ARTICLES

LETHAL REJECTION: AN EMPIRICAL ANALYSIS OF THE ASTONISHING PLUNGE IN DEATH SENTENCES IN THE UNITED STATES FROM THEIR POST-*FURMAN* PEAK

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Harris County, Texas—comprised of portions of the Houston metropolitan area—was once justifiably called the "epicenter" of the death penalty in the United States.[1] This status was cemented during the peak of the post-*Furman* era[2] of death sentencing in the

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The authors extend heartfelt thanks to the following persons for their extraordinary help: law professors Brandon Garrett (U. of Virginia), Jon Gould (American U.), Michael Heise (Cornell), and Gregory Sisk (U. of St. Thomas—Minneapolis); social science professors James Acker (SUNY-Albany), Amanda Geller (N.Y.U.) and Michael Radelet (Colorado), and independent statistician Kenneth D. Levin. Additionally, the authors are very grateful for assistance provided by Drake University Law School's professors of law librarianship Rebecca Lutkenhaus and Karen Wallace, administrative assistant Debra Booth, and student research assistant Kylie Crawford.

[1] Paul Duggan, *George W. Bush: The Record in Texas*, WASH. POST (May 12, 2000), https://www.washingtonpost.com/archive/politics/2000/05/12/george-w-bush-the-record-in-texas/d5285d54-4378-453a-8cd7-deab7798bb7a/?utm_term=.0a9fb1308518 ("Harris County . . . is the epicenter of the death penalty in Texas. . . . If Harris County had a death row, it would be bigger than the death rows in 29 states.").

[2] The case demarking the beginning of modern death penalty law in the United States is *Furman v. Georgia*. 408 U.S. 238 (1972) (per curiam); *see generally* DAVID M. OSHINSKY, CAPITAL PUNISHMENT ON TRIAL: *FURMAN V. GEORGIA* AND THE DEATH PENALTY IN MODERN AMERICA 54 (2010) ("Though the *Furman* decision had applied only to the three cases on the docket, it effectively halted capital punishment in the United States . . . finding the current practices to be in violation of the Eighth and Fourteenth Amendments."). In that case the Court rendered a holding that the Georgia system for imposing death sentences was so arbitrary as to constitute cruel and unusual punishment under the Eighth Amendment. *Furman*, 408 U.S. at 239–40; *see also id.* at 253 (Douglas, J., concurring) ("[W]e deal with a system of law and justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty."). Because other states' systems were constitutionally indistinguishable from Georgia's, the decision effectively forced states to either abolish the death penalty or rework their systems. *See* LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT § 6.01 (3d ed. 2012); OSHINSKY, *supra*, at 54. Most states chose to rework, which has caused the Court to generate a huge body of case law

early-to-mid 1990's.[3] In 1994 seventeen defendants were sentenced to death in Harris County.[4] Yet twenty years later in 2014 only four defendants were sentenced to death there.[5] This plunge is startling. But it is also almost exactly representative of the United States as a whole, where death sentences plunged from 310 in 1994 to 73 in 2014—an astonishing 76% decline.[6]

The popular media have posited a variety of reasons for this decline.[7] So have scholars. But existing scholarly analyses—while illuminating—are either without extensive empirical analysis,[8] or

regulating these new systems over the last forty-plus years. *See generally, e.g.*, CARTER ET AL., *supra*, § 6.01–6.07 (examining the revised death penalty statutes of several states and the Supreme Court's response to challenges of those statutes); OSHINSKY, *supra*, at 56–129 (exploring the aftermath of *Furman* and the states' attempts to create constitutional death penalty statutes).

[3] *See* TRACY L. SNELL, BUREAU OF JUST. STATS., PUB. NO. NCJ 248448, CAPITAL PUNISHMENT, 2013 — STATISTICAL TABLES 19 tbl.16 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/cp13st.pdf [hereinafter BJS 2013 CAPITAL PUNISHMENT REPORT]. This report shows that death sentences topped 300 four times since 1972: in 1986 (301), 1994 (311), 1995 (310), and 1996 (315). *Id.* Thus, 1994 was the year with the second-most death sentences, and was part of a trilogy of years (1994–1996) that represent the apex of death sentencing in the modern era.

[4] A complete spreadsheet [hereinafter Complete Spreadsheet] containing the data on which this article is based is on file with the authors. An abbreviated version of that spreadsheet [hereinafter Online Spreadsheet] is available at albanylawreview.org. We have abbreviated it both to make it more manageable for the reader, and because we want to preserve the dataset for future research endeavors. This data has not been independently verified by the members of the Albany Law Review. As to the particular cases referred to here, *see* Online Spreadsheet, *supra*, at ll. 88, 89, 93, 94, 96, 104, 111, 114, 115, 116, 118, 121, 122, 123, 126, 128, 131.

[5] *See id.* at ll. 1139, 1140, 1142, 1144.

[6] *See infra* Table 1; *infra* notes 27–32 and accompanying text (providing the basis for these numbers).

[7] *See, e.g.*, Matt Ford, *The Death Penalty Becomes Rare*, ATLANTIC (Apr. 21, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-death-penalty-becomes-unusual/390867/ (citing the cost of capital prosecutions); Jon Herskovitz, *U.S. Death Penalties, Executions Slow as Capital Punishment Is Squeezed*, REUTERS (Nov. 15, 2015), http://www.reuters.com/article/us-usa-execution-idUSKCN0T40OV20151115 (citing problems with execution protocols, the high costs of death penalty prosecutions, and the increased availability of the life-without-parole option); Stacy Teicher Khadaroo, *This Year, US Imposed Fewest Death Sentences in Four Decades*, CHRISTIAN SCI. MONITOR (Dec. 18, 2014), http://www.csmonitor.com/USA/Justice/2014/1218/This-year-US-imposed-fewest-death-sentences-in-four-decades (stating causes to include a "large drop in violent crime" and more states offering the life-without-parole sentencing option); Richard Wolf & Kevin Johnson, *Courts, States Put Death Penalty on Life Support*, USA TODAY, http://www.usatoday.com/story/news/nation/2015/09/14/death-penalty-execution-supreme-court-lethal-injection/32425015/ (last visited Sept. 21, 2017) (citing the emotional and financial tolls of prosecuting capital cases, the increased availability of the life-without-parole sentencing option, and continuing challenges to execution methods).

[8] *See, e.g.*, Richard C. Dieter, *The Future of the Death Penalty in the United States*, 49 U. RICH. L. REV. 921, 925 (2015) (proposing emergence of the innocence issue as the most likely cause, plus the emergence of life-without-parole, and the drop in the murder rate); Stephen F. Smith, *Has the "Machinery of Death" Become a Clunker?*, 49 U. RICH. L. REV. 845, 855, 860–61, 864–65 (2015) (suggesting high cost, low likelihood of success, long delays in effectuating

empirical analysis that is limited to certain jurisdictions or time periods,[9] or nationwide in scope, but without examination of the details of individual cases.[10] This article reports the results of an

executions, dropping murder rates, and problems with lethal injection protocols); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 212–13, 240 (2012) (mentioning extensive legal regulation, the rise of life-without-parole, and the cost and uncertainty of executions); Jordan M. Steiker, *Peculiar Times for a Peculiar Institution*, 48 TULSA L. REV. 357, 367, 369–71 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)) (suggesting possible candidates for factors causing decline including: decreasing enthusiasm by prosecutors, the surprisingly effective litigation concerning lethal injection protocols, the effects of exonerations, the rise of life-without-parole, and decreasing murder rates); Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1932–55 (2006) (examining juror sentencing decisions and suggesting that an accumulation of micro -level changes have had large effects including: (1) "tipping" just a couple of jurors in a significant number of cases toward an anti-death stance which can cause the jury to more often tilt in that direction; (2) professionalization of the capital defense bar; (3) more cautious prosecutors; and (4) elimination of the possibility of death for the "mentally retarded" and juveniles by U. S. Supreme Court mandate).

[9] *See, e.g.*, Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 664–65, 678–79, 728–29 (2017) (examining the twenty-one death penalty trials in Virginia from 2005 to 2015 and comparing them with twenty death penalty trials from 1996 to 2004, and concluding that criminal defense in the later era improved substantially due to provision of regional capital defense resources beginning in 2004); Greg Goelzhauser, *Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions*, 96 JUDICATURE 161, 162 (2013) (examining prosecutorial charging decisions in capital cases in over 300 prosecutorial districts nationwide in 2004 and 2005, and concluding that larger budgets are correlated with an increased likelihood of a prosecutor seeking the death penalty); David McCord, *What's Messing with Texas Death Sentences?*, 43 TEX. TECH L. REV. 601, 602–03 (2011) (analyzing statewide and county data in Texas from 1992 to 2009 to conclude that five factors contributed to the decline in death sentences during that time: (1) fewer capital murder convictions (modest effect), (2) advent of life-without-parole as mandatory alternative sentence (large effect), (3) exemption of "mentally retarded" and juveniles (modest effect), (4) less-populous county opt-out (large effect), and (5) Harris County plunge in death sentences (large effect)); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 229, 265–75 (2012) (examining certain death-sentence-producing counties and concluding that new models of representation like trial consulting offices have sometimes reduced new death sentences drastically); *New Report Finds Counties that Use Death Penalty the Most Are Plagued by Prosecutorial Misconduct, Bad Lawyers, and Racial Bias*, FAIR PUNISHMENT PROJECT (Aug. 23, 2016), http://fairpunishment.org/new-report-finds-counties-that-use-death-penalty-the-most-are-plagued-by-prosecutorial-misconduct-bad-lawyers-and-racial-bias/ (examining more than 200 direct appeals in eight high-volume death penalty counties between 2006 and 2015, and finding systemic problems in these outlier counties).

[10] *See, e.g., generally*, Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259 (2016) (creating a method to calculate the concentration of death sentences in counties, examining the high-concentration counties, and concluding that decisional pathways common to such counties lead to violation of the norm of punishing similarly blameworthy offenders equally); *see also* James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 329–31 (2011) ("Our analysis [of data at the county level] suggests a different reason [for the decline of capital punishment]: a rebellion of sorts by the majority of communities and citizens in capital states who rarely or never use the death penalty, but for years have been subsidizing its profligate use by the minority of jurisdictions that often impose it.").

empirical analysis that spans the whole country over a two-decade period at the level of individual case characteristics, in search of significant contributing factors in the decline of death sentences.

The article proceeds in three parts. Part I explains the methodology for unearthing relevant data and preparing it for analysis. Part II analyzes the decline in death sentences due to decreasing *death eligibility*, that is, fewer murderers over time who meet the criteria that made death a sentencing option. Four reasons will be examined: fewer death-eligible murders,[11] the United States Supreme Court's exemptions of juveniles who were less than eighteen years of age at the time of the commission of the murder[12] and persons with intellectual disability (known to the law as the "mentally retarded"),[13] and the abolition of the death penalty in several states.[14] Finally, Part III examines increasingly narrower perceptions of *death-worthiness*, that is, the evolution in attitudes among prosecutors and sentencers[15] toward deeming fewer among the many death-eligible defendants worthy of death sentences. This Part requires the most complicated analysis because unlike death-eligibility decisions, which are dictated by law,[16] death-worthiness

[11] *See infra* Section II.A.

[12] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding sentencing a juvenile to death constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments); *infra* Section II.B.

[13] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that sentencing a "mentally retarded" person to death constitutes cruel and unusual punishment under the Eighth Amendment); *infra* Section II.C. The Supreme Court doctrine and many lower court decisions continue to speak in terms of the exemption for "mentally retarded" persons even though that designation has been abandoned in larger society in favor of "intellectually disabled." *See, e.g.*, Change in Terminology: "Mental Retardation" to "Intellectual Disability," 78 Fed. Reg. 46,499 (Aug. 1, 2013) (explaining the Social Security Administration's change in certain federal regulations to replace "mentally retarded" with "intellectually disabled," effective Sept. 3, 2013). We will use the more current term.

[14] In order of abolition, New York, New Jersey, New Mexico, Illinois, Connecticut, and Maryland. *See States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Nov. 13, 2017). For a discussion of the effects of abolition in these states, *see infra* Section II.D.

[15] In most jurisdictions, in the three years we examined, the sentencing decision-maker was a jury, although occasionally a defendant waived jury sentencing in favor of being sentenced by a judge. In a few jurisdictions in some or all of the three years we examined the sentencing decision maker was a judge rather than a jury. Judge sentencing was permitted in all three of the years we studied under *Spaziano v. Florida*. 468 U.S. 447, 465 (1984). Currently, however, there is grave doubt whether judge sentencing is constitutional. *See* Hurst v. Florida, 136 S. Ct. 616, 624 (2016) (holding that a trial judge's re-finding an aggravating circumstance in support of a death sentence violates the defendant's Sixth Amendment right to a jury trial).

