THE IMPACT OF DEATH PENALTY ABOLITION ON CONVICTION APPEALS IN STATE SUPREME COURTS

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ABSTRACT

This paper explores the ways in which the politics and legality of capital punishment affect judicial outcomes in non-capital cases. Specifically, it analyzes the effect that state-level death penalty abolition has on the success of non-capital conviction appeals in state supreme courts. Using data from all 50 states on cases decided between 1995 and 1998, I employ linear probability estimation and logistical regression to analyze the factors affecting judicial outcomes in state supreme courts. These factors include, among others: the legality of the death penalty in the forum state; whether the case occurred pre or post-conviction; the relevance of certain legal issues; and the ultimate disposition of the case. The outcome of interest is a modified judicial outcome variable, which describes whether the party facing criminal liability – the party opposite the government – won or lost at the state supreme court. Several variables exerted statistically-significant effects. State-level death penalty abolition was found to decrease a defendant's likelihood of success by 11 percent. The ultimate disposition of the case – the extent to which the lower court ruling was reversed or affirmed – also played a prominent role in determining outcomes. Defendants were more than three times as likely to have won a case if the decision reversed the lower court, and defendants were about one-tenth as likely to have won a case if the decision affirmed the lower court. These results shed light on the complex web of factors that affect judicial outcomes and clarify the impact of death penalty abolition.

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Many thanks,
Maxwell Horvath

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I. INTRODUCTION

In this study, I evaluate the impact of state-level death penalty abolition on criminal judicial outcomes in state supreme courts. I further examine a variety of legal, political, and personal factors that augment that relationship and exert effects of their own. I examine how these effects vary based on a collection of covariates, including the status of the defendant, the legal issues in the case, and the nature of the court's ultimate decision. I specifically focus on post-conviction cases in which defendants challenge the validity of their convictions. I enter this analysis with two conflicting hypotheses, each of which can be reasonably argued. On one hand, death penalty abolition could reflect an underlying judicial climate that is less punitive; such a judicial climate would produce more favorable judicial outcomes for criminal defendants in state supreme courts in abolition states. On the other hand, death penalty abolition could make judges more willing to uphold convictions by removing the possibility that such a ruling would result in that defendant's execution. In all, I seek to understand the factors, both discrete and diffuse, affecting judicial outcomes for criminal defendants challenging convictions in state supreme courts.

The law is not the same everywhere. Judicial fora – states, federal districts, and federal circuits – have distinct judicial ecosystems. Evidentiary rules, procedural rules, common-law doctrines, statutes, and judicial policies can vary between them. These differences can be compounded by extra-legal factors – the makeup of jury pools, the demographic composition of the judiciary, and the ideological and political climate – that affect how the law is applied and understood. Judicial ecosystems can vary greatly between fora, and judicial outcomes can vary as a result.

Understanding variance in judicial outcomes is particularly important in the criminal context. In criminal cases, the constitutional rights, personal liberty, and even the life of the defendant may hang in the balance. When the stakes are that high, society has a responsibility to fully understand the factors that affect outcomes.

The federal judicial system is designed to ensure the homogeneity of the law and the consistency of legal outcomes across jurisdictions. To that end, the Supreme Court plays a critical role by resolving circuit splits – differences between federal circuits about certain provisions of law. The law can vary between circuits, but fundamental differences rarely escape Supreme Court clarification. By contrast, state court systems develop their laws independent of one another; the resulting differences between states' laws can be drastic. These differences range from minute and technical rules, such as notice requirements and the phrasing of evidentiary rules, to fundamental concepts such as the definition of personhood and the legality of the death penalty. In criminal cases governed by state law, a defendant's odds of success – and the range of possible outcomes – largely depend on the state in which they are prosecuted.

Within state court systems, state supreme courts are an ideal subject for analysis for two primary reasons. First, they are courts of last resort – effectively a defendant's last true chance to have an unfavorable ruling reversed.[1] State supreme court decisions are, for the most part, final. Second, state supreme courts have curated caseloads. They rarely deal with appeals as of right in criminal cases, as criminal defendants usually exhaust their right to appeal in intermediate

[1] Parties can file a petition for certiorari with the Supreme Court if they receive an unfavorable ruling in a state supreme court. However, only a tiny fraction of certiorari petitions are granted, and the Supreme Court only accepts cases that present novel questions. Further, the Supreme Court has begun to significantly decrease the number of state-court cases it hears each term. As a result, the state supreme court is, effectively, the final opportunity for most parties to plead their case.

appellate courts. As a result, meritless appeals are dealt with by intermediate appellate courts and rarely reach the high courts. State supreme courts select the cases they hear, often choosing cases that are closely contested, with legitimate arguments to be made on both sides of an important issue.

