷

In the body of this Article, the extreme rarity of death sentences currently in Georgia, North Carolina, Pennsylvania, South Carolina, and Virginia is summarized.²⁶⁸ This Appendix provides additional jurisdiction-specific snapshots, covering the operation of the statutes in the seven states that recently abolished capital punishment, the eight states where death sentencing has been rare in absolute terms, and ten additional states where studies focused on other issues have offered relevant data.²⁶⁹

II. STATES THAT HAVE RECENTLY ABOLISHED CAPITAL PUNISHMENT

New York. Even statewide tracking of capital cases is rare because few of the death-penalty jurisdictions have established agencies that are funded to discover this information and have statutory authority to obtain it. New York State was an exception. The legislation that enacted the death penalty in New York in 1995 also created a Capital Defender Office (“CDO”) with a mandate to ensure that capitally charged defendants received effective representation.²⁷⁰ Prosecutors were required to notify the CDO whenever anyone was arrested for first-

266. *Id.* at 11-12; *see also id.* at 149 (discussing “muscle memory,” a term coined by Professor Lee Kovarsky, to describe prosecutorial inertia in continuing to seek death sentences).

267. *Id.* at 88.

268. *See supra* Part V.A–E.

269. *See infra* App. 1 Parts II–III.

270. Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 16-17, 20.

degree murder.²⁷¹ Such defendants were then eligible for capitally qualified counsel (either staff attorneys from the CDO or private attorneys who had received specialized training through the CDO) unless and until the prosecution advised the court on the record that death had been precluded as a potential punishment.²⁷²

New York's post-*Furman* experiment with a death penalty system began on September 1, 1995, and effectively ended on June 24, 2004, when the state's highest court found the statute unconstitutional.²⁷³ While the statute was operational, 877 defendants were charged with potential death-eligible offenses, entitling them to capitally qualified counsel.²⁷⁴ The statute imposed a deadline of 120 days after arraignment in the trial court for prosecutors to decide whether they would actually seek to impose the death penalty in the individual case.²⁷⁵ Over ninety percent of the cases were decapitalized (i.e., prosecutors elected to seek life without parole, rather than the death penalty, as the maximum punishment), and only fifty-eight went forward as death penalty prosecutions.²⁷⁶ Many of those cases were still resolved by negotiated disposition, including two that were resolved after conviction in the trial court.²⁷⁷ Only seven death sentences were imposed, and all of them were

271. N.Y. JUD. LAW § 35-b(6)(a) (McKinney 2002).

272. *Id.* § 35-b(1)-(2), (7).

273. *People v. LaValle*, 817 N.E.2d 341, 344, 357-58, 367 (N.Y. 2004) (finding that jury instruction which informed jurors that the court would impose a parole-eligible sentence in the event of jury nonunanimity in the penalty phase were coercive). The court's decision left the remainder of the statute intact and would have permitted the legislature to correct the statutory infirmity. *Id.* at 367. Instead, the state assembly held five public hearings conducted by its standing committee on Codes, Judiciary, and Correction from December 15, 2004, through February 11, 2005. See JOSEPH LENTOL ET AL., ST. COMM. ON CODES, JUDICIARY, & CORR., THE DEATH PENALTY IN NEW YORK 4 (2005), <http://www.nyasembly.gov/comm/Codes/20050403/deathpenalty.pdf>. The committee took no steps toward correcting the statutory infirmity, and the death penalty was no longer operational.

274. Email from Kevin M. Doyle, former Capital Defender, to Russell Stetler (Oct. 17, 2012, 5:37 PM) (on file with author) (reporting data maintained by the New York State Capital Defender Office ("CDO Capital Case Tracking Database")).

275. N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2014).

276. E-mail from Doyle to Stetler, *supra*, note 274.

277. The two cases that were resolved after first-degree murder convictions in the trial court were in Kings County. See *People v. Page*, 785 N.Y.S.2d 113, 113-14 (App. Div. 2d 2004); *People v. Bonton*, 775 N.Y.S.2d 901, 901 (App. Div. 2d 2004). The Jermaine Page plea was reported by Joseph P. Fried, *Brooklyn Killer Takes Deal for Life in Prison*, N.Y. TIMES, Oct. 29, 1988, at B8. Jerry Bonton's plea was reported by Mike Claffey, *Killer Chooses Life Over Death in Plea Agreement*, N.Y. DAILY NEWS (Apr. 12, 2000, 12:00 AM), <http://www.nydailynews.com/archives/boroughs/killer-chooses-life-death-plea-agreement-article-1.870752>.

ultimately overturned.²⁷⁸ By any calculus, the vast majority of cases did not end in death sentences.