[16] That is, a defendant either meets the criteria to be eligible for a death sentence, or does not meet them. *See* David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence? —An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1, 3–4 (2009). Certainly sometimes a defendant's death-eligibility is contested, but the most common aggravating

decisions emerge from an opaque brew of many factors, including, but not limited to, resource differentials among jurisdictions,[17] prosecutorial attitudes,[18] the wishes of the murder victim's survivors,[19] defense counsel performance,[20] public opinion,[21] and sentencer reactions.[22] But while death-worthiness decisions are often opaque in individual cases, each case generates empirical data from which patterns may be discerned. Part III uses such data to analyze ten questions:

- Did the advent of life-without-parole ("LWOP") reduce death sentences in jurisdictions where it was added as an option?
- Did sentencers become more reluctant to return death sentences?
- Were death sentences decreasingly imposed in less aggravated cases and increasingly imposed in more aggravated cases?
- Did presentation of greater numbers of mitigating factors conduce to fewer death sentences?

circumstances are typically clear cut and not subject to multiple interpretations if there is evidence to support them. For the most common aggravators, *see* McCord, *supra*, at 32–33 (identifying the most common aggravating circumstances as murders committed during robbery, home burglary, kidnapping and rape; multiple murders; prior record of violent crimes; victim twelve years of age or younger; to conceal a crime by eliminating a witness; murder-for-hire; for pecuniary gain other than robbery; and police officer/correctional officer/other government servant victim).

[17] *See* David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 203 n.127 (1986); Goelzhauser, *supra* note 9, at 161, 168.

[18] *See, e.g.*, Sundby, *supra* note 8, at 1950 (stating that a professionalized capital defense bar affects a prosecutor's decision to seek the death penalty as it makes the prosecutor's task more difficult). One can postulate an interrelated combination of reasons that may have caused prosecutors to become increasingly unwilling to seek death sentences, including: taking advantage of the viable political cover provided by LWOP, the increasing effectiveness of the capital defense bar making death sentences less likely, the mounting cost of prosecuting capital cases, the perception that sentencers are becoming increasingly difficult to convince to return death sentences, frustration over delays caused by the seemingly endless appellate process (especially the possibility of a sentence reversal with the prospect of a resentencing proceeding years after the original trial), and lack of certainty as to the sentence ever being carried out due to continuing litigation over execution protocols. *See also supra* notes 7–8 and accompanying text (discussing of many of these factors).

[19] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (upholding the constitutionality of victim impact evidence during sentencing for capital punishment cases).

[20] *See* Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 TEMP. POL. & CIV. RTS. L. REV. 389, 411–12 (2010).

[21] *See generally* Francis T. Cullen et al., *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 57–58 (2000) (noting that the American public favors harsher punishments for violent offenders including capital punishment).

[22] *See, e.g.*, David McCord, *The Perplexities of Penalty-Phase-Only Retrials*, 2 OHIO ST. J. CRIM. L. 215, 247 (2004).

- Did robbery during a murder became a less powerful aggravator?
- Did 18- to 20-year-olds benefit from a ripple effect from the exemption of juveniles?
- Did death sentences become less common in multiple perpetrator cases?
- Did low population counties increasingly drop out of death sentencing?
- Did low revenue counties increasingly drop out of death sentencing? and
- Did a few traditionally high-volume death sentencing counties skew the figures by cutting back on the use of the death penalty due to local political factors?

I. METHODOLOGY

We did not have the resources to gather and analyze data from every year in the post-*Furman* era. Instead, we decided to focus on three particular years: 1994, 2004, and 2014—a monumental enough undertaking in itself. We chose 1994 as the starting point because it was one of the peak death sentencing years in the post-*Furman* era,[23] and because 1994 enabled us to leap two decades ahead to the most recent year for which data were available when we began the project—2014. Then 2004 became the midpoint for sampling what happened between 1994 and 2014. The data collection for those three years proceeded in four steps.

Thorough analysis required inclusion of all of the death-sentenced cases, and a robust control group death-eligible cases in which defendants did not receive death sentences. Thus, **step one** was to

[23] *See* BJS 2013 CAPITAL PUNISHMENT REPORT, *supra* note 3. The exact number of death sentences in particular years is more slippery to pin down than one would expect. The most recognized source for these numbers are the occasional Capital Punishment Reports of the Bureau of Justice Statistics ("BJS"). *See About the Bureau of Justice Statistics*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=abu (last visited Nov. 13, 2017). These reports are not without their difficulties, however, particularly: (1) the numbers change slightly from Report to Report, presumably because BJS retroactively learns more information that causes it to change a case to a different year, or delete it entirely. *Compare, e.g.*, BJS 2013 CAPITAL PUNISHMENT REPORT, *supra* note 3 (noting 311 prisoners were sentenced to death in 1994), *with* TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ 245789, CAPITAL PUNISHMENT, 2012 — STATISTICAL TABLES 19 tbl.16 (Nov. 2014), http://www.bjs.gov/content/pub/pdf/cp12st.pdf [hereinafter BJS 2012 CAPITAL PUNISHMENT REPORT] (noting 315 prisoners were sentenced to death in 1994). Further, (2) the names of the defendants are never listed so it is impossible to confirm that the BJS figures are accurate. *See, e.g.*, BJS 2013 CAPITAL PUNISHMENT REPORT, *supra* note 3 *passim*. Indeed, Professor McCord once filed a Freedom of Information Act request for a list of the names, which was rejected by BJS.

find as many death-eligible cases as possible. A case was considered death-eligible if any of nineteen statutory aggravating circumstances that typically render a murder death-eligible were present: multiple murders; murders during robbery, rape, kidnapping, home burglary, or arson; to escape incarceration; for financial motive other than robbery; to eliminate or retaliate against a witness; for an anti-government or terroristic motive; hate crime; prior murder conviction; prior violent felonies; committing the murder while incarcerated; victim twelve years of age or younger; victim seventy years of age or older; victim a government servant (usually a police officer); torture; and hiring a killer/acting as a hired killer.[24]

We created three designations: *Death-Sentenced* ("DS"), *Sentencer-Spared* ("SS") (the sentencer was presented with the option of death but chose a lesser sentence),[25] and *Prosecutor-Spared* ("PS") (the prosecutor did not pursue a death sentence through the sentencing phase, and thus a lesser sentence was imposed).[26] DS cases were relatively easier to find by comparing the lists from succeeding quarterly Death Row USA reports[27] name-by-name—over 3,000 names for each quarter.[28] For SS and PS cases no equivalent lists existed, so these cases were identified through news database searches.[29] The only way not to exclude relevant cases was to use the very broad search term "death /s sentence or penalty." This returned tens of thousands of articles for each year, only a small proportion of which were relevant.

The final tally of 1665 death-eligible cases, comprised of 517 DS cases, 311 SS cases, and 837 PS cases, is shown in Table 1, below. In

[24] *See* McCord, *supra* note 16, at 11–15 (identifying statutory common aggravating circumstances); *cf.* Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1817–18 (2006) (coding death-eligibility based on multiple murder; murders during robbery, rape, kidnapping, burglary, or arson; murder victim six years of age or younger; murders committed while incarcerated; sniper killings; gangland killings; and killings in the course of drug business).

[25] Most of the SS cases came from the sentencer deciding against a death sentence after a penalty phase. In a few SS cases, the case did not proceed to the penalty phase because the defendant was found guilty only of a non-death-eligible homicide crime.

[26] Most PS cases were the result of a plea bargain to a lesser sentence—usually LWOP. A few PS cases resulted from the prosecutor having announced before trial that a death sentence would not be sought.

[27] *See Death Row USA*, NAACP LEGAL DEF. & EDUC. FUND, http://www.naacpldf.org/death-row-usa (last visited Nov 13, 2017) (publishing quarterly Death Row USA reports).

[28] Death Row USA is not infallible though, especially back in 1994 when the defendants were not listed in alphabetical order in each jurisdiction, but rather in order of sentence imposition in each jurisdiction, and then at least partially rearranged in succeeding quarters—we occasionally found death sentences via news database searches that were not listed in Death Row USA for 1994.

[29] Mostly in the WestLaw USNEWS database.

summary then, the database includes every DS case[30] from the three years along with very robust comparison sets of SS and PS cases—indeed, the SS and PS cases outnumber the DS cases 1148 to 517.[31]

Table 1: Cases Categorized by Disposition

	Death sentences[32]	**Sentencer-spared**	**Prosecutor-spared**	**Total for each year**
1994	310	158	290	*758*
2004	134	113	296	*543*
2014	73	40	251	*364*
Total for each type of case	*517*	*311*	*837*	**Grand total: 1665**

This Table and Tables 2 through 14 throughout the remainder of the article are all available in graph form and in color in the Online Table-to-Graph Appendix.[33]

Step two was to find as many details as possible about each case. The two primary sources were online news databases for all three

[30] By "every" we mean every case we could find using every source available to us, which falls just short of the figures for 1994 and 2004 suggested by BJS. *See* BJS 2013 CAPITAL PUNISHMENT REPORT, *supra* note 3, at 19 tbl.16. We have no reason to believe the BJS figures are more likely to be correct than our own. A case is counted within the year if the sentence was imposed in that year.

[31] *See infra* Table 1. Despite the strengths of our dataset, we certainly recognize that it falls short of perfection in at least five respects. First, while we found all of the DS cases from each of the three years, we do not know what proportion of the SS and DS cases we found because there is no other source against which we can check our figures. Second, coverage gaps may exist as to the SS and PS cases because the news sources in the USNEWS database may not have covered every geographical area from which death-eligible cases could have arisen. Third, we did not examine the court files for the 1,665 cases in the database, which would have required a huge team of researchers and an enormous budget. Thus, we undoubtedly missed some relevant facts. Fourth, we found varying amounts of information depending on how many appellate reports and news articles were available about each case. This means we often found more information about DS cases than about SS and PS cases because of the availability of appellate opinions regarding many of the DS cases. And fifth, as to news reports, we were limited to what the reporters thought was newsworthy about the cases, which we suspect was sometimes biased toward mention of aggravating factors more than mitigating factors.

[32] Comparing with the BJS 2013 Capital Punishment Report, our research found one less death sentence in 1994 (310 versus 311), and four fewer in 2004 (134 versus 138). *See* BJS 2013 CAPITAL PUNISHMENT REP., *supra* note 3, at 19 tbl.16. BJS has not yet promulgated a figure for 2014 with which to compare our figure of 73, but that number does correspond with the figure reported by the Death Penalty Information Center. *See 2014 Sentencing*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/2014-sentencing (last visited Nov. 14, 2017).

[33] The chart is available at albanylawreview.org.

years[34] and appellate opinions for 1994 and 2004 DS cases.[35] Appellate opinions did not yet exist for 2014 DS cases, so in addition to news reports, we ascertained as many names as we could of the prosecutors and defense lawyers in each case, and sent each of them a letter inquiring about the facts of their cases. We received a fair number of replies.[36]

Step three was to code each case for scores of variables, including factors relating to where the case was litigated (state or federal court, and if in state court, in which county, the county's population as of the most applicable census,[37] and the county's revenue for the applicable year[38]), age of the defendant, sixty-six aggravating factors,[39] and twenty-two mitigating factors.[40] Then we input the coded variables into a Statistical Package for the Social Sciences ("SPSS") spreadsheet.[41]

Finally, **step four** was to analyze that data. That analysis is set forth in the remainder of this article. Much of the analysis is presented in the form of counting and percentages, which are

[34] Again, primarily in the WestLaw USNEWS database, although when we noticed a particular locality that was not covered by that database, we undertook other methods to try to find the cases. For example, when the news database no longer made available to us certain key newspapers, like the *Philadelphia Inquirer* and *Miami Herald*, we used databases specific to those newspapers. Google searches were also helpful sometimes.

[35] Although as to California, the appellate process works so slowly that, even by 2014, there were very few appellate opinions from the 2004 death sentences.

[36] On file with the authors.

[37] For 1994, the 1990 census; for 2004 the 2000 census; and for 2014 the 2010 census. *See USA Counties Data File Downloads*, U.S. CENSUS BUREAU, https://www.census.gov/support/USACdataDownloads.html#POP (last visited Nov. 14, 2017) (scroll to "Population—Total and Selected Characteristics", then click the file "POP01.xls." Data for the 1990 Census (revised figures) is found on the POP01B tab in the H Column with the heading POP020190D. Data for the 2000 Census is found on the POP01A tab in the AF column with the heading POP010200D. Data for the 2010 Census is found on the POP01A tab in the AJ column with the heading POP010210D). For further explanation of the data structure of this Excel sheet, *see USA Counties Data File Information*, U.S. CENSUS BUREAU, https://www.census.gov/support/USACdataInfo.html (last visited Nov. 14, 2017).