This study will proceed as follows. Section I offers background information on judicial decision making and death penalty abolition, and Section II surveys the critical literature in those areas. Section III describes the theoretical underpinnings of the model that I estimated. Section IV describes the data and methods I used in this analysis. Section V explains the model I estimated in empirical detail. Section VI details the empirical results of my analysis, and Section VII describes the conclusions drawn therefrom.

II. BACKGROUND

The legality of capital punishment in America is decided on a jurisdiction-by-jurisdiction basis. Each state and the federal government have the authority to abolish or maintain the use of the death penalty in cases brought under the laws of their jurisdiction. The legality of a federal death penalty does not preclude states from abolishing the death penalty, and the abolition of the death penalty in a given state does not preclude federal prosecutors from seeking a death sentence – nor federal judges from imposing one – in federal court in that state.[2] The death penalty is currently used by 29 states, the federal government, and the military; 21 states have abolished the death penalty.[3] As of 1998 – when the data used in this study were collected – 14 states had abolished the death penalty.[4]

The regulations and policies surrounding the death penalty differ between jurisdictions.[5] In each jurisdiction in which the death penalty is legal, there are strict rules determining which offenders are eligible for a death sentence, specifying the conditions under which a death sentence is permissible, and detailing state-prescribed methods of execution.[6] In 2005, the Supreme Court of the United States held that capital punishment of minors – and capital punishment for crimes committed when the defendant was a minor – is unconstitutional under the federal Constitution.[7] At the time, the execution of minors had already been deemed

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[2] *States and Capital Punishment,* NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that capital punishment for crimes committed by a person under the age of 18 violated the 8th Amendment ban on cruel and unusual punishment).

unconstitutional under many state constitutions.[8] The death penalty can be abolished in a given jurisdiction by way of statute, constitutional amendment, or decree of the highest court in that jurisdiction.

41 of the 50 state judicial systems feature at least three levels of judicial review.[9] The names of the three levels of courts vary slightly between states, but for the most part their functions and responsibilities are the same. Each state has trial courts, often known as the "Circuit Courts" or "District Courts."[10] These courts are litigants' points of entry into the judicial system – all lawsuits start in trial courts. The trial courts are finders of fact. Trial judges hear motions, gather and analyze evidence, and occasionally convene juries in order to determine what truly happened between the parties to a given case.[11] The trial courts are the only finders of fact; appellate courts may only consider the factual record developed by the trial court.

When litigants are unhappy with the trial court's decision, they appeal, usually to an intermediate appellate court known as the "Court of Appeals."[12] These courts reconsider the trial court's ruling to determine whether it erred in applying the law to the facts. In almost all cases, trial litigants are guaranteed the right to appeal an unfavorable decision to an intermediate

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[8] *See id.*

[9] Nine states only have two levels of courts – a trial court and an appellate court of last resort. In those states, the state supreme court handles all appeals from the trial court.

[10] *Comparing Federal and State Courts*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts. Some states have different names for their trial courts. In New York, the trial court is known as the "Supreme Court."

[11] *Id.*

[12] In Maryland and New York, the highest court in the state is known as the "Court of Appeals." In Maryland, the intermediate appellate court is known as the "Court of Special Appeals." In New York, the intermediate appellate court is the "Supreme Court, Appellate Division."

appellate court; the intermediate appellate court must take all cases that come to it, and it does not have discretion to turn away appellants.[13]

Parties who receive unfavorable decisions in intermediate appellate courts may appeal those decisions to the state supreme court – the highest court in the state. State supreme courts have discretionary jurisdiction and are not required to take all of the cases presented to them. Generally, state supreme courts only take cases that present novel questions under the constitution of the forum state.[14] In those cases, the court steps in to resolve a previously unresolved constitutional issue. State supreme court decisions can be appealed to the United States Supreme Court; the United States Supreme Court can only hear a state court case if it poses some question of federal law.[15]

[13] *Comparing Federal and State Courts*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts.

[14] *Id.* In some states, there are issues that the state supreme court is required to review under state law.