Connecticut. Professor John J. Donohue III, a lawyer and economist at Stanford, published a comprehensive review of “the application of the death penalty in Connecticut from 1973 until 2007.”²⁷⁹ He found that out of 4686 murders in the sample period, there were 205 “death-eligible cases that resulted in a homicide conviction,” of which 141 were charged with a capital felony.²⁸⁰ Of the 141 capitally charged cases, 49 defendants were “allowed to plead guilty to a non-capital offense. Of the remaining 92, 66 were convicted of a capital felony and 26 were acquitted” of capital felony charges.²⁸¹ Of the 66 defendants convicted of capital felony charges, 28 proceeded “to a death penalty sentencing hearing, resulting in 9 sustained death sentences, and one execution.”²⁸²

Delaware. The state of Delaware had a relatively high death-sentencing rate in relation to the number of murders.²⁸³ However, the most comprehensive study found a total of 49 death sentences resulting from 138 total trials and resentencings, including defendants who had more than 1 trial or sentencing.²⁸⁴

Illinois. From mid-1977, when the modern death penalty statute took effect, to December 31, 2001, Illinois sentenced 289 people to death.²⁸⁵ A 1989 study of death sentencing in Illinois found that the death penalty was infrequently imposed; in the three and a half years ending in December 1980, only one percent of homicides resulted in a

278. Six death sentences were overturned by the New York Court of Appeals. *See* *People v. Taylor*, 878 N.E.2d 969, 984 (N.Y. 2007); *People v. Shulman*, 843 N.E.2d 125, 140 (N.Y. 2005); *People v. LaValle*, 817 N.E.2d 341, 346, 368 (N.Y. 2004); *People v. Mateo*, 811 N.E.2d 1053, 1083 (N.Y. 2004); *People v. Cahill*, 809 N.E.2d 561, 567 (N.Y. 2003); *People v. Harris*, 779 N.E.2d 705, 711, 729 (N.Y. 2002). The case of the remaining death-sentenced prisoner, Nicholson McCoy, was resolved following the *LaValle* decision. *See* Robert Gearty & Bill Hutchinson, *Sentenced to Life, Killer Yawns!*, N.Y. DAILY NEWS, Sept. 10, 2004; William Glaberson, *Across New York, a Death Penalty Stuck in Limbo*, N.Y. TIMES, Aug. 21, 2004, at A1, B5.

279. JOHN J. DONOHUE III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4600 MURDERS TO ONE EXECUTION 1, 464 (2014), https://works.bepress.com/john_donohue/137.

280. *Id.* at 1.

281. *Id.*

282. *Id.*

283. *See* John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 172 (2004); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1942 fig. 2 (2012). Johnson and her colleagues note that prior studies had revealed that “in relation to the number of murders, Delaware has the third-highest death sentencing rate in the United States.” Johnson et al., *supra*, at 1928.

284. E-mail from John H. Blume to Russell Stetler (Oct. 29, 2012, 4:30 PM) (on file with author).

285. Glenn L. Pierce & Michael L. Radelet, *Race, Religion, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39, 40 (2002) (citation omitted).

death sentence for the perpetrator.²⁸⁶ A later study reached the same conclusion.²⁸⁷ From January 1, 1988, through December 31, 1997, 5310 sentences were imposed for first-degree murder, but only 115 were death sentences.²⁸⁸

Maryland. In a study funded by the state of Maryland, the late criminologist Raymond Paternoster and his colleagues identified 1311 cases eligible for the death penalty (out of nearly 6000 first and second-degree murder cases) from 1978 to 1999, with death sentences imposed in seventy-six cases.²⁸⁹