[38] County revenue figures are compiled and reported every ten years in years ending in 2 in the Census of Governments. Thus, the most recent for each of the years being studied were, respectively, 1992, 2002, and 2012. For 1992 figures, *see* 4 BUREAU OF THE CENSUS, 1992 CENSUS OF GOV'TS, NO. 3, FINANCES OF COUNTY GOVERNMENTS, at 123 tbl.13 (1997), https://www.census.gov/prod/2/gov/gc92-4/gc924-3.pdf (see column "Revenue, Total"); for 2002 figures, *see* 4 U.S. CENSUS BUREAU, 2002 CENSUS OF GOV'TS, NO. 3, FINANCES OF COUNTY GOVERNMENTS: 2002, at 135 tbl.13 (2005), https://www.census.gov/prod/2005pubs/gc02x43.pdf (column "Revenue, Total"); and for 2012 figures *see* County Revenue Data for 2012, U.S. CENSUS BUREAU, http://www2.census.gov/pub/outgoing/govs/special60/ (last updated Aug. 14, 2017) (download "_IndFin_1967-2012.zip"; then see "IndFin12a.Txt").

[39] *See infra* Appendix 1.

[40] *See infra* Appendix 1.

[41] *See* Complete Spreadsheet, *supra* note 4.

techniques of descriptive statistics.[42]

II. DECREASES TO DEATH-ELIGIBILITY

A. Decrease in Death-Eligible Murders

The starting point for examining the decrease in death-eligible murders is the FBI's Uniform Crime Reports.[43] These Reports list the number of "Murders and non-negligent manslaughters" ("murders") in each state for each year.[44] In the thirty-seven states that had the death penalty in 1994[45] there were 19,250 murders in 1994,[46] which declined dramatically to 13,800 in 2004,[47] and further but less dramatically to 12,440 in 2014.[48] These figures include the

[42] *See Descriptive and Inferential Statistics*, LAIRD STATS., https://statistics.laerd.com/statistical-guides/descriptive-inferential-statistics.php (last visited Nov. 14, 2017).

> Descriptive statistics is the term given to the analysis of data that helps describe, show or summarize data in a meaningful way such that, for example, patterns might emerge from the data. Descriptive statistics do not, however, allow us to make conclusions beyond the data we have analysed or reach conclusions regarding any hypotheses we might have made. They are simply a way to describe our data. . . . When we use descriptive statistics it is useful to summarize our group of data using a combination of tabulated description (i.e., tables), graphical description (i.e., graphs and charts) and statistical commentary (i.e., a discussion of the results).

Id.

[43] *See UCR Publications*, FBI, https://www.fbi.gov/about-us/cjis/ucr/ucr-publications (last visited Nov. 14, 2017) (providing Uniform Crime Reports for 2002–2004 and 2012–2014). The Reports for 1992–1994 are only available in hard copy, but are available from libraries that are government repositories, such as the Opperman Law Library at Drake University Law School. *See List of Participating Repositories: Fiscal Years 1959–Present*, NAT'L UNION CATALOG MANUSCRIPT COLLECTIONS (May 7, 2015), https://www.loc.gov/coll/nucmc/repositorieslist.html (providing a list of repositories for each state).

[44] *See, e.g.*, *Table 5: Crime in the United States by State*, *2014*, FBI: CRIME IN THE UNITED STATES 2014, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-5 (last visited Nov. 14, 2017) [hereinafter UCR 2014 Table 5].

[45] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *See* JAMES J. STEPHAN & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ 158023, CAPITAL PUNISHMENT 1994, at 3–4 tbl.1 (Feb. 1996), http://www.bjs.gov/content/pub/pdf/cp94.pdf (listing the states that had the death penalty in 1994 and the death-eligible crimes in each respective state).

[46] *See infra* Table 2.

[47] *See infra* Table 2.

[48] *See infra* Table 2. Two notes are in order regarding these figures. First, believing it would be somewhat misleading to base the calculations solely on the number of murders in the particular year at issue inasmuch as most of the murders that could have resulted in death sentences in that year were committed in prior years—most commonly in the two years prior—we averaged the number of murders in the year at issue with the number of murders in the two prior years. For example, the three-year average figure for 2014 is 12,440, while the figure for 2014 alone is 12,328. *Compare Table 5: Crime in the United States by State*, *2013*, FBI: CRIME

six jurisdictions that abolished the death penalty after 2003,[49] but those effects will be subtracted shortly.[50]

There is no listing of non-death sentences in death-eligible cases for any year. The figures for *all* murders, however, would be useful to calculate the likely number of *death-eligible* murders if the relative proportion of death-eligible murders could be ascertained for the three years at issue. Fortunately, a remarkable empirical study gives good reason to believe that the proportion of murders that are death-eligible remains virtually constant over time. Fagan, Zimring, and Geller conducted a massive and painstakingly detailed study of over 490,000 murders in the United States from 1976 to 2003 in both death penalty and non-death penalty states.[51] They concluded:

> The pattern of capital-eligible homicides [in the nondeath penalty states] fluctuates over time in a manner similar to the death penalty states. . . . *[T]here is little variation in the rates of capital-eligible homicides over time* [and] the shape of the temporal trends in capital-eligible homicides in death penalty states and nondeath penalty states is nearly identical.[52]

Since death-eligible cases remained a constant proportion of murders, they decreased proportionately along with the overall

IN THE UNITED STATES 2013, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/5tabledatadecpdf/table_5_crime_in_the_united_states_by_state_2013.xls (last visited Nov. 14, 2017) (reporting the figure for 2013), *and Table 5: Crime in the United States by State, 2012*, FBI: CRIME IN THE UNITED STATES 2012, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/5tabledatadecpdf (last visited Nov. 14, 2017) (reporting the figure for 2013), *with* UCR 2014 Table 5, *supra* note 44 (reporting the figure for 2014). Ultimately this made little difference in the calculations since the number of murders nationwide did not vary significantly from year-to-year, although it did trend significantly downward over time. *See Table 1: Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1995–2014*, FBI: CRIME IN THE UNITED STATES 2014, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1 (last visited Nov. 14, 2017) [hereinafter UCR 2014 Table 1]. Second, two death penalty jurisdictions—the federal government and the military—did not account for any homicides on their own since any such homicides are included within the state figures.

[49] *See States with and Without the Death Penalty*, *supra* note 14.

[50] *See infra* Section II.D.

[51] *See* Fagan et al., *supra* note 24, at 1816.

[52] *Id.* at 1826–27 (emphasis added). It is interesting to note that this seems to be the case no matter what proportion of murders turn out to be death-eligible under varying state statutory schemes. For instance, in some states the aggravating circumstances are so encompassing that a very high proportion of murders are death-eligible. *See e.g.*, Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1091–93, 1109–10 (2013) (finding that 90.4% of Colorado murder cases were death-eligible over a twelve-year period, and reviewing prior empirical studies finding 86% of murders in Georgia during a five-year period were death-eligible, and that 84% of murders in California were death-eligible during a five-year period; but by contrast, a study in New Jersey over an eighteen-year period found only 21% of murders were death-eligible, and a study in Maryland over a twenty-one-year period likewise found 21% of murders death-eligible).

decrease in murders.[53] Thus, it is possible to calculate how many death sentences there would likely have been in 2004 and 2014 if the same death-sentencing rate had prevailed as in 1994,[54] and nothing else had changed.[55] Note that even though precise numbers will be used below, they are meant to represent estimates.

In 1994, based on 310 death sentences among 19,250 murders,[56] the death-sentencing rate was .016. If that rate had continued, the 13,800 murders in 2004 would have resulted in about 221 death sentences—a decrease of about eighty-nine from 1994; and the 12,440 murders in 2014 would have resulted in about 199 death sentences—a decrease of 111 from 1994. Thus, the decrease in the number of death-eligible murders was a very substantial factor in the decline in death sentences;[57] indeed, clearly the most substantial of any factor examined in this article.

But by the same token, the decrease in murders does not account for the entire decline in death sentences: rather than 221 death sentences in 2004 there were only 134[58]—leaving an additional decline of about eighty-seven to be accounted for by other explanations; and rather than 199 death sentences in 2014 there were only seventy-three,[59] leaving about 126 to be accounted for by other explanations. All of this can be summarized as follows:

[53] *See* Fagan et al., *supra* note 24, at 1827; UCR 2014 Table 1, *supra* note 48.

[54] We will report our results by using 1994 as a baseline for comparison; that is, we will compare 2004 with 1994, and 2014 with 1994, but will not explicitly compare 2014 with 2004 because that would unnecessarily complicate matters.

[55] Of course, many other things *did* change, as will be explored elsewhere in the article.

[56] *See infra* Table 2.

[57] *See infra* Table 2.

[58] *See infra* Table 2.

[59] *See infra* Table 2.

Table 2: Decreases in Murders and Estimated Corresponding Effects

	# of murders in the 37 death penalty jurisdictions	**# of death sentences**	**Projected # of death sentences if 1994 rate of .016 had continued**	**Estimated decrease in # of death sentences due to decreased # of murders**	**Estimated add'l decrease in # of death sentences *not* due to decreased # of murders**
1994	19,250	310			
2004	13,800	134	221	89	87
2014	12,440	73	199	111	126

B. The Effect of the Exemption of Juveniles[60]

The decline in death sentences for juveniles in 1994 compared with 2004 is a matter of death-*worthiness* since juveniles were still death-eligible in 2004.[61] By contrast, the decline in comparing 1994 to 2014 is a matter of death-*eligibility* because by 2014 juveniles were no longer death-eligible.[62] Nonetheless, it makes sense to consider these two time intervals together.

Based on Table 3, below, if the rate of capital homicides committed by juveniles remained constant[63] and applying the 1994 juvenile

[60] "Juveniles" for purposes of death-eligibility are defendants who committed the murder before their eighteenth birthday. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

[61] *See id.* (holding, in 2005, that capital punishment is unconstitutional as applied to juvenile offenders).

[62] *See id.*

[63] In fact, the rate of capital homicides by juveniles may well have declined because the rate of murders by juveniles probably declined more steeply than the murder rate as a whole. The nationwide murder figure for 1994 is 23,305. *See* FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1994 13 (1995). For 2004, the number was 16,137. *See* FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2004 15 (2005), https://www2.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf. Finally, for 2014 is 14,249. UCR 2014 Table 1, *supra* note 48.

The FBI's Supplementary Homicide Reports cite figures of 2,800 murders by juveniles nationwide in 1994, 978 in 2004, and 782 in 2014 (the 2014 number combines the age brackets of ages 0 to 11 and 12 to 17, whereas the 1994 and 2004 numbers cited here only reflect ages 12 to 17). C. Puzzanchera et al., *Year of Incident by Age of Offender for United States*, *Easy*

death sentence rate of .00094[64] to the 13,800 murders in 2004,[65] one might have predicted about thirteen juvenile death sentences in 2004, of which only two were imposed[66]—thus a decline of eleven due to prosecutorial or sentencer decisions not to impose death sentences on juveniles. But the SS and PS columns show a broader trend: prosecutors had almost completely opted out of seeking death sentences for juveniles even before the Supreme Court's exemption in 2005. Given the small number of juvenile defendant capital cases in 2004—only nine—it is probable that in many juvenile cases prosecutors did not even bring capital charges, but rather some lesser homicide charge that did not register "hits" with the database search terms we used. Thus, it appears that juveniles had been almost totally exempted *de facto* from death-eligibility before the Supreme Court exempted them *de jure*. Indeed, there would likely have been *zero* juvenile death sentences in 2014 even without the Supreme Court exemption because the progression from 1994 to 2004 to 2014 is eighteen to two to very likely zero.

Access to the FBI's Supplementary Homicide Reports: 1980-2015, OFF. JUV. JUST. & DELINQ. PROGRAMS, https://www.ojjdp.gov/ojstatbb/ezashr/asp/off_display.asp (last updated June 1, 2017). Thus, while the national murder rate fell by 30.7% from 1994 to 2004, and by 11.7% from 2004 to 2014, the number of murders by juveniles fell by 65% from 1994 to 2004, and by 20% from 2004 to 2014. But the murders-by-juveniles figures themselves are problematic for our purposes in two ways. First, the numbers are not broken down between death penalty and non-death penalty jurisdictions; second, the category of juvenile murderers in the Supplementary Homicide Reports is ages 12 to 17, while the age range that matters for our analysis is only 16- to 17-year olds inasmuch as juveniles under age sixteen were already exempt from death sentences before 2005. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (banning death sentences for murderers who were less than age sixteen at the time of the murder). With these difficulties, the game of attempting to estimate the hypothetical number of death sentences that would have been imposed if prosecutors and sentencers had not viewed juveniles as less death-worthy, based on a projected lower number of murders by juveniles, hardly seems worth the candle.

[64] That is, eighteen juvenile DS out of 19,250 murders. *See supra* Table 2; *infra* Table 3.

[65] *See supra* Table 2.

[66] *See infra* Table 3.