[15] *Id.*

III. LITERATURE REVIEW

There is no published scholarship addressing the effect of death penalty abolition on judicial decision making in non-capital cases before state supreme courts. Nonetheless, four primary bodies of scholarship underly my analysis and offer useful context. Specifically, I look to build on scholarship studying: 1) the politics, law, and morality of the death penalty; 2) judicial decision making in capital cases; 3) judicial decision making in state supreme courts; and 4) the impact of judicial policies on judicial outcomes and decision making.

a. THE POLITICS, LAW, AND MORALITY OF THE DEATH PENALTY

The body of literature discussing the death penalty is vast. For the purposes of this study, it is useful to consider two types of death penalty scholarship: those making moral, legal, and political arguments for or against the death penalty, and those analyzing and discussing the politics of the death penalty in the United States. Both offer important context for my analysis.

Much of the recent scholarship advocating against the death penalty has focused on its disparate and discriminatory application throughout history. Jesse Jackson, Sr. discusses these themes at length in *Legal Lynching: The Death Penalty and America's Future*, while also providing an authoritative account of the development of capital punishment in America.[16] Many scholars have discussed the disproportionately high rates of execution of African-American defendants, and the disproportionately low rates of execution for crimes with African-American victims.[17] Charles J. Ogletree is one of many who have drawn connections between the current

[16] JESSE JACKSON, SR., ET AL., LEGAL LYNCHING: THE DEATH PENALTY AND AMERICA'S FUTURE (2001).

[17] *See, e.g.* Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39 (2002) (presenting empirical evidence showing racial and geographic disparities in capital punishment in Illinois); *see also* Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521 (2017); Donald F. Tibbs, *Towards an Abolition Democracy: The Death Penalty, Circa 2015*, 25 WIDENER L. J. 83

system of capital punishment and historical use of extra-judicial lynching against blacks during the Jim Crow era.[18] Others, such as Joan W. Howarth, have sought to draw attention to the disproportionate execution of males in American society.[19]

Scholarship discussing the politics of the death penalty has shown that the politics and policy of the death penalty can be altered with framing and advocacy. Scholars studying these questions have largely focused on successful tactics employed by abolitionists. For example, Andy Hoover and Ken Cunningham have shown that the death penalty abolition movement in New Jersey was successful primarily because of issue-framing.[20] Abolitionists focused on the prevalence of wrongful convictions, the opposition of some victims' families to capital punishment, and the opposition of law enforcement to capital punishment.[21] Other scholars have discussed international advocacy regarding the death penalty, including advocacy between nations.[22] Carol S. Steiker details the unwillingness of European nations to extradite suspected terrorists to the United States following 9/11, for fear that they would be executed.[23] As these works reflect, the death penalty is a controversial issue in American society that can be argued, framed, and spun like any other.

(2016); Jordan H. Schafer, *Judicial Administration of the Death Penalty*, 35 U. TOL. L. REV. 593 (2004); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15 (2002).

[18] Ogletree, *supra* note 17.

[19] Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002).

[20] Andy Hoover & Ken Cunningham, *Framing, Persuasion, Messaging, and Messengers: How the Death Penalty Abolition Movement Succeeded in New Jersey*, 38 HUMAN. & SOC'Y 443 (2014).

[21] *Id.*

[22] *See, e.g.* Anthony McGann & Wayne Sandholtz, *Patterns of Death Penalty Abolition, 1960-2005: Domestic and International Factors*, 56 INT'L STUD. Q. 275 (2012); Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131 (2002).

[23] Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002).

b. JUDICIAL DECISION MAKING IN CAPITAL CASES

The scholarship on judicial decision making in capital cases illustrates the extent to which capital punishment differs from other types of issues and cases that judges deal with. Specifically, considerations of capital punishment stand out in that they implicate not only law, but also politics, policy, morality, and religion.

Deborah Beim and Jonathan P. Kastellec discuss the ways in which the ideological polarization of the death penalty affects judicial coalition-building. They find that liberal judges in federal circuit courts almost exclusively dissent from death penalty decisions when those decisions deny relief to defendants. [24] Conversely, more conservative judges primarily dissent from decisions granting relief.[25] Further, conservative-leaning circuit courts are more likely to conduct en banc review of a panel decision granting relief to a death penalty defendant.[26] Other scholars have similarly found that ideology plays an outsized role in judicial decision making in death penalty cases.[27]

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[24] Deborah Beim & Jonathan P. Kastellec, *The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Cases*, 76 J. POL. 1074 (2014).