New Jersey. The death penalty was reinstated in New Jersey in 1982.²⁹⁰ In January 2007, the New Jersey Death Penalty Study Commission published a report recommending “that the death penalty in New Jersey be abolished and replaced with life imprisonment”²⁹¹ The Commission found that only a small percentage of defendants were sentenced to death.²⁹² From 1982 through 2005, there were 455 “death-eligible defendants (cases in which the evidence supported the elements of a capital prosecution). Of those, 228 were tried capitally and 60 death sentences were imposed.”²⁹³

New Mexico. A study in New Mexico identified 211 death penalty cases filed from July 1, 1979 through December 31, 2007, of which 203 had been resolved.²⁹⁴ “Nine cases . . . were dismissed before trial . . . [a]lmost half (47.8 percent)” were resolved with “a plea bargain that precluded a death sentence, while 46.9% of the cases went to trial. Roughly one quarter of the resolved cases proceeded to a penalty phase,” and juries returned fifteen death sentences (7.11% of the 211 cases).²⁹⁵

286. SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 43 (1989).

287. Pierce & Radelet, *supra* note 285, at 46-47.

288. *Id.* at 50.

289. Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS 1, 15, 19-20 (2004).

290. N. J. DEATH PENALTY STUDY COMM’N REPORT, *supra* note 262, at 6.

291. *Id.* at 2, 87.

292. *Id.* at 24.

293. *Id.*

294. Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 266 (2008).

295. *Id.* at 266.

III. JURISDICTIONS THAT HAVE RETAINED CAPITAL PUNISHMENT

Thirty-one state statutes plus the federal and military criminal codes retain capital punishment,²⁹⁶ but the majority of death-eligible cases have avoided death sentences in these jurisdictions as well. Twelve of these jurisdictions had ten or fewer prisoners under sentence of death as of July 1, 2017, and Nebraska had only eleven prisoners on death row.²⁹⁷ Statistical analysis is largely futile because of the minute size of some of the datasets for eight of these twelve retentionist jurisdictions: Kansas, Montana, Nebraska, New Hampshire, South Dakota, Utah, Washington, and Wyoming.²⁹⁸ However, the numbers are so low in absolute terms that no further analysis is required to establish rare use. For the remaining twenty-three jurisdictions that retain the death penalty, studies from over half of them confirm how infrequently death sentences have been imposed.²⁹⁹

Federal. The Committee on Defender Services of the Judicial Conference of the United States created a Subcommittee on Federal Death Penalty Cases, chaired by the Honorable James R. Spencer.³⁰⁰ The subcommittee's initial report was issued in May 1998 and its recommendations were adopted by the Judicial Conference of the United States on September 15, 1998.³⁰¹ An update released in September 2010 provided data on federal capital defendants, 1989-2009.³⁰² The update noted that the data employed "should be viewed as a good estimate," rather than a precise count, but also that the numbers are conservative in

296. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Feb. 2, 2018).

297. DEBORAH FINS, DEATH ROW U.S.A.: A QUARTERLY REPORT BY THE CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATION FUND, INC. 38-39 (2017), http://www.naacpldf.org/files/case_issue/DRUSASummer2017.pdf. As of July 1, 2017, the eleven jurisdictions with ten or fewer prisoners under sentence of death were: Colorado, 3; Idaho, 8; Kansas, 10; Montana, 2; New Hampshire, 1; New Mexico, 2; South Dakota, 3; Utah, 9; Virginia, 5; Washington, 8; Wyoming, 1; U.S. military, 5. *Id.* at 48, 52, 54, 64. Nebraska had eleven prisoners on death row. *Id.* at 38.

298. *Id.* at 38-39.

299. No published studies could be found for ten states: Alabama, Arkansas, Florida, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, Tennessee, or Texas.