Table 3: Juvenile Death-Eligible Cases

	Death Sentences	**Sentencer spared**	**Prosecutor spared**	**TOTAL cases with juvenile defendants**
1994	18[67]	12	37	67
2004	2[68]	2	5	9
2014	n/a	n/a	n/a	n/a

C. The Effect of the Exemption of Intellectually Disabled Persons

The United States Supreme Court exempted the intellectually disabled from death sentences in 2002.[69] But unlike bright-line juvenile status, whether a defendant is intellectually disabled is based on fuzzy criteria,[70] and is often hotly-contested.[71] Accordingly, there are no definitive figures regarding how many intellectually disabled persons were sentenced to death in 1994, a figure that is needed to be able to estimate how many fewer death sentences there were in 2004 and 2014 due to the exemption. Nonetheless, an outstanding empirical piece by Blume, Johnson, and Seeds allows for a good estimate:

> There are more than three thousand death row inmates. We found 234 cases [from 2002 to 2008] adjudicating the substance of *Atkins* [mental retardation] claims, which implies that about seven percent of all death row inmates have filed *Atkins* claims. . . . Nearly forty percent of all defendants who allege mental retardation have, in fact,

[67] *See* Online Spreadsheet, *supra* note 4, at ll. 19, 22, 68, 105, 112, 116, 124, 131, 280, 314, 368, 388, 394, 396, 400, 406, 426, 428; *cf.* Lynn Cothern, *Juveniles and the Death Penalty*, COORDINATING COUNCIL ON JUV. & DELINQ. PREVENTION (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.) Nov. 2000, at 5 tbl.2 (2000), https://www.ncjrs.gov/pdffiles1/ojjdp/184748.pdf (listing 17 juvenile death sentences in 1994).

[68] *See* Online Spreadsheet, *supra* note 4, at ll. 237, 242.

[69] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[70] The Court defined "mental retardation" as:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Id. at 308 n.3 (citation omitted).

[71] *See, e.g.*, Bill Mears, *Justices Divided over Death Penalty and Intellectual Disability*, CNN, http://www.cnn.com/2014/03/03/us/supreme-court-disability/index.html (last updated Mar. 3, 2014).

proved it.[72]

Applying these percentages to the 310 death sentences from 1994, if 7% of those defendants had plausible, litigable intellectual disability claims, that would be about twenty-two defendants; and if about 40% of those twenty-two defendants with plausible intellectual disability claims would have prevailed, that would mean a total of about nine would have been spared. Then, given the smaller number of death-eligible murders in 2004 and 2014, using the 1994 rate of death sentences for the intellectually disabled (.00047 based on about nine death sentences out of 19,250 murders), and assuming that the proportion of intellectually disabled murderers remained constant,[73] then but for the Supreme Court exemption, there would probably have been about seven intellectually disabled defendants who would have been sentenced to death in 2004 based on 13,800 murders, and about six in 2014 based on 12,440 murders.[74]

D. The Effect of Abolition of the Death Penalty in Several States

Between 2004 and 2013, the death penalty, or at least its prospective application, was repealed in six states.[75] In five states this was by legislative action—New Jersey (2007),[76] New Mexico (2009),[77] Illinois (2011),[78] Connecticut (2012),[79] and Maryland (2013),[80] while in New York it was by judicial pronouncement of the death penalty statute as partially constitutionally defective[81] followed by legislative inaction to attempt to correct the defect—New

[72] John H. Blume et al., *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 628 (2009).

[73] We are not aware of any data indicating that the proportion of murders committed by intellectually disabled persons varied over time.

[74] As with juvenile death sentences, it is perhaps also true that death sentences for intellectually disabled persons might also have approached or reached zero by 2014 even without the Supreme Court exemption.

[75] *See States with and Without the Death Penalty*, *supra* note 14.

[76] *See New Jersey*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/new-jersey-1 (last visited Nov. 15, 2017).

[77] *See New Mexico*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/new-mexico-1 (last visited Nov. 15, 2017).

[78] *See Illinois*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/illinois-1 (last visited Nov. 15, 2017).

[79] *See Connecticut*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/connecticut-1 (last visited Nov. 15, 2017).

[80] *Maryland*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/maryland-1 (last visited Nov. 15, 2017).

[81] *See* People v. LaValle, 817 N.E.2d 341, 359 (N.Y. 2004) (holding that statutorily-mandated deadlock instruction at the penalty phase violated the state constitution).

York (2004–present).[82] As shown in Table 4, below, these repeals had little effect in reducing death sentences in 2014 because only Illinois had been active in imposing death sentences in the prior two decades,[83] and even that state had dramatically decreased by 2004—seven years before the repeal there.[84] So without abolition in these states, one still would not have expected more than about three death sentences among them in 2014—perhaps a couple in Illinois and maybe one from one of the other states.

Table 4: Death Sentences in Abolition Jurisdictions

	DS 1994	**DS 2004**	**DS 2014**
New Jersey	0	1[85]	n/a
New Mexico	1[86]	0	n/a
Illinois	9[87]	3[88]	n/a
Connecticut	0	1[89]	n/a
Maryland	0	1[90]	n/a
New York	0	0	n/a

E. Summary of the Likely Changes Due to Decreases in Death-Eligibility:

As summarized in Table 5, below, an estimated 55% of the decline in death sentences comparing 2004 to 1994 was due to decreases in death-eligibility; and an estimated 51% of the decline in death sentences comparing 2014 with 1994 was due to decreases in death-eligibility.

[82] *See New York*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/new-york-1 (last visited Sept. 22, 2017).
[83] *See infra* Table 4.
[84] *See Illinois*, *supra* note 78; *infra* Table 4.
[85] *See* Online Spreadsheet, *supra* note 4, at l. 214.
[86] *Id.* at l. 1.
[87] *Id.* at ll. 354–62.
[88] *Id.* at ll. 194–96.
[89] *Id.* at l. 178.
[90] *Id.* at l. 206.

Table 5: Summary of Estimated Portion of the Decline Due to Decreased Death-Eligibility

	Estimated decreased # of death sentences from 1994 to 2004 due to decreases in death-eligibility	**Estimated decreased # of death sentences from 1994 to 2014 due to decreases in death-eligibility**
Fewer death-eligible murders	89[91]	111[92]
Juvenile exemption	n/a	0—no DS even w/o exemption[93]
Intellectual disability exemption	7[94]	6[95]
Abolition in six states	n/a	3[96]
Total	96	120

III. DECREASES DUE TO CHANGING PERCEPTIONS OF DEATH-WORTHINESS

A. Did Prosecutorial and/or Sentencer Willingness to Impose Death Sentences Decrease After LWOP Became an Available Alternative Sentence in Several States?

From 1994 to 2009, eleven states adopted LWOP as an alternative to death in lieu of, or in addition to, a pre-existing sentencing alternative that allowed the defendant the opportunity for parole.[97]

[91] *See supra* Part II.A.
[92] *See supra* Part II.A.
[93] *See supra* Part II.B.
[94] *See supra* Part II.C.
[95] *See supra* Part II.C.
[96] *See supra* Part II.D.
[97] Some states added LWOP as an option, in which case there were three sentencing options: death, LWOP, and life with possibility of parole. Other states replaced their parole option with LWOP. This difference does not matter for our purposes. In order by year, and alphabetically within each year, the states that adopted LWOP as an option were: Florida, Act of May 25, 1994, ch. 94-228, § 1, 1994 Fla. Laws 1576, 1577 (codified as amended at FLA. STAT. § 775.082(1)(a) (2017)) (becoming effective May 25, 1994—prior option was "hard 25," i.e., life with possibility of parole in 25 years); Mississippi, Act of Apr. 7, 1994, ch. 566, § 3, 1994 Miss. Laws 847, 851 (codified as amended at MISS. CODE ANN. § 97-3-21 (2017)) (becoming effective July 1, 1994—prior option was life with possibility of parole); North Carolina, Act of Mar. 23,

Some commentators assert that the availability of LWOP gave prosecutors "political cover" allowing more leeway to plea bargain cases and "sell" the result in a way that would be palatable to the public—there was no chance that the defendant would ever again be out on the streets.[98] Similarly, the "*never* get out" argument may have helped capital defense lawyers convince sentencers to spare defendants from death sentences.[99]

The effects of the enactment of LWOP can be examined via the Bureau of Justice Statistics ("BJS") annual Capital Punishment Reports.[100] These Reports list the number of death sentences in each state for each year. Table 6, below, shows the eleven states that enacted an LWOP alternative, along with the year of enactment, plus the number of death sentences in the two years before the enactment,

1994, ch. 21, § 5, 1994 N.C. Sess. Laws 59, 60 (codified at N.C. GEN. STAT. § 15A-2002 (2017)) (becoming effective Jan. 1, 1995—prior option was "hard 25"); Virginia, Act of Oct. 13, 1994, Spec. Sess. II, ch. 2, 1994 Va. Acts 18, 30 (codified as amended at VA. CODE ANN. § 53.1-165.1 (2017)) (becoming effective Jan. 1, 1995—prior options were complicated, but "hard 25" was the baseline rule); Nebraska, Act of June 13, 1995, Legis. B. No. 371, § 21, 1995 Neb. Laws 563, 572 (codified as amended at NEB. REV. STAT. § 83-1,110 (2017)) (The situation here is complicated. In 2014, the Nebraska Supreme Court decided that when the legislature changed the sentencing option to "life imprisonment" in 1995, that meant LWOP. State v. Castaneda, 842 N.W.2d 740, 757–58 (Neb. 2014). Whether the Nebraska trial courts had been interpreting the statute that way from 1995 to 2014 is unclear to us. In any event, the death penalty numbers are so small in Nebraska as to make this inquiry moot as to the larger picture); Ohio, Act of Aug. 10, 1995, Amend. Sub. S.B. No. 2, 1995 Ohio Laws 7136, 7453–57 (codified as amended at OHIO REV. CODE ANN. § 2929.03 (West 2017)) (becoming effective July 1, 1996—prior option was "hard 20"); South Carolina, Act of June 7, 1995, Act No. 83, § 10, 1995 S.C. Acts 545, 557–61 (codified as amended at S.C. CODE ANN. § 16-3-20 (2017)) (becoming effective Jan. 1, 1996—prior option was "hard 30"); Kentucky, Act of Apr. 14, 1998, ch. 606, sec. 72, § (3), 1998 Ky. Acts 3598, 3638 (codified as amended at KY. REV. STAT. ANN. § 532.025(3) (West 2017)) (becoming effective July 15, 1998—prior option was "hard 25"); New Jersey, Act of June 18, 2002, ch. 26, § 10, 2002 N.J. Laws 105, 117 (codified as amended at N.J. STAT. ANN. § 2C:11-3(b)(4) (West 2017)) (becoming effective June 18, 2002—prior option was "hard 30"); Texas, Act of June 17, 2005, ch. 787, §§ 1, 6, 2005 Tex. Gen. Laws 2705, 2705, 2706 (codified as amended at TEX. PENAL CODE ANN. § 12.31 (West 2017); TEX. CODE CRIM. PROC. ANN. § 37.071 (West 2017)) (becoming effective September 1, 2005—prior option was "hard 40"); New Mexico, Act of Mar. 18, 2009, ch. 11, § 3, 2009 N.M. Laws 133, 135 (codified at N.M. STAT. ANN. § 31-20A-2 (2017)) (becoming effective July 1, 2009—prior option "hard 30").

[98] *See, e.g.*, Steiker & Steiker, *supra* note 8, at 234–35 ("LWOP provides substantial cover to prosecutors who forego capital sentences, as it ameliorates concerns about recidivism from the pro-death-penalty side."); Herskovitz, *supra* note 7; Khadaroo, *supra* note 7; Wolf & Johnson, *supra* note 7.

[99] *See, e.g.*, Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1844, 1845 (2006) ("The slim sociological evidence available suggests that the life-without-parole option does induce juries to avoid imposing the death penalty. . . . [P]rosecutors seeking the death penalty have a strong incentive to imply that defendants will be back out on the street, and thus to oppose life-without-parole statutes, while capital defense lawyers have just the opposite goal.").

[100] These reports are available online. *See Publications & Products: Capital Punishment*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=pbse&sid=1 (last visited Nov. 17, 2017).

the year of enactment, and the two years after enactment. In Nebraska, New Jersey, and New Mexico, there was no noticeable effect from the enactment of LWOP because those states were largely inactive in imposing death sentences throughout their five-year interval. In six states—Florida, Mississippi, North Carolina, Ohio, South Carolina, and Kentucky—the number of death sentences did not consistently decline after the enactment of LWOP.[101] In Virginia, death sentences were lower in both years after enactment—although higher in the year of enactment. But looking at the third and fourth year after LWOP enactment dispels the inference that those relatively low years were due to the enactment of LWOP: Virginia imposed four death sentences three years after enactment of LWOP,[102] and nine death sentences four years after enactment,[103] showing that death sentences in Virginia did not trend downward with the enactment of LWOP.