[25] *Id.*

[26] *Id.*

[27] *E.g.* Carol Ann Traut & Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision Making: The California Judges and Capital Punishment*, 60 J. POL. 1166 (1998) (finding that the intensity of ideological positions is perhaps the biggest predictor of decision making in capital cases); Melinda Gann Hall & Paul Brace, *The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts*, 75 SOC. SCI. Q. 136 (1994) (same); *see also* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999) (noting that proportionality review, which is allowed in most states, enables appellate judges to overturn death sentences based on personal conceptions of "death-worthiness"); *see also* Nicole Veilleux, *Staying Death Penalty Execution: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543 (1996).

Some scholars have found that, in addition to ideology, practical political realities impact decision making in capital cases.[28] Brandice Canes-Wrone et al. present empirical research analyzing the political pressures placed on state high court judges facing re-election.[29] They focus on judges in states that employ non-partisan judicial elections, rather than judicial appointment regimes or elections in which judges affiliate with a particular political party.[30] They find that judges in states with non-partisan elections face the greatest political pressure to uphold capital sentences and decide cases in accordance with public opinion.[31] In other words, judges face the most political pressure to uphold capital sentences in states where voters will vote based on their decisions from the bench, rather than their party affiliation.

Finally, the death penalty implicates fundamental notions of morality and spirituality. Ori Lev argues that the death penalty is somewhat unique in its implication of moral and spiritual considerations for judges.[32] He examines the anti-capital-punishment views of Supreme Court Justices Blackmun and Powell, among others, and finds a unique tension. These judges morally opposed the death penalty but were forced to reach decisions pursuant to legal frameworks that acknowledged its legality.[33]

As the foregoing makes clear, the death penalty is different. By simultaneously implicating law, morality, religion, politics, and policy, capital punishment is unlike most other

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[28] *See, e.g.* Brandice Canes-Wrone, Tom S. Clark, & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23 (2014).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Ori Lev, *Personal Morality and Judicial Decision making in the Death Penalty Context*, 11 J. L. & RELIGION 637 (1994).

[33] *Id.*

legal issues that judges consider. Judges, like all of us, often have beliefs about the death penalty are personal, complex, and potentially fundamental to their judicial ideologies. It is crucial to consider the ways in which these types of foundational issues affect judicial decision making.

c. JUDICIAL DECISION MAKING IN STATE SUPREME COURTS

The decision making matrices facing state supreme court judges differ from those facing federal judges. While scholars have long acknowledged the importance of the purely legal model of judicial behavior – which holds that mechanical legal analysis primarily determines judicial behavior – the current literature generally accepts that other factors are also at play. Scholars have noted differing approaches to judicial selection and retention, the looming specter of Supreme Court review, and principles of federalism as factors affecting judicial behavior.

Some scholars favor a purely attitudinal model of judicial decision making – espousing the simple idea that judges make decisions based on personal policy preferences, and nothing else.[34] According to a purely attitudinal model, ideology is the primary factor contributing to judicial behavior, at the expense of legal, institutional, personal, or political considerations.[35] Although ideology certainly plays a role in judicial decision making, it seems increasingly clear that there are also other factors at play.[36]

Craig F. Emmert's integrated model of judicial decision making in state supreme courts is a useful starting point. After analyzing a dataset with thousands of state high court decisions, he

[34] *E.g.* JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[35] *E.g.* NANCY MAVEETY, THE PIONEERS OF JUDICIAL BEHAVIOR (2003).

[36] *See, e.g.* William Mischler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 169-72 (1996).

shows that a wide variety of legal factors exert independent impacts on decision making.[37] In particular, he identifies legal issue, appellant identity, constitutional arguments advanced, the centrality of those constitutional arguments, and the decision of the lower court as particularly impactful variables.[38] Emmert's work demonstrates the wide variety of purely legal considerations that can affect judicial decision making.

Other scholars have focused on institutional models of judicial decision making. They draw connections, both empirically and theoretically, between state high court decision making and judicial selection regimes. Much of this work has focused on the unique considerations facing elected judges. The work of Damon M. Cann and Teena Wilhelm offers empirical evidence of a connection between public opinion and judicial decision making – particularly for elected judges.[39] That relationship, they propose, varies with the method of judicial retention; elected judges seem to care more about public opinion than appointed judges.[40] Finally, they find that decisions are more likely to mirror public opinion in visible, politically-charged cases.[41]

Jenna Becker Kane argues that the judicial responsiveness to electoral concerns affects not only ultimate decision making, but also responsiveness to amicus briefs.[42] Kane does note that judges primarily respond to the information presented in amicus briefs – rather than being

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[37] Craig F. Emmert, *An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases*, 54 J. POL. 543 (1992).