300. SPENCER REPORT, *supra* note 115, at Introduction.

301. *Id.*

302. JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES PT. II.A (Sept. 2010), <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>.

the sense that they count only death-eligible cases that were actually or likely to be filed in federal court:

In this report, the term “death-eligible” refers to a case that is expected to be or already has been filed in federal court and in which at least one count of the indictment alleges or is expected to allege an offense for which the death penalty is a possible punishment. It is essential to note that such federal death-eligible cases do not constitute the entire universe of “potential” federal death penalty prosecutions. Rather, these death-eligible federal cases are themselves the result of a selection process. As a jurisdictional matter, most federal death penalty cases could be prosecuted in either federal court or state court. Federal authorities, often in consultation with state law enforcement agencies, determine whether and where to bring the prosecution, a decision that may turn on any one of a number of factors. This research has found no source from which the number of all such potential federal death penalty cases can readily be ascertained.³⁰³

The update identified 2975 “death-eligible” federal capital defendants from 1989 through 2009,³⁰⁴ and found that the Attorney General authorized 463 of those cases to proceed capitally.³⁰⁵ “By the end of 2009, 262 authorized defendants had been tried,” and sixty-eight of those who proceeded to trial were sentenced to death.³⁰⁶ Thus, three quarters of the defendants in authorized cases avoided the death penalty at trial.³⁰⁷ Others avoided the death penalty through plea bargains.³⁰⁸ A scant two percent of the “death-eligible” federal defendants received the death penalty.³⁰⁹

Military. The majority of death-eligible cases under the military capital punishment system have also avoided death sentences. A study by Professors Catherine M. Grosso, the late David C. Baldus, and George Woodworth found that 104 death-eligible cases were prosecuted from 1984 through 2005, “result[ing] in the imposition of fifteen death sentences.”³¹⁰

303. *Id.* at 4 & n.6.

304. *Id.* at 5 fig. 1 (“Death-Eligible” Federal Capital Defendants, 1989-2009, by Calendar Year of Indictment”).

305. *Id.* at 8 fig. 2 (“U.S. Department of Justice Capital Authorizations, 1989-2009, by Year of Authorization”).

306. *Id.* at 8, 10 (footnote omitted).

307. *Id.* at 12 tbl. 1.

308. *Id.* at ix.

309. *See id.* at 5 fig. 1, 10.

310. Catherine M. Grosso et al., *The Impact of Civilian Aggravating Factors on the Military Death Penalty (1984–2005): Another Chapter in the Resistance of the Armed Forces to the Civilianization of Military Justice*, 43 U. MICH. J.L. REFORM 569, 570 (2010) (footnote omitted).

Arizona. In 2000, the Attorney General of Arizona formed the Capital Case Commission “to study key issues and make recommendations to try to ensure that the death penalty process in Arizona is just, timely and fair,” and in December 2002 the Commission released its report.³¹¹ From 1974 through July 1, 2000, there were 228 defendants sentenced to death.³¹² The most death sentences in a year was sixteen, in 1982.³¹³ The fewest was four, in 1985 and 1995.³¹⁴ In producing the report, researchers gathered data on first-degree murder indictments from 1995–1999.³¹⁵ Of the 971 individuals indicted during the five-year period, the prosecuting agency filed a notice of intention to seek the death penalty 381 times (39.2%).³¹⁶ Over half, 195 (51.2%), proceeded to trial, and 143 (73%) of those trials resulted in a conviction.³¹⁷ “One-fifth of the death-noticed defendants who are convicted of first-degree murder at trial [were] sentenced to death (29 of 143 or 20.3%). . . . [T]wo additional defendants were sentenced to death after pleading guilty to first-degree murder.”³¹⁸

California. Funding cuts have prevented any agency from continuing to track all of the death penalty cases in California, but in the early post-*Furman* years, the Office of the State Public Defender did track all cases in order to make reliable forecasts of its own appellate caseload.³¹⁹ Cases were tracked from the introduction of the new death penalty statute in 1977 through December 31, 1989.³²⁰ Over ninety percent of potential capital cases avoided the death penalty: 3425 cases were filed, but only 319 death sentences were imposed statewide

311. OFFICE OF THE ATT’Y GEN., CAPITAL CASE COMM’N, FINAL REPORT 1 (2002), <https://www.azag.gov/sites/default/files/sites/all/docs/Criminal/ccc/Capital%20Case%20Commission%20-%20Final%20Report.pdf>.

312. *Id.* at 10, 25.

313. PEG BORTNER & ANDY HALL, CTR. FOR URB. INQUIRY, SUMMARY OF DEATH SENTENCES PROCESS: DATE SET I RESEARCH REPORT TO ARIZONA CAPITAL CASE COMMISSION 1 (2001), <https://www.azag.gov/sites/default/files/sites/all/docs/Criminal/ccc/Attachment%20B%20-%20Data%20Set%20I.pdf>.