That leaves only Texas, where the decline in death sentences after the enactment of LWOP was dramatic and consistent. In the two years before the enactment of LWOP, Texas handed down twenty-nine death sentences (2003) and twenty-three death sentences (2004). In the year of LWOP's enactment—2005—death sentences dropped to fourteen, and in the two succeeding years remained at relatively the same decreased level: eleven death sentences (2006) and fourteen death sentences (2007).[104] Nor has the number of death sentences in Texas exceeded eleven in any year since 2007.[105] Thus, there is a plausible inference that the enactment of LWOP in Texas had a significant causal effect toward fewer death sentences. Perhaps

[101] *See infra* Table 6.

[102] TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ 172881, CAPITAL PUNISHMENT 1997, at 6 tbl.5 (Dec. 1998), https://www.bjs.gov/content/pub/pdf/cp97.pdf.

[103] TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, PUB. NO. NCJ 179012, CAPITAL PUNISHMENT 1998, at 6 tbl.5 (Dec. 1999) http://www.bjs.gov/content/pub/pdf/cp98.pdf.

[104] *See infra* Table 6.

[105] *See* BJS 2013 CAPITAL PUNISHMENT REPORT, *supra* note 3, at 9 tbl.4; BJS 2012 CAPITAL PUNISHMENT REPORT, *supra* note 23, at 8 tbl.4; TRACY L. SNELL, BUREAU OF JUSTICE STATS., PUB. NO. NCJ 242185, CAPITAL PUNISHMENT, 2011—STATISTICAL TABLES 8 tbl.4 (July 2013), http://www.bjs.gov/content/pub/pdf/cp11st.pdf; TRACY L. SNELL, BUREAU OF JUSTICE STATS., PUB. NO. NCJ 236510, CAPITAL PUNISHMENT, 2010—STATISTICAL TABLES 8 tbl.4 (Dec. 2011), http://www.bjs.gov/content/pub/pdf/cp10st.pdf; TRACY L. SNELL, BUREAU OF JUSTICE STATS., PUB. NO. NCJ 231676, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 8 tbl.4 (Dec. 2010), http://www.bjs.gov/content/pub/pdf/cp09st.pdf; TRACY L. SNELL, BUREAU OF JUSTICE STATS., PUB. NO. NCJ 228662, CAPITAL PUNISHMENT, 2008—STATISTICAL TABLES 7 tbl.4 (Dec. 2009), http://www.bjs.gov/content/pub/pdf/cp08st.pdf; TRACY L. SNELL, BUREAU OF JUSTICE STATS., PUB. NO. 224528, CAPITAL PUNISHMENT, 2007—STATISTICAL TABLES tbl.4 (Dec. 2008), http://www.bjs.gov/content/pub/html/cp/2007/cp07st.pdf. There is no BJS Report pertaining to 2014 yet, but Texas imposed eleven death sentences in 2014. *See 2014 Sentencing*, *supra* note 32.

this was because Texas enacted LWOP about a decade later than other active death penalty states.[106] When those other states enacted LWOP in the mid-1990s, death sentencing was in its ascendancy;[107] and in that relatively death-penalty-friendly era the enactment of LWOP seems to have made little difference. But by 2005, when Texas enacted LWOP, death sentencing was well into decline.[108] Perhaps in that much less death-penalty-friendly environment, the enactment of LWOP gained more traction in causing a decline in death sentences.[109]

[106] *See, e.g.*, Act of June 17, 2005, ch. 787, §§ 1, 6, 2005 Tex. Gen. Laws 2705, 2705, 2706; *supra* note 97 and accompanying sources.

[107] *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf (last updated Nov. 9, 2017).

[108] *See id.*

[109] Of course, it is possible that the enactment of LWOP had a delayed effect in a reducing death sentences in the other jurisdictions, too, as the environment became less death-penalty-friendly, but we saw no way to measure that possible effect.

Table 6: Death Sentences Before and After Enactment of LWOP Alternative

	2 years before	1 year before	Year of enactment	1 year after	2 years after
FL—1994[110]	27	32	39	31	25
MS—1994[111]	4	12	5	3	9
NC—1994[112]	22	32	27	34	25
VA—1994 [113]	7	8	10	6	1
NE—1995[114]	0	1	0	2	1
OH—1996[115]	13	17	17	8	16
SC—1996[116]	7	10	8	5	8
KY—1998 [117]	2	2	5	4	3
NJ—2002[118]	1	1	1	0	1
TX—2005[119]	29	23	14	11	14
NM—2009[120]	0	0	0	0	0

B. Have Sentencers Become Less Willing to Impose Death Sentences?

Some commentators assert that sentencers, perhaps because of highly publicized exonerations, the availability of LWOP, and the generally less death-favorable climate of public opinion,[121] have

[110] Act of May 25, 1994, ch. 94-228, § 1, 1994 Fla. Laws 1576, 1577 (1994) (codified as amended at FLA. STAT. § 775.082(1)(a) (2017)).

[111] Act of Apr. 7, 1994, ch. 566, § 3, 1994 Miss. Laws 847, 851 (codified as amended at MISS. CODE ANN. § 97-3-21 (2017)).

[112] Act of Mar. 23, 1994, ch. 21, § 5, 1994 N.C. Sess. Laws 59, 60 (codified as amended at N.C. GEN. STAT. §15A-2002 (2017)).

[113] Act of Oct. 13, 1994, ch. 2, 1994 Va. Acts Spec. Sess. II 18, 30 (codified as amended at VA. CODE ANN. § 53.1-165.1 (2017)).

[114] Act of June 13, 1995, Legis. B. No. 371, § 21, 1995 Neb. Laws 563, 572 (codified as amended at NEB. REV. STAT. § 83-1,110 (2017)).

[115] Act of Aug. 10, 1995, Amend. Sub. S.B. No. 2, 1995 Ohio Laws 7136, 7453–57 (codified as amended at OHIO REV. CODE ANN. § 2929.03 (LexisNexis 2017)).

[116] Act of June 7, 1995, Act No. 83, § 10, 1995 S.C. Acts 545, 557–61 (codified as amended at S.C. CODE ANN. § 16-3-20 (2017)).

[117] Act of Apr. 14, 1998, ch. 606, § 72(3), 1998 Ky. Acts. 3598, 3638 (codified as amended at KY. REV. STAT. ANN. § 532.025(3) (West 2017)).

[118] Act of June 18, 2002, ch. 26, § 10, 2002 N.J. Laws 105, 117 (codified as amended at N.J. STAT. ANN. § 2C:11-3(b)(4) (West 2017)).

[119] Act of June 17, 2005, ch. 787, §§ 1, 6, 2005 Tex. Gen. Laws 2705, 2705, 2706 (codified as amended at TEX. PENAL CODE ANN. § 12.31 (West 2017); TEX. CRIM. PROC. CODE ANN. § 37.071 (West 2017)).

[120] Act of Mar. 18, 2009, ch. 11, § 3, 2009 N.M. Laws 133, 135 (codified as amended at N.M. STAT. ANN. § 31-20A-2 (2017)).

[121] *See Death Penalty*, GALLUP, http://news.gallup.com/poll/1606/Death-Penalty.aspx (last

become increasingly less inclined to impose death sentences.[122] On the other hand, the death-qualification process—during which prospective jurors must avow that they are at least somewhat amenable to imposing a death sentence in order to avoid being stricken for cause[123]—seems unlikely to yield juries that are noticeably less likely to impose death sentences as the decades march on.[124] The data support this latter contention[125]: As shown in Table 7, below, sentencers did not become consistently less willing to impose death sentences.[126] While the rate declined from 66% in 1994 to 54% in 2004, the rate rose back to 65% in 2014.

Table 7: Death Sentences as a Percentage of Cases Presented to Sentencers

	# Death sentences	**# Sentencer spared**	**Total # of cases to sentencer**	**Death sentence %**
1994	310	158	467	66%
2004	134	113	248	54%
2014	73	40	113	65%

C. Aggravation Level

There is a relative consensus that if anyone should be sentenced to death, it should only be the "worst of the worst" murderers.[127] Accordingly, it was crucial to try to determine whether death sentences have declined because non-death sentences became

visited Nov. 19, 2017).

[122] *See, e.g.*, Dieter, *supra* note 8, at 923–25; Sundby, *supra* note 8, at 1932–56.

[123] *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[124] For further discussion of both sides of this issue, *see* McCord, *supra* note 9, 612 n.55; Sundby, *supra* note 8, at 1938, 1942.

[125] *See supra* Table 1 (showing the figures for "# Death sentences" and "# Sentencer spared"). The "Total # of cases to sentencer" comes from adding the two prior columns. The "Death sentence %" column shows the "# Death sentences" column as a percentage of the "Total # of cases to sentencer" column.

[126] Of course, the database is missing some percentage of SS cases from all three years because we had no list of all such sentences to go by. But, since the same search methods were used to find the SS cases in all three years, the percentage that is missing from each year is probably about the same. Thus, the death sentencing percentages would likely decrease by relatively the same amount for each of the three years if the "dark figure" of all SS cases were available.

[127] *See* McCord, *supra* note 16, at 5–6 (making the case for the "worst-of-the-worst" being a useful rubric for death sentences). For their parts, both authors believe that nobody should be sentenced to death.

increasingly associated with less aggravated cases while death sentences became increasingly associated with "worst of the worst" cases.[128] The High Aggravator and Low Aggravator independent variables were developed to examine these questions.[129]

To estimate the aggravation level of each case, we built upon the analysis that one of the authors developed in two prior articles.[130] For purposes of the current article, an "aggravator" is defined as anything that could make a prosecutor or sentencer think worse of a defendant, and thus more likely to return a death sentence. Aggravators include, but are not limited to, statutory aggravating circumstances[131] because a host of things beyond the statutory aggravating circumstances can make a defendant look worse. For example, a defendant's killing of the victim's pet animal is not a statutory aggravating circumstance in any jurisdiction, but certainly makes the defendant look worse in the eyes of prosecutors and sentencers.[132]

Developing the Aggravators had two aspects. The first aspect was identifying them. This involved a modicum of subjective judgment, but Aggravators are obvious by their nature and we believe our judgments identifying sixty-six of them are uncontroversial.[133] Indeed, our list looks very much like a condensed version of the mother-of-all-aggravator-lists from the famous Baldus, Woodworth, and Pulaski project involving over 2,000 murders in Georgia in the 1970s.[134]

The second aspect of the Aggravator analysis was weighting the

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[128] *See id.* ("[T]he death penalty must be reserved for the 'worst of the worst.'").

[129] Of course, aggravation level is only half of the "worst of the worst" equation—the other half is mitigation, which will be examined. *See infra* Part III.D.

[130] *See* David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary more than Three Decades After* Furman, 71 BROOK. L. REV. 797, 833–38 (2005) (developing "depravity point" analysis); McCord, *supra* note 16, at 11–16 (developing depravity point analysis further). In this article we switch terminology to the more familiar descriptor "aggravator."

[131] *See Aggravating Factors for Capital Punishment by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/aggravating-factors-capital-punishment-state (last visited Nov. 19, 2017) (listing aggravating factors by state).

[132] *Cf. id.* (excluding any indication that a state considers killing a victim's pet to be an aggravating factor).

[133] *See infra* Appendix 1. We began coding with an obvious list of Aggravators. Then while coding each of the 1,665 cases we added Aggravators as we came across them, and then examined the cases already coded to see if they needed to have the new Aggravators added. Eventually we ended up with a list of sixty-six aggravators that "worked" in that we were not encountering any factor that was not already on the coding sheet.

[134] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 67, 549–63 (1990) (listing virtually every possible aggravator coding factor).

factors. Simple counting was insufficient because common sense indicates that Aggravators are not equally aggravating—for example, killing four victims is qualitatively worse than causing great risk of death to others without killing them, even though jurisdictions typically include both multiple murders and causing great risk of death as statutory aggravating circumstances.[135] Prior empirical research confirms this common sense not-all-aggravators-are-equal conclusion.[136] Weighting is thus consistent with prior empirical research, but our analysis goes further by identifying numerous Aggravators and assigning weights to all of them. We used the weighting scale of 5 points (most aggravating) to 1 point (least aggravating) from the most recent piece in which one of the authors employed a similar analysis.[137] Weighting involves significant subjective judgment, but we believe the weightings are sufficiently reliable for the limited task they were asked to perform—enabling an estimated rank-ordering the cases on a spectrum in order to examine whether the Aggravator level showed any relationship to a death or non-death sentence.

Appendix 1 is the coding sheet with the weights. To briefly summarize here:

- The 5-point Aggravators all involve an additional murder by the defendant—one additional murder victim has a weight of 5, two additional victims a weight of 10, three or more additional murder victims a weight of 15;[138] and a prior murder (evidenced either by a conviction or proof of such a murder without conviction) also has a weight of 5.
- The 4-point Aggravators are: an anti-government/

[135] *See, e.g.*, NEB. REV. STAT. ANN. § 29-2523(1)(e),(f); *see also* Scott Phillips & Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence*, 45 HOFSTRA L. REV. 417, 433, 434 (2016) (arguing that some murders are more serious than others, based on a variety of aggravating factors, which affect the seriousness of the murder in different degrees).