[38] *Id.*

[39] Damon M. Cann & Teena Wilhelm, *Case Visibility and the Electoral Connection in State Supreme Courts*, 39 AM. POL. RES. 557 (2011); *see also* Pablo T. Spiller & Richard G. Banden Bergh, *Toward a Positive Theory of State Supreme Court Decision Making*, 5 BUS. & POL. 7 (2003) (presenting empirical evidence showing that trends in state high court decision making depend in part on the state-mandated mode of judicial selection, election, or retention).

[40] Cann & Wilhelm, *supra* note 39.

[41] *Id.*

[42] Jenna Becker Kane, *Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making*, 17 ST. POL. & POL'Y Q. 251 (2017).

swayed by the identities of the drafters themselves – and she acknowledges that this trend seems to diminish the importance of electoral concerns. Nonetheless, she notes that judicial responsiveness to the information in amicus briefs, particularly in politically-charged cases, is very closely tied to the re-election and campaign fundraising concerns of individual judges.[43] Specifically, she notes that judges facing re-election more often directly cite amicus briefs in politically-charged cases that mirror the opinions of the public or of powerful political figures.[44]

Importantly, this scholarship indicates that political concerns also affect judges who are appointed and then reappointed by the legislature, rather than elected.[45] Thomas Gray's study of state high court judges in South Carolina, Vermont, and Virginia – the only states in the union where high court judges can be retained by the legislature at the end of their terms – offers some insight. Gray submits that judges appointed by the party in the majority at the end of their term are largely insulated from political pressure and can make decisions independently. He argues that they are largely assured that the legislature will reappoint them, even if they stray from the party line on a few occasions.[46] Conversely, judges appointed by the party in the minority at the end of their term face a robust set of political pressures. Those pressures can be analyzed by comparing judges eligible for reappointment to those who are ineligible for reappointment because of mandatory or voluntary retirement.[47] The voting patterns of minority-appointed judges who are ineligible for legislative reappointment largely resemble voting patterns from

[43] *Id.*

[44] *Id.*

[45] *See, e.g.* Thomas Gray, *The Influence of Legislative Reappointment on State Supreme Court Decision making*, 17 ST. POL. & POL'Y Q. 275 (2017).

[46] *Id.*

[47] Many states have a mandatory retirement age for state supreme court judges.

earlier in their terms. Minority-appointed judges who are eligible for legislative reappointment, however, vote in line with the opinions of the majority legislative party far more often.[48] Thus, even judges who are not directly accountable to public opinion can be subject to indirect political pressure from a legislative majority that did not appoint them.[49]

Other scholars maintain that respect for national Supreme Court standards and fear of Supreme Court reversal motivate decision making in some areas. Sara C. Banesh and Wendy L. Martinek specifically examine confession cases.[50] Their findings indicate that state supreme courts carefully heed Supreme Court jurisprudence in confession cases, sticking carefully to the national standard, which is highly deferential to the factual determinations of lower courts.[51] Thus, one of the best predictors of decision making in confession cases is the decision of the court below – indicating that state high courts have taken Supreme Court precedent seriously in this area, and are not inclined to rely heavily on a shield of federalism.[52] Interestingly, Banesh and Martinek find little support for attitudinal or institutional models of decision making in confession cases.[53]

Broadly, this scholarship illustrates the complexity of the decision making matrices that affect judicial behavior in state supreme courts. The outcome of a case cannot be attributed exclusively to the quality of the briefs, performance at oral argument, or even the ideology of

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[48] Gray, *supra* note 44.

[49] *Id.*

[50] Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision Making in Confession Cases*, 23 JUST. SYS. J. 109 (2002).

[51] *Id.*

[52] *Id.*

[53] *Id.*

individual judges. While the legal merits of each case are, of course, the starting point for any judge, a wide array of factors also have the potential to affect decision making in state high courts. These factors can be personal, political, attitudinal, institutional, ideological, or pragmatic.