314. *Id.*

315. PEG BORTNER & ANDY HALL, CTR. FOR URB. INQUIRY, ARIZONA FIRST-DEGREE MURDER CASES SUMMARY OF 1996–1995 INDICTMENTS: DATA SET II RESEARCH REPORT TO ARIZONA CAPITAL CASE COMMISSION, at v (2002), <https://www.azag.gov/sites/default/files/sites/all/docs/Criminal/ccc/Data%20Set%20II%20Report%20June%202002.pdf>.

316. *Id.*

317. *Id.*

318. *Id.*

319. *See* CALIFORNIA APPELLATE PROJECT: INVESTIGATING HABEAS CORPUS CLAIMS (1994) (providing county breakdown of death penalty cases based on data compiled by the Office of the State Public Defender) (on file with author and the *Hofstra Law Review*).

320. *Id.*

(9.3%).³²¹ In Los Angeles, 1711 cases were filed, with only ninety-nine death sentences imposed (5.7%).³²²

Colorado. A study of death sentencing from 1980 through 1999 in Colorado identified 110 defendants against whom the death penalty was sought.³²³ “[T]hirty-seven of the 110 cases went to a penalty phase, but . . . the sentencing authority (judge or jury)” imposed death sentences on only thirteen of the defendants (11.8%).³²⁴ An empirical study of every murder conviction in Colorado, from 1999 through 2010, found that approximately ninety percent of Colorado murders could have been eligible for the death penalty, but prosecutors sought the death penalty in only three percent.³²⁵ The death penalty was pursued all the way through sentencing in only one percent of the cases, and it was obtained in only 0.6% of the cases.³²⁶ There are currently only three prisoners under sentence of death in Colorado.³²⁷ All three were prosecuted in Arapahoe County, two were co-defendants, and all three attended the same high school.³²⁸

Georgia. A study by reporters for the *Atlanta Journal Constitution* examined 2328 total murder convictions in Georgia from 1995 to 2004,³²⁹ including 1315 cases eligible for the death penalty.³³⁰ Prosecutors sought the death penalty in roughly one-fourth of these cases (344).³³¹ Most were then resolved by plea agreements, but 127 went to trial and fifty-seven defendants received death sentences (including eight whose cases were overturned and who were not resentenced to death).³³² Thus, death sentences imposed represented 44.8% of the cases that went

321. *Id.*

322. *Id.* The number of penalty trials statewide was 675; the number in Los Angeles was 220. *Id.*

323. Stephanie Hindson et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 COLO. L. REV. 549, 566-67 (2006).

324. *Id.* at 573 (footnote omitted).

325. Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 UNIV. COLO. L. REV. 1069, 1097, 1109, 1111 (2013).

326. *Id.* at 1111-12.

327. FINS, *supra* note 297, at 38.

328. See *Personal Stories Grip Lawmakers on Death Penalty*, DENVER POST (Mar. 17, 2013, 6:43 AM), <http://www.denverpost.com/2013/03/17/personal-stories-grip-lawmakers-on-death-penalty> (explaining that Nathan Dunlap, Robert Ray, and Sir Mario Owens all attended Overland High School in Aurora, a Denver suburb).

329. Bill Rankin et al., *A Matter of Life and Death: Death Still Arbitrary*, ATLANTA J. CONST. (Sept. 23, 2007, 12:00 AM), <https://www.myajc.com/news/state--regional/from-2007-matter-life-and-death-death-still-arbitrary/uQMik03eSLJ7VII4wvUZnN>.

330. *Id.*

331. *Id.*

332. *Id.*

to trial (57 of 127), 16.5% of the cases where prosecutors sought death (57 of 344), and 4.3% of the death-eligible cases (57 of 1315).³³³

Idaho. A study for the Idaho legislature reviewed the cases of 251 defendants who were charged with first-degree murder from 1998 to 2013.³³⁴ “[P]rosecutors sought the death penalty for forty-two defendants (17%).”³³⁵ Prosecutors later withdrew the notice of intent to seek death for thirteen defendants.³³⁶ Nineteen of the remaining thirty-three defendants proceeded to trial.³³⁷ Seventeen were found guilty, and six received a death sentence.³³⁸ Twenty-three defendants pleaded guilty (to murder or a lesser included offense), and one additional death sentence was imposed.³³⁹ Thus, from 1998 to 2013, ninety-seven percent of defendants charged with first-degree murder received a sentence other than death.³⁴⁰