[136] *See* Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 739–44 (2007) (citing studies finding that multiple murder is a more powerful aggravating factor than kidnapping and sexual assault, which in turn are more aggravating that robbery). Shatz says, "Despite differences in methodologies and timeframes, the studies are in substantial agreement, and they confirm common wisdom." *Id.* at 744.

[137] *See* McCord, *supra* note 16, at 11–16.

[138] We decided to stop adding points for murders after the third additional murder because the 15 aggravator points sufficiently served to move the defendant toward the top of the aggravator pile. But it should also be noted that one of the Oklahoma City bombers, Terry Nichols, is in the 2004 dataset (he was spared by a jury). *See* Online Spreadsheet, *supra* note 4, at l. 587. If we had not decided to cap the aggravator points for additional victims at 15, then Nichols would have scored off-the-charts with 168 murder victims, some of whom were police officers and children.

terroristic motive, committing a murder while incarcerated, killing a government servant,[139] torture, and hiring a killer/ acting as a hired killer.

- The 3-point Aggravators: attempted murder causing serious injury; rape; kidnapping; murder during an attempt to escape incarceration; insurance/inheritance or other blatantly financial motive (not including robbery); and thrill killing.
- The 2-point Aggravators are numerous. Among the most frequently occurring are: robbery; burglary of a home; to eliminate/retaliate against a witness; defendant's record of other violent felonies (not including murder); victim age twelve or younger; and several aspects of the method of killing and the aftermath of the murder.
- The 1-point Aggravators are also numerous. Some of the most frequently occurring are: attempted murder without serious injury; murder during a drug deal; gang-related; male obsession/stalking; defendant's history of less serious crimes; victim age seventy or older; three or more handgun wounds; and multiple forms of violence in the killing.

After coding the weighted factors, the Aggravator point total in each case was determined by adding up the Aggravator points. For purposes of analysis, the top quartile of aggravated cases was designated "High Aggravator" (13–39 Aggravator points) and the bottom quartile was designated "Low Aggravator" (1–5 Aggravator points). In all three years there was at least one DS case that scored 30 or more Aggravator points: six in 1994,[140] two in 2004,[141] and one in 2014;[142] while on the other end of the spectrum, the low in Aggravator points for a DS case was two in 1994,[143] two in 2004,[144]

[139] Usually a police or correctional officer, although occasionally another government servant. *See, e.g.*, N.Y. PENAL LAW § 125.26(1)(a)(i)-(iii) (McKinney 2017) (noting that, in New York, the murder of police officers, peace officers, emergency rescue responders, and employees of correctional facilities warrants aggravated murder charges).

[140] Online Spreadsheet, *supra* note 4, at ll. 36, 64, 93, 284, 360, 395. These cases all involve defendants who killed multiple victims, with other aggravator factors piled on as well. The highest total of 39 was for Harvey Robinson in Pennsylvania in 1994 (line 64), who killed three victims (10 points), committed a rape (3 points) as part of a series of rapes (2 points), committed kidnapping (3 points) and burglary (2 points), had a record of other violent felonies (2 points), engaged in torture (4 points), inflicted three or more stab wounds (2 points), slit a victim's throat (2 points), inflicted blunt force trauma (2 points), strangled a victim (2 points), used multiple forms of violence (1 point) and dumped or buried a body (1 point).

[141] *Id.* at ll. 203, 264.

[142] *Id.* at l. 1101.

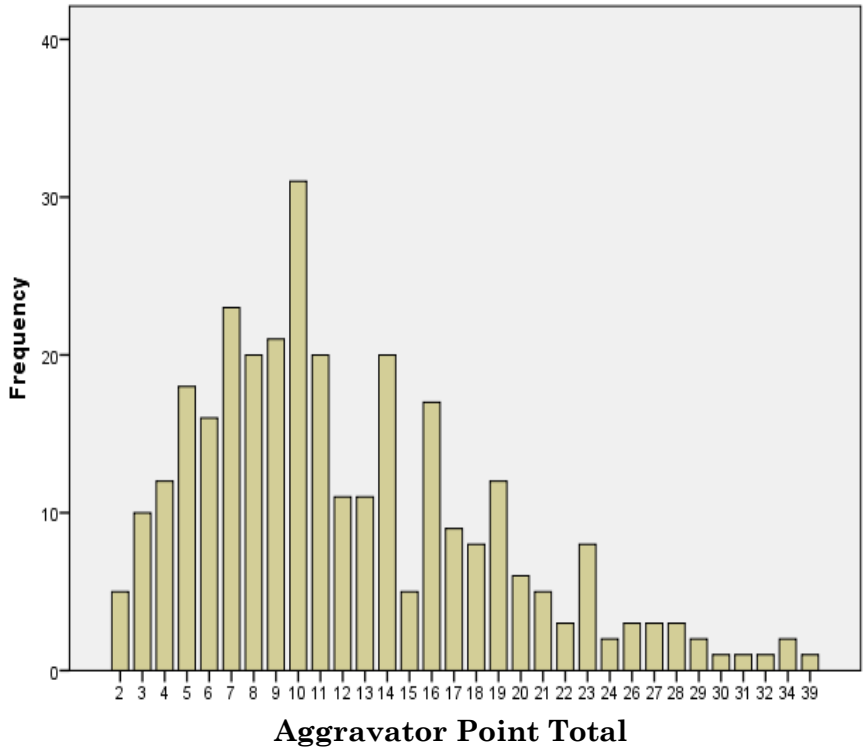
[143] *Id.* at ll. 35, 62, 70, 97, 396.

[144] *Id.* at l. 199.

and three in 2014.[145]

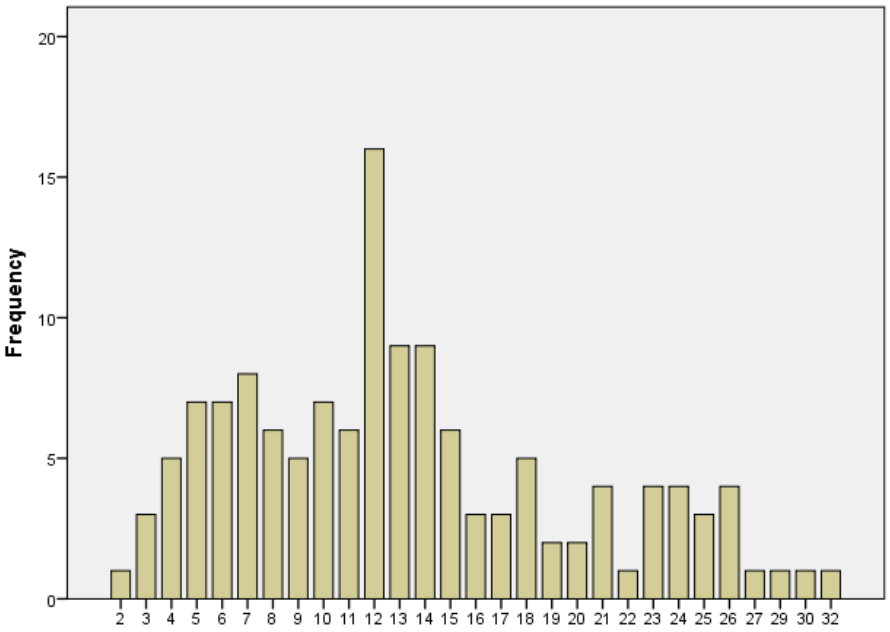
Graphs A, B, and C, below, show Aggravator point distributions for each year. Each Graph presents a rough bell curve, with the Frequency ranges in the three graphs being different because of the declining number of death sentences:

Graph A: Death Sentences in 1994

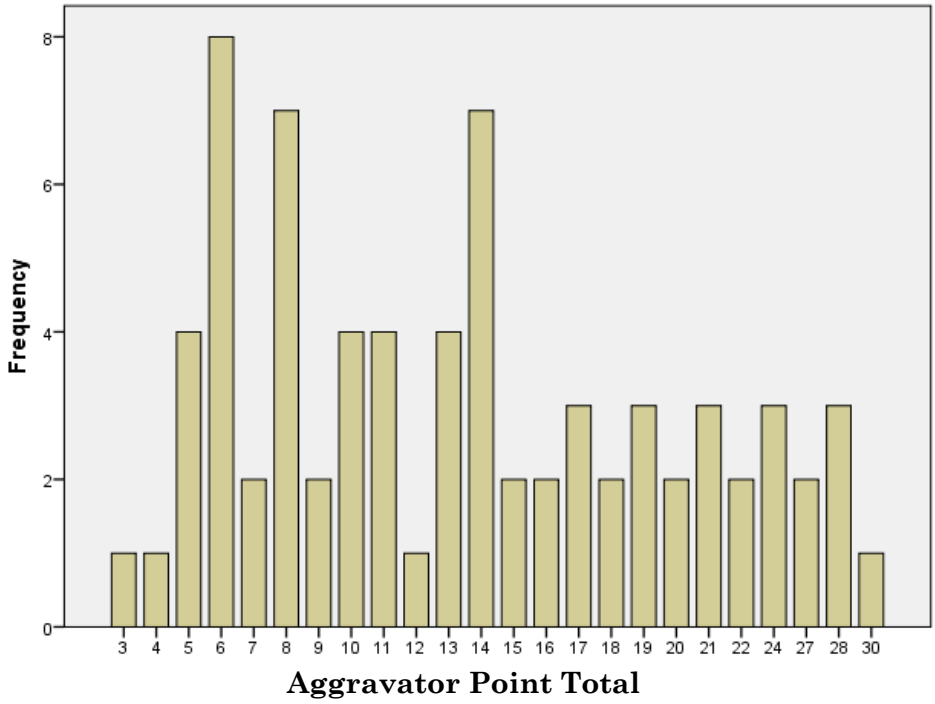


[145] *Id.* at l. 1085.

Graph B: Death Sentences in 20



Graph C: Death Sentences in 2014



The average number of Aggravator points for DS cases increased from 12.15 in 1994 to 13.25 in 2004 to 13.73 in 2014.[146] This supports the hypothesis that death sentences became somewhat more concentrated in higher aggravation cases over time. Also, closer examination of Low Aggravator and High Aggravator cases provides support for this hypothesis. In Low Aggravator cases, Table 8, below, shows that prosecutors and sentencers mostly winnowed out death sentences over time. The percentage of DS cases among all lowest quartile cases fell from 14.2% in 1994 to 11.9% in 2004 to 8.2% in 2014. Yet there were still four DS cases in 2004 with Aggravator totals of less than four,[147] and two such cases in 2014.[148]

[146] *See* Online Spreadsheet, *supra* note 4, at col. aggravator (averaging the "aggravator" column figures for each year for sentence code 0 (DS) cases).

[147] *See supra* Graph B.

[148] *See supra* Graph C.

Table 8: Lowest Quartile Aggravator

	# bottom quartile cases (≤ 5 Aggr. Points)	**# bottom quartile DS**	**# bottom quartile non-DS (i.e., SS + PS)**	**% of bottom quartile cases with DS**	**DS as % of bottom quartile cases**
1994	215	45	56-SS 114-PS	14.2% (44 of 310)	45/215 20.9%
2004	106	16	23-SS 67-PS	11.9% (16 of 134)	16/106 15.1%
2014	109	6	5-SS 98-PS	8.2% (6 of 73)	6/109 5.5%

Table 9, below, shows that prosecutors and sentencers increasingly concentrated death sentences in High Aggravator cases. High Aggravator cases as a percentage of DS cases increased from 39.7% in 1994 to 47.8% in 2004 to 53.4% in 2014. Yet there were still many highest quartile, "worst of the worst" cases that avoided death sentences—indeed, almost exactly the same number as those that garnered death sentences: 224 non-death sentences versus 226 death sentences. Interestingly, a substantially larger percentage of High Aggravator cases ended in death sentences in 1994 (65.8%) than in 2004 (40.0%) and 2014 (37.9%) even though the High Aggravator death sentences as a percentage of all DS cases was less in 1994 than in 2004 and 2014. So while death sentences in 1994 were imposed more prolifically and indiscriminately across the aggravation spectrum, this wider casting of the net also resulted in a greater percentage of the High Aggravator cases receiving death sentences.