Indiana. Based on an analysis of 4617 murders and non-negligent homicides during the years 1990 through 2000, the Indiana Public Defender Council could not determine “how many of these homicides were eligible for a death penalty request, meaning that one or more of the 16 aggravating circumstances could be alleged and the defendant was 18 or older,” but concluded, “[p]rosecuting attorneys actually requested the death penalty in 153 of these homicides, 48 of the cases proceeded to a capital trial, and 25 actually resulted in death sentences.”³⁴¹

Kentucky. A study of all murder indictments in Kentucky, between December 22, 1976 (the effective date of the capital statute) and October 1, 1986, identified 864 cases resulting in murder convictions.³⁴² Prosecutors had pursued capital punishment at some point in 557 cases, but only 104 went to trial in front of death-qualified juries, with thirty-five death sentences imposed.³⁴³

333. *Id.*

334. OFF. OF PERFORMANCE EVALUATIONS, FINANCIAL COSTS OF THE DEATH PENALTY 10 (2014), <https://deathpenaltyinfo.org/documents/IDCost.pdf>. “One case filed in November 1997 was included in the count because the county prosecutor submitted a notice of intent to seek the death penalty and the defendant received the death penalty in 1999.” *Id.* at 11.

335. *Id.* at 10.

336. *Id.* at 10 n.1.

337. *Id.* at 11 ex.2.

338. *Id.*

339. *Id.*

340. *Id.* at 10.

341. *Death Penalty Facts*, IND. DEATH PENALTY COUNCIL, <https://www.in.gov/ipdc/files/Facts%20about%20the%20death%20penalty.pdf> (last updated July 20, 2012).

342. Thomas Keil & Gennaro Vito, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes*, 7 JUST. Q. 190, 194 (1990).

343. *See id.* at 197.

Missouri. The Missouri Department of Corrections published sentencing data for first-degree murder cases from Fiscal Year 1990 through Fiscal Year 2006, showing eighty-seven death sentences imposed compared to 714 sentences of life without parole (i.e., 10.9% of cases ending in death sentences).³⁴⁴

Nebraska. The late Professor David Baldus and his colleagues analyzed 185 death-eligible cases in Nebraska from 1973 to 1999.³⁴⁵ They found that death was waived by the State in over half the cases (96 of 185).³⁴⁶ Of the remaining eighty-nine (48%) which proceeded to a penalty trial, only twenty-nine resulted in death sentences (about a third of the cases that proceeded to trial, or about sixteen percent of all the death-eligible cases).³⁴⁷

North Carolina. The North Carolina Office of Indigent Defense Services analyzed all potentially capital cases with warrant dates from July 1, 2001 through April 22, 2008.³⁴⁸ “Over 83% ended in a conviction of second degree murder or less. . . . Over 12% ended in a voluntary dismissal, no true bill, or no probable cause finding. . . . 45% ended in a conviction of *less* than second-degree murder.³⁴⁹ For “proceeded capital cases” (where the prosecution pursued the death penalty at some point), “60% ended in a conviction of second degree murder or less. . . . 22% ended in a conviction of *less* than second degree murder. . . [and only] 3% ended in a death verdict.”³⁵⁰

Pennsylvania. A study in 2016 by the *Reading Eagle* newspaper noted that “[n]o state agency tracks all of the commonwealth’s death sentences.”³⁵¹ The newspaper developed a database from online court records, State Supreme Court rulings, and media reports.³⁵² Its conclusion was that “[f]ewer than 2 percent of Pennsylvania’s roughly 25,000 homicides the past four decades have resulted in a death

344. MO. DEP’T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2006, at 47 (rev. 2007) (“Capital Punishment: Awaiting Execution, Executions and Sentences for Murder 1st Degree FY1990-FY2006”).

345. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486, 545 fig. 1 (2002).

346. *Id.*

347. *Id.*

348. N.C. OFFICE OF INDIGENT DEF. SERVS., FY07 CAPITAL TRIAL CASE STUDY, at II (2008), <https://web.archive.org/web/20090321002052/http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf> (data included cases disposed of by April 22, 2008).

349. *Id.*

350. *Id.*

351. Nicole C. Brambila, *Executing Justice: The Discretionary Nature of the Death Penalty in Pennsylvania*, *READING EAGLE* (June 20, 2016, 12:01 AM), <http://www.readingeagle.com/news/article/executing-justice-the-discretionary-nature-of-the-death-penalty-in-pennsylvania>.

352. *Id.*

sentence. . . . 60 percent of those sentences came from four counties . . . [a]nd almost two dozen counties have not sentenced anyone to death.”³⁵³

South Carolina. Professor John H. Blume and colleagues reviewed cases litigated prior to the opening of the Capital Trial Division of the South Carolina Commission on Indigent Defense in 2008.³⁵⁴ “Using court files, contemporary news accounts, and other publicly available information” to profile 151 homicides in Charleston County between 2002 and 2007, these researchers found “115—fully 76%—involved facts that would support the existence of at least one statutory aggravating circumstance sufficient to render them eligible” for the death penalty, but only five (4.3%) were actually prosecuted as death penalty cases—with one resultant death sentence.³⁵⁵ They found similar results in Richland County: 117 death-eligible cases out of 152 potentially eligible cases—and “only 4—a mere 3.4% of the death-eligible cases—were actually prosecuted as a capital case.”³⁵⁶ The researchers also found that the State sought death sentences in 226 cases statewide from 1995 to 2007.³⁵⁷ They looked closely at 124 cases from the counties that produce the greatest number of death sentences and found that there were death verdicts in only nine of the 124 cases.³⁵⁸

Tennessee. A survey of first-degree murder cases from July 1, 1977, when Tennessee’s current capital sentencing scheme went into effect, and June 30, 2017, identified 2514 defendants who were convicted of first-degree murder.³⁵⁹ The statute requires the state supreme court to conduct a comparative proportionality review in every capital case. The state supreme court promulgated Rule 12 in 1978 requiring trial judges to complete and file reports in every case involving

353. *Id.* A recent study indicated that following post-conviction reversals, ninety-seven percent of Pennsylvania cases received a disposition sentencing the defendant to life or less. See Robert Brett Dunham, *Pennsylvania Capital Post-Conviction Reversals and Subsequent Dispositions*, DEATH PENALTY INFO. CTR. (Apr. 23, 2018), https://deathpenaltyinfo.org/files/pdf/Pennsylvania_Subsequent%20Dispositions_2018_04-23.pdf.

354. John H. Blume, Sheri L. Johnson, Emily C. Paavola, & Keir M. Weyble, *When Lightning Strikes Back: South Carolina’s Return to the Unconstitutional, Standardless Capital Sentencing Regime of the Pre-Furman Era*, 4 CHARLESTON L. REV. 479, 499 (2010).

355. *Id.* at 499 & n.87.

356. *Id.* at 499-500; E-mail from Emily C. Paavola, Researcher, to Russell Stetler (Oct 18, 2012, 6:59 AM) (on file with author).

357. Blume et al., *supra* note 354, at 531; E-mail from Paavola to Stetler, *supra* note 356.

358. Blume et al., *supra* note 354, at 531-32; E-mail from Paavola to Stetler, *supra* note 356.

359. See Bradley A. MacLean & H. E. Miller, Jr., *Tennessee’s Death Penalty Lottery*, 13 TENN. J.L. & POL’Y 85, 88-89 (2018). Co-author Miller conducted the survey (which appears as an appendix to the article) in order to study arbitrariness in Tennessee’s capital sentencing system. *Id.* at 89.

first-degree murder convictions.³⁶⁰ The survey found 1348 adult first-degree murder cases in which Rule 12 reports were filed, and another 1166 cases in which the trial courts failed to file Rule 12 reports, for a total of 2514 cases.³⁶¹ The authors noted that there were undoubtedly additional first-degree murder cases for which no Rule 12 reports were filed but which they were unable to identify.³⁶² However, according to the authors, “[t]o the extent there are additional first degree murder cases that were not found, statistics including those cases would more strongly support the infrequency of death sentences”³⁶³ Only 192 defendants received death sentences in the forty-year period surveyed.³⁶⁴ The authors conclude, “Among those 192 defendants, only 86 death sentences have been sustained [by appellate courts] as of June 30, 2017, while the death sentences imposed on 106 defendants have been vacated or reversed. Accordingly, over the span of the past 40 years only approximately 3.4% of convicted first degree murderers have received sustained death sentences—and most of those cases are still under review.”³⁶⁵