Table 9: Highest Quartile Aggravator

	# top quartile cases	# top quartile DS	# top quartile non-DS (i.e., SS + PS)	% of top quartile cases with DS	DS as % of top quartile cases
1994	187	123	64	39.7% (123/310)	65.8% (123/187)
2004	160	64	96	47.8% (64/134)	40.0% (64/160)
2014	103	39	64	53.4% (39/73)	37.9% (39/103)

D. Number of Mitigators

While there are many aspects of capital defense lawyering that could have impacted upon the decline in death sentences[149], the only aspect about which we were able to collect data was presentation of mitigation evidence. The data, though, turned out to have two significant limitations. First, information about mitigation was spottier than about Aggravators, presumably because reporters believe readers are more interested in the outrageous facts of the crimes than the sad circumstances of defendants that contributed to the crimes. Second, unlike for Aggravators, we could not devise a plausible way to weigh mitigators.[150] For example, many defendants presented evidence of childhood trauma and deprivation. Yet the variety of such trauma and deprivation evidence was enormous and

[149] The United States Supreme Court has noted, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." Strickland v. Washington, 466 U.S. 668, 688–89 (1984). There is undoubtedly a large element of "art" in top-notch criminal representation even though there are also undoubtedly "certain basic duties" that are more "science" than art. *Id*. at 688, 693. Because superior defense lawyering is partly an art, it is difficult to measure whether capital defense lawyers became more effective over time. Nonetheless, there is reason to believe that, in general, capital defense representation has improved significantly since 2000 when the United States Supreme Court raised the bar for effective assistance of counsel in capital cases by requiring better investigation into possible mitigation evidence. The Court raised the bar without changing the standard. The standard of "reasonably effective assistance" was announced in *Strickland v. Washington*, where the Court held that it was not ineffective assistance for the defense lawyer to fail to investigate possible mitigation evidence. *Id.* at 687, 699. But sixteen years later in *Williams v. Taylor*, the Court held that a very similar failure to investigate mitigating fell below the standard of "reasonably effective assistance." *See* Williams v. Taylor, 529 U.S. 362, 395–96 (2000) (citations omitted). The Court then reinforced this more robust obligation to search for mitigation evidence in 2003. *See* Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citations omitted) (holding that defense counsel must make efforts to obtain all reasonably available mitigating evidence).

[150] By their nature, most Aggravators call for little or no subjective interpretation. For example, Aggravator of multiple murders is an objective, yes/no factor.

defied quantification. Thus, we were limited to designating twenty-two categories of mitigating evidence and counting the Number of Mitigators that were presented in each case.[151] The average number of mitigators presented as 2.74 in 1994, rose to 2.92 in 2004, and counterintuitively declined to 2.23 in 2014.[152] This simple counting does not say much; thus, we were unable to draw any conclusions regarding whether more or better presentation of mitigating evidence was a significant factor in the decline in death sentences.

E. Robbery

Table 10, below, demonstrates robbery's declining predictive power for death sentences in three ways. First, robbery's presence in all DS cases faded from a very robust 55% in 1994 to 48% in 2004 to 34% in 2014. Second, DS as a percentage of all cases involving robbery declined from 48.3% in 1994 to 27.7% in 2004 to 18.4% in 2014. And third, death sentences in lowest quartile cases in which robbery was a factor faded from 18.7% of all robbery cases in 1994 to 12.3% in 2004 to 8.0% in 2014.[153] The decreasing power of robbery to provoke death sentences is of great real-world importance since robbery is the most common aggravating factor in death-eligible cases by a substantial margin,[154] even though arguably it is not highly aggravating relative some other common aggravators.[155]

[151] *See* Online Spreadsheet, *supra* note 4, at col. nummit (adding figures in each year and dividing by the number of cases in that year).

[152] *Id.*

[153] *See infra* Table 10; Online Spreadsheet, *supra* note 4, at col. robbery.

[154] *See* McCord, *supra* note 16, at 1–2, 31–33 (surveying 1128 death-eligible cases nationwide in 2004 and 2005 and finding that robbery was the most common aggravator (445 instances). The next closest was multiple murders (369 instances)).

[155] *See id.* at 42, 44 (arguing that robbery alone does not make a murderer among the "worst of the worst" and that kidnapping and rape are arguably more serious aggravators); *see also* Shatz, *supra* note 136, at 770 ("[O]rdinary robbery-burglary murderers . . . are, in every respect, the 'average' murderers whose culpability 'is insufficient to justify the most extreme sanction available to the State.'").

Table 10: Robbery Cases

	# DS cases with robbery	**% of all year's DS with robbery**	**DS as % of robbery cases**	**# DS cases with robbery and ≤5 Aggr. points**	**DS cases with robbery ≤ 5 Aggravator points as % of DS with robbery**
1994	354 DS-171 SS-67 PS-116	55% (171 of 310)	48.3% (171 out of 354)	32	18.7% (32/171)
2004	235 DS-65 SS-52 PS-118	48% (65 of 134)	27.7% (65 out of 235)	8	12.3% (8/65)
2014	136 DS-25 SS-20 PS-91	34% (25 of 73)	18.4% (25 out of 136)	2	8.0% (2/25)

F. Age 18 to 20

Average Aggravator points for defendants aged 18 to 20 in DS cases[156] was almost identical in 1994 and 2004—8.91 and 8.72—but shot up to 15.33 in 2014 after juveniles had been exempted in 2005. Table 11, below, shows that death sentences for defendants aged 18 to 20 as a percentage of all death sentences declined from 15.2% in 1994 to 12.7% in 2004 to 4.1% in 2014. Similarly, the percentage of age 18 to 20 DS cases as a percentage of all age-18-to-20 cases fell from 28% in 1994 to 17% in 2004 to 5.6% in 2014. Thus, it seems that 18- to 20-year-olds may well have benefitted from a ripple effect from the abolition of the death penalty for juveniles.

[156] *See* Online Spreadsheet, *supra* note 4, at col., age.

Table 11: Cases with Defendants 18–20 Years Old

	# age 18-20 cases	# age 18-20 DS	# age 18-20 non-DS (i.e., SS + PS)	% of age 18-20 cases with DS	Age 18-20 DS as % of DS
1994	168	47	SS-41 PS-80	28% (47 of 168)	15.2% (47 of 310)
2004	100	17	SS-21 PS-62	17% (17 of 100)	12.7% (17 of 134)
2014	54	3	SS-6 PS-45	5.6% (3 of 54)	4.1% (3 of 73)

G. Multiple Perpetrators

Average Aggravator points in Multiple Perpetrator DS[157] cases rose from 11.64 in 1994 to 13.26 in 2004 to 15.00 in 2014. It appears that multiple perpetrator cases needed to be more aggravated over the years to evoke death sentences. Table 12, below, also shows that the percentage of multiple perpetrator DS cases among all DS cases dropped from 41% in 1994 to 26.1% in 2004 to 20.5% in 2014. Similarly, Multiple Perpetrator DS cases as a percentage of all Multiple Perpetrator cases fell from 36% in 1994 to 15.8% in 2004 to 11.7% in 2014.[158]

It seems that prosecutors and sentencers—surely with much prompting from capital defense lawyers—became more cautious in seeking death sentences in multiple perpetrator cases. Perhaps this was because often the only remaining witnesses to the murder are the surviving perpetrators, whose interest in shifting the bulk of the blame to other perpetrators is obvious. This attempted blame-shifting may obscure who was the "worst" perpetrator of the bunch, and faced with such uncertainty sentencers may tend toward the LWOP option.

[157] *See* Complete Spreadsheet, *supra* note 4, col., multipleperps.
[158] *See infra* Table 12.

Table 12: Cases with Multiple Perpetrators

	# mult. perp cases	# mult. perp DS	# mult. perp non-DS cases (i.e., SS + PS cases)	% of mult. perp cases with DS	Mult. perp DS as % of DS
1994	353	127	SS-79 PS-147	36% 127/353	41% (127 of 310)
2004	222	35	SS-37 PS-150	15.8% 35/222	26.1% (35 of 134)
2014	128	15	SS-14 PS-99	11.7% 15/128	20.5% (15 of 73)

H. Low Population

A population of 50,000[159] marks cutoff for the lowest decile of counties. The average Aggravator point score in these bottom decile counties did not show a consistent trend—it went from 12.11 in 1994, up to 12.57 in 2004, and then down to 10.57 in 2014.[160] But Table 13, below, nonetheless gives some reason to believe that Low Population became a predictor of non-death sentences over time. In contrast to some of the prior Tables, DS and SS cases were combined here because the number of cases presented to sentencers more accurately reflects the number of cases on which counties were willing to spend capital-level resources than the number of DS cases alone. The percentage of DS + SS cases in Low Population counties as a percentage of DS + SS cases in all counties decreased from 12.0% in 1994 to 9.2% in 2004 to 6.5% in 2014.

It would certainly not be surprising to find that low-population counties increasingly opted out of death sentencing as it has become more costly.[161] Low population counties usually have fewer monetary resources because they have lower tax bases.[162] Yet the cost of death penalty prosecutions is much higher than for non-capital cases[163] and

[159] Actually, it marks the 10.2% level, but we equate it to the bottom decile for the sake of simplicity.

[160] *See* Online Spreadsheet, *supra* note 4, at cols., CountyPop, Depravity.

[161] *See* Stephen F. Smith, *supra* note 8, at 855; Ford, *supra* note 7; Herskovitz, *supra* note 7; Wolf & Johnson, *supra* note 7.

[162] *See generally*, Adam M. Gershowitz, *Panel Three: The Wisdom of Capital Punishment (Apart From Morality or the Risk of Convicting the Innocent)*, 47 TEX. TECH. L. REV. 151, 154–55, 158 (2014) ("Nor should we tolerate . . . defendants facing the death penalty because they committed their crimes in Philadelphia as opposed to Pittsburgh, or Houston as opposed to a small Texas county without the resources to seek the death penalty.").

[163] *See* Sherod Thaxton, *Criminal Law: Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY

should not vary much between low population and more populous counties because most of the requirements that cause death penalty cases to be more expensive are imposed by the Constitution.[164]

Table 13: Low Population

	DS + SS cases in all counties[165]	**DS + SS cases in bottom decile Low Population**	**DS + SS cases in bottom decile Low Population as % of all DS + SS cases**
1994	463	56	12.0 %
2004	227	21	9.2 %
2014	107	7	6.5 %

I. Low Revenue

The lowest decile figure is about $22.77 million. Table 14, below, shows that in the lowest decile[166] of counties for which revenue data were available,[167] there is no evidence that Low Revenue was

475, 543 (2013) ("Capital cases are more expensive and time-consuming than comparable noncapital murder cases at every stage of the process: more time for pretrial preparation, more pretrial motions, more experts, more attorneys for the defense (and typically the government as well), more time to conduct voir dire, longer trials, longer jury deliberations, and more appeals that take longer.").

[164] For example, jury selection is considerably more time-consuming and expensive in capital cases because of the "death qualification" requirement: a juror can neither be too unwilling to impose a death sentence, nor too eager to impose one. *Compare* Wainwright v. Witt, 469 U.S. 412, 424–25 (1985) (noting a prospective juror can be struck for cause if that person's scruples against the death penalty would substantially interfere with his or her duties as a juror), *with* Morgan v. Illinois, 504 U.S. 719, 729 (1992) ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.").

[165] These figures are composed of the DS plus SS cases from Table 1, with subtraction for the federal and military cases which are not attributable to any county, of which there were 5 SS on 0 DS in 1994, 10 DS and 10 SS in 2004, and 4 DS and 2 SS in 2014. *See* Complete Spreadsheet, *supra* note 4, at col. state; *supra* Table 1.

[166] *See supra* note 38 (collecting sources from which the bottom decile figure of $22,772,400 was calculated); Complete Spreadsheet, *supra* note 4, at col. countyrev.

[167] County revenue data were unavailable for twenty-three DS cases in 1994 because the figures were not reported for those counties in the sources we used. This was true of five DS cases in 2004, and an additional ten did not have county revenue data because they were in federal or military court. In 2014, all four of the cases for which county revenue data were unavailable were in federal court. Going a bit deeper into the missing counties, there may be a hint of a pattern. Of the twenty-three counties in 1994 for which county revenue data were missing, eleven of them were well below the level of the bottom decile (50,000) of population. *See* Online Spreadsheet, *supra* note 4, at ll. 46, 90, 99, 146, 288, 358, 367, 376, 381, 385, 424. This was also true for three of the five such cases in 2004. *Id.* at ll. 164, 185, 211. These low populations give some reason to believe that those counties might have been in the low decile of county revenue. If they were, then the percentages in Table 13 would become 12.9% in 1994

predictive of non-death sentences in 2004 or 2014. In each of the three years the percentage of DS cases in these counties as a percentage of DS cases that year was within two-tenths of a percentage point of 10%.[168]

Table 14: Low Revenue

	# DS in counties for which county revenue data available	**# DS in bottom decile Low Revenue**	**Bottom decile Low Revenue as % of all DS**
1994	287 (of 310 total DS)	28	9.8 %
2004	119 (of 134 total DS)	12	10.0 %
2014	69 (of 73 total DS)	7	10.1 %

J. Five "Idiosyncratic Counties"

In state criminal prosecutions, death sentencing decisions occur at the county level.[169] In most death penalty states there are high-volume death sentencing counties, typically among the highest population counties in the state.[170] High population means a high level of revenue that permits such counties to afford to prosecute several death sentence cases per year.[171] It follows that if something unusual of a local political nature happens in such counties that dramatically affects the number of death sentences they are willing to pursue, the effects will be both important and idiosyncratic. The data showed dramatic drops in death sentences in 2004 and 2014 in five high population counties that had been high-volume death sentencing counties in 1994: Harris County, Texas; Cook County, Illinois; Pima County, Arizona; Philadelphia County, Pennsylvania,

(40 of 310), 12.0% in 2004 (15 of 124) and 10.1% in 2014.

[168] *See infra* Table 14.

[169] Gershowitz, *supra* note 162, at 176.

[170] *See* RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 29–30 (2013), http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf (listing these counties, in order, of contributing sixty or more inmates to death rows as they were populated as of January 1, 2013: Los Angeles, California; Harris, Texas; Philadelphia, Pennsylvania; Maricopa, Arizona; Riverside, California; Clark, Nevada; Orange, California; and Duval, Florida).

[171] *See* Complete Spreadsheet, *supra* note 4, at cols., countypop, countyrev.

and Miami-Dade County, Florida.[172] These drops seemed too great to be completely explained by the other variables. We will designate these as idiosyncratic counties.

As to two of these counties we identified possible local political reasons that might have accounted, at least in part, for the dramatic drops. First and most important was Harris County. As of 2010, more executed inmates in the U.S. in the preceding forty years had been sentenced to death in Harris County than in any *state*—except for the rest of Texas' 253 counties combined.[173] During its peak five-year period from 1992 to 1996, Harris County imposed an average of 13.2 death sentences per year; yet for the five-year period 2005 to 2009, it imposed an average of only 2.4 per year.[174] Probably much of the explanation lies in the retirement of the long-time "deadly D.A." Johnny Holmes in 2001,[175] which combined with the Houston Police Department Crime Lab scandal beginning in 2002 to spring leaks in the Harris County "death penalty pipeline."[176] While the pipeline still had some vitality in 2004—ten death sentences[177]—immediately thereafter its spigot no longer poured forth large numbers of death sentences. From 2005 to 2014 Harris County issued as many as four death sentences in only one year (2014); three death sentences once (2011); two death sentences five times (2005, 2006, 2007, 2009, and 2010); one death sentence two times (2012 and 2013); and no death sentences once (2008).[178]

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[172] *See* Simone Seiver, *Why Three Counties that Loved the Death Penalty Have Almost Stopped Pursuing It*, MARSHALL PROJECT (Aug. 11, 2015), https://www.themarshallproject.org/2015/08/11/why-three-counties-that-loved-the-death-penalty-have-almost-stopped-pursuing-it#.3pghQyxMH (pegging the declines in Harris County, Texas; Oklahoma County, Oklahoma; and Philadelphia County, Pennsylvania, to the succession of new district attorneys who were less successful or less ardent in pursuit of death sentences). We did not include Oklahoma County, Oklahoma in our analysis. While it is true that Oklahoma County largely dropped out of death sentencing after 2008, that County had not had more than three death sentences in any one year from 2004 to 2008. *See Oklahoma 2004*, DEATH SENTENCES TODAY, http://deathsentences.wp.drake.edu/death-sentences/2004-2/oklahoma/ (last visited Nov. 21, 2017); *Oklahoma 2005*, DEATH SENTENCES TODAY, https://deathsentences.wp.drake.edu/death-sentences/2005-2/oklahoma-2/ (last visited Nov. 21, 2017); *Oklahoma 2006*, DEATH SENTENCES TODAY, http://deathsentences.wp.drake.edu/death-sentences/2006-2/oklahoma-2006/ (last visited Nov. 21, 2017); *Oklahoma 2007*, DEATH SENTENCES TODAY, http://deathsentences.wp.drake.edu/death-sentences/2007-2/oklahoma-2007/ (last visited Nov. 21, 2017); *Oklahoma 2008*, DEATH SENTENCES TODAY, http://deathsentences.wp.drake.edu/death-sentences/2008-2/oklahoma-2008/ (last visited Nov. 21, 2017).

[173] *See* McCord, *supra* note 9, at 609.

[174] *See id.* at 609–10.

[175] *See id.* at 610.

[176] *See id.* at 609–12 (providing a more detailed explanation of the Harris County decline).

[177] *See id.* at 611.

[178] These figures are derived by counting cases from Harris County listed on Professor McCord's *Death Sentences Today* website. *See* David McCord, *Death Sentences*, DEATH

Secondly, Cook County dropped from six death sentences in 1994 to two in 2004;[179] and from 2005 to 2011 (when Illinois abolished the death penalty),[180] Cook County issued two death sentences in two years (2005 and 2006), one death sentence in one year (2007), and no death sentences in three years (2008–2010).[181] This decline was probably at least partially due to a crisis of confidence in the Chicago Police Department engendered by a coerced confession scandal centered on a particular squad of detectives that sent several defendants to death row.[182]

We were unable to identify any possible local reasons for the similar unusual drops in Pima,[183] Philadelphia,[184] and Miami-Dade Counties.[185] But Harris and Cook Counties suffice to buttress the point of the famous aphorism attributed to former Speaker of the House Tip O'Neill that "All politics is local."[186] In death sentencing, local politics in high-volume counties can have outsized effects.

SENTENCES TODAY, http://deathsentences.wordpress.drake.edu/death-sentences/ (last visited Nov. 21, 2017) (locating figures by first clicking any year from 2005 to 2014, then clicking "Texas"). Of course, the downturn was also affected by Texas's adoption of LWOP in 2005, thus illustrating the difficulty of trying to disentangle local causes from more broad-based causes. *See* McCord, *supra* note 9, at 611–12; *see also supra* notes 104–09 and accompanying text (discussing the effect of the adoption of LWOP in Texas).

[179] *See* Online Spreadsheet, *supra* note 4, at ll. 194, 195, 355, 359, 361, 362, 373, 374.

[180] *See Illinois*, *supra* note 83.

[181] *See Death Sentences*, *supra* note 178 (locating figures by first clicking any year from 2004 to 2010; then clicking "Illinois").

[182] *See generally* G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. REV. 329 (2014) (setting forth a comprehensive overview of the facts).

[183] Pima County (Tucson), Arizona, imposed seven death sentences in 1994, none in 2004, and never more than three in any year from 2005 to 2014, including five years with no death sentences. *See* Online Spreadsheet, *supra* note 4, at ll. 279, 280, 281, 283, 426, 430, 431; *Death Sentences*, *supra* note 178 (locating figures by first clicking any year from 2005 to 2014; then clicking "Arizona").

[184] Philadelphia County imposed nine death sentences in 1994, two in 2004, and as many as four in only one year from 2005 to 2014, including three years with no death sentences. *See* Online Spreadsheet, *supra* note 4, at ll. 50, 51, 53, 55, 56, 57, 61, 62, 67, 231, 233; *Death Sentences*, *supra* note 178 (locating figures by first clicking any year from 2005 to 2014; then clicking "Pennsylvania").

[185] Miami-Dade County, Florida, imposed nine death sentences in 1994, none in 2004, and no more than two in any year from 2005 to 2014, including four years with no death sentences. *See* Online Spreadsheet, *supra* note 4, at ll. 316, 322, 330, 335, 337, 339, 344, 369, 370; *Death Sentences*, *supra* note 178 (locating figures by first clicking any year from 2005 to 2014; then clicking "Florida").

[186] *See* TIP O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL AND OTHER RULES OF THE GAME xv (1994); Charles P. Pierce, *Tip O'Neill's Idea That All Politics Is Local Is How Government Dies*, ESQUIRE (July 17, 2015), http://www.esquire.com/news-politics/politics/news/a36522/how-all-government-is-local-and-thats-how-it-dies/.

IV. A SUMMARY OF THE EMPIRICAL ANALYSIS

The analysis provides reason to believe that decreases in *death-eligibility* accounted for about half of the decline in death sentences. Specifically:

- The decrease in the number of murders accounted for about eighty-nine fewer death sentences in 2004 compared with 1994, and about 111 fewer death sentences in 2014 compared with 1994;
- There were probably about ten fewer death sentences imposed on juveniles in each of 2004 and 2014—and that decline was already largely in place *de facto* before the Supreme Court's *de jure* exemption in 2005;
- The exemption of the intellectually disabled probably accounted for about six or seven fewer death sentences in each of 2004 and 2014;
- The abolition of the death penalty in six states after 2004 probably accounted for only about three fewer death sentences in 2014.

As to *death-worthiness*, the analysis provides reason to believe that:

- The enactment of LWOP as an option in ten jurisdictions in the heyday of death sentencing the early-to-mid 1990's did not lead to a decline in death sentences, but the enactment in Texas during the declining phase of death sentencing in 2005 may well have done so.
- Sentencers did not become consistently less likely to render death sentences.
- In 2004 and 2014 an increasingly lower proportion of death sentences were rendered in Low Aggravator cases, and an increasingly greater proportion were rendered in High Aggravator cases.[187] But there were still perplexing cases at each end of the spectrum: a handful of death sentences in very Low Aggravator cases in 2004 and 2014, while about half of High Aggravator cases across all three years did not receive death sentences.
- Robbery increasingly became less predictive of death sentences in 2004 and 2014.
- Defendants aged 18 to 20 were increasingly unlikely to be sentenced to death in 2004 and 2014.

[187] *See supra* Tables 8 & 9.

- Multiple perpetrators were increasingly unlikely to be sentenced to death in 2004 and 2014.
- Low population counties increasingly dropped out of death sentencing in 2004 and 2014.
- The bottom decile counties in terms of revenue defied expectations. The data provided no reason to believe those counties increasingly abandoned death sentences in 2004 or 2014.
- Cases' venue in one of five idiosyncratic counties—Harris, Cook, Pima, Philadelphia, and Miami-Dade—had significant explanatory power for some of the reduction in death sentences in 2004 and 2014, probably for local political reasons.

CONCLUSION

The decline in death sentencing in the United States from 1994 has been relatively rapid, quite steep, and is continuing—from the endpoint of our dataset, death sentences declined from 73 in 2014 to 49 in 2015;[188] and in 2016 only 31 death sentences were imposed.[189] The American death penalty seems like an ever-crankier version of the Cheshire Cat: it is grudgingly disappearing, leaving behind only its frown.

[188] *See 2015 Sentencing*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/2015-sentencing (last visited Nov. 26, 2017).

[189] *See 2016 Sentencing*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/2016-sentencing (last visited Nov. 26, 2017).

APPENDIX A

(Aggr. Weight in front)
Aggravators:
[Other crimes]
5 two murder victims
10 three murder victims
15 four or more murder victims
3 Attempted murder serious inj
1 Attempted murder w/o s.i.
1 Serious assaults short of a.m.
2 Robbery
1 Robbery—part of series
3 Rape
2 Rape—part of series
3 Kidnapping
2 Burglary of home
2 Arson
3 Escape incarceration
1 Drug deal/theft of drugs
1 Drug dealing—ongoing
2 Escape arrest/flee officers
2 Violating protective order
2 Phys. abuse of child—ongo
[Other reprehensible motives]
3 Insurance, inheritance, other
2 Eliminate/retaliate witness
1 Gang-related
4 Anti-government/terroristic
2 Love triangle
1 Male obsession/stalking
2 Hate crime
3 Thrill
[Defendant's criminal history]
5 Murder conviction
5 Murder—no conviction
2 Other violent felony(ies)
1 Less serious crimes history
[Bad incarceration behavior]
4 Murder while incarcerated
1 Lesser acts or threats of viol.
2 Escape attempted

1 Possession of weapon
1 Seeking outside help
[Particularly sympathetic victim]
2 twelve years or younger
1 seventy years or older
1 Frail/handicapped not age
4 Police/c.o. officer on duty
4 Other government servant
[Particularly bad killing method]
4 Torture—physical
1 three or more handgun wounds
1 Rifle/shotgun
2 Execution-style
2 3 or more stab wounds
2 Slitting throat
2 Blunt force
2 Strangle/suffocate/drown
2 Poisoning
2 Burning to death
2 Starving
1 Multiple forms of violence
[Other particularly bad details/aftermath]
4 Hiring killer or acting as
1 Luring victim to homicide
2 Victim bound
2 Victim begged
1 In presence of child
2 Killing child in presence par.
2 Behavior/remarks relishing
2 Sexual perversity beyond rape
1 Causing great risk to others
1 Killing pet
2 Mutilating corpse
1 Dumping or burying corpse
2 Callousness afterward
Mitigating Factors:
[Mitigation mentioned]
In news reports
In appellate opinion(s)
[Type of defense witness(es)]
Non-expert (family/friends)
Expert

[Type of excuse mitigation evidence]
17 years of age or younger
18-20 years of age
Mental retardation
Head trauma
Mental illness
Emotionally disturbing event
Terrible upbringing
Intoxicated at time of crime
Alcohol/drug abuse—history of
Multiple perpetrators
Other excuse
[Type of positive mitigation]
Good son/parent/friend/relative
Good character usually
Military veteran
No/little criminal history
Good employment history
Remorseful
Cooperated with police
Religious
Other positive
[Not likely a future danger]
Well-behaved in structure
Violence out of character