IV. SUMMARY

Forty jurisdictions (thirty-eight states, plus the federal and military jurisdictions) have had capital statutes in the post-*Furman* era.³⁶⁶ In seven of them, the death penalty has been so rare in absolute terms that there are no statistical studies available.³⁶⁷ This Article discussed five states where death sentences have become vanishingly rare.³⁶⁸ This Appendix has summarized studies from the seven states that recently abolished capital punishment and from nine additional states, plus the federal and military jurisdictions.³⁶⁹ No studies have been identified for the remaining ten states, but the thirty jurisdictions for which published analyses and data are available (or death sentences are few in absolute terms) indicate how rare death sentences have been in a majority of

360. *Id.* at 118.

361. *Id.* at 130.

362. *Id.*

363. *Id.* at 131 n.120.

364. *Id.* at 132.

365. *Id.*

366. *See supra* App. 1 Part III.

367. *See supra* App. 1 Part III.

368. *See supra* Part V.

369. *See supra* App. 1 Part II.

jurisdictions.³⁷⁰ The jurisdictions discussed in this Article and Appendix 1 are summarized in Table 1.³⁷¹ The death-sentencing rates in the remaining ten jurisdictions are summarized in Table 2.³⁷²

Table 1: Jurisdictions discussed either in this Article or Appendix 1.³⁷³

| Few death sentences in absolute numbers (no statistical analyses) | <i>Death sentences now vanishingly rare (see supra, Part IV)</i> | States that have abolished the death penalty (summarized in Appendix 1) | Jurisdictional “snapshots” summarized in Appendix 1 | No published studies located at this time |
|---|--|---|---|---|
| Kansas | Georgia* | Connecticut | Federal | Alabama |
| Montana | North Carolina* | Delaware | Military | Arkansas |
| New Hampshire | Pennsylvania* | Illinois | Arizona | Florida |
| South Dakota | South Carolina* | Maryland | California | Louisiana |
| Utah | Virginia | New Jersey | Colorado | Mississippi |
| Washington | | New Mexico | Georgia* | Nevada |
| Wyoming | | New York | Idaho | Ohio |
| | | | Indiana | Oklahoma |
| | | | Kentucky | Oregon |
| | | | Missouri | Texas |
| | | | Nebraska | |
| | | | North Carolina* | |
| | | | Pennsylvania* | |
| | | | South Carolina* | |
| | | | Tennessee | |

370. See supra App. 1 Part III.

371. See infra App. 1, Tbl. 1.

372. See infra App. 1, Tbl. 2.

373. Asterisk (*) designates states discussed as now “vanishingly rare” in Article and historically rare in Appendix 1.

Table 2: Death-sentencing rates for jurisdictions not discussed in this Article or Appendix 1.³⁷⁴

| <i>State</i> | <i>Death Sentencing Rate (per 100 murders)</i> | Death Sentences 1977-2013 | Murders 1977-2013 |
|--------------------|--|------------------------------|----------------------|
| Alabama | 3.090 | 456 | 14,756 |
| Arkansas | 1.624 | 118 | 7265 |
| Florida | 2.256 | 939 | 41,617 |
| Louisiana | 0.721 | 162 | 22,471 |
| Mississippi | 1.685 | 174 | 10,326 |
| Nevada | 0.027 | 149 | 5487 |
| Ohio | 1.512 | 333 | 22,026 |
| Oklahoma | 3.552 | 309 | 8700 |
| Oregon (1978-2013) | 1.891 | 75 | 3966 |
| Texas | 1.484 | 958 | 64,573 |

374. Blume & Vann, *supra* note 165, at 216 fig. 7. These twelve states have rates within the wide (but low) overall range calculated by Blume & Vann, from 0.002 (Colorado) to 3.914 (Delaware) death sentences per 100 murders. *Id.*