As the scholarship on the death penalty and on judicial decision making in capital cases reflect, a wide variety of factors influence decision making in state high courts. Further, the death penalty is a unique issue that implicates morality, politics, religion, law, and policy in complex ways. It stands to reason, then, that the presence or absence of the death penalty in a given state could impact judicial decision making, regardless of whether or not the case at hand is a would-be capital case.

d. THE IMPACT OF JUDICIAL POLICIES ON DECISION MAKING

There is also significant scholarship examining the impact that judicial and legal policies have on judicial behavior. Most of this scholarship focuses on the impact of the Federal Sentencing Guidelines on judicial behavior and sentencing patterns. Some of these scholars have discussed the death penalty.

Critics of the Sentencing Guidelines have noted that they have, to some extent, exacerbated sentencing disparities and lengthened average terms of incarceration. JS Hall and William J. Stuntz independently note that the implementation of the Sentencing Guidelines – which were intended to decrease sentencing disparities and improve equality in the criminal justice system – have actually worsened conditions for some indigent defendants. [54] Specifically,

[54] William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); JS Hall, *Guided to Injustice? The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331 (1999); *see also* David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267 (2005).

the Guidelines have led to a drastic increase in guilty pleas by increasing prosecutorial power and limiting the ability of defense attorneys to protect their clients from lengthy sentences.[55]

Other scholars have examined the impact of the Sentencing Guidelines on judicial behavior. Using data from the United States Sentencing Commission, Max M. Schanzenbach and Emerson H. Tiller find that the Guidelines have caused judges to alter their approaches to sentencing in order to avoid reversal on appeal.[56] They find that fact-oriented adjustments and variations are reviewed far less strictly on appeal than official departures from Guidelines recommendations.[57] Sentencing judges may account for this by using adjustments rather than departures – even where a departure may be more appropriate – in order to protect sentences from subsequent reversal. Further, sentencing judges that are politically aligned with the appellate court are more likely to use departures than those who are not.[58]

Shawn D. Bushway et al. similarly find that the Sentencing Guidelines impact judicial decision making in sentencing review. Specifically, appellate judges appear to become impact-sensitive when reviewing Guidelines-focused challenges to sentences, shying away from adversely impacting defendants, even where there may have been an error in the sentence reached at the trial court.[59] The work of these scholars clearly indicates that legislative and executive policies that regulate judicial decision making also impact it in unintended ways.

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[55] *See* Stuntz, *supra* note 54; Hall, *supra* note 54.

[56] Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007).

[57] *Id.*

[58] *Id.*

[59] Shawn D. Bushway, Emily G. Owens, & Anne Morrison Piehl, *Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors*, 9 J. EMPIRICAL LEGAL STUD. 291 (2012).

e. GOALS OF THIS STUDY

No published studies have yet examined the impact of state-level death penalty abolition on judicial decision making in state courts in non-capital conviction appeals. My analysis addresses this gap and seeks to expand upon the literature on legal and political factors impacting judicial outcomes. By isolating the impact of death penalty abolition on outcomes in non-death penalty cases, this paper explores the extent to which judges' views on capital punishment are connected to their overarching judicial philosophies, legal ideologies, and policy preferences. Rather than simply examining judicial behavior in death penalty cases, this paper analyzes the extent to which legal and political structures related to a controversial issue might affect judicial outcomes in all cases – even those in which the issue is not directly relevant. This paper also seeks to situate those issues within the complex and dynamic matrix of factors affecting judicial behavior, and to show exactly how much of an impact they have. In doing so, this paper builds on scholarship on judicial behavior and enhances our understanding of judicial decision making. I also seek to build upon death penalty scholarship by exploring the extent to which death penalty politics and policy are a proxy for general judicial, political, and ideological climate of a state court system. By bridging the gap between death penalty scholarship and judicial behavior scholarship, I seek to add depth and nuance to both.

IV. THEORETICAL FRAMEWORK

In order to examine the relationship between death penalty abolition and judicial outcomes in state supreme courts, I develop the theoretical model described below. The framework underlying this model attempts to illustrate the factors that should impact judicial outcomes in criminal cases or alter the ways in which death penalty abolition impacts judicial behavior. I specifically focus on cases in which defendants challenge the validity of their convictions; my baseline model assumes that the underlying case is a conviction challenge. I also examine how effects differ when a conviction is not being challenged by controlling for the absence of a conviction. The empirical model described in Section VI is developed pursuant to this theoretical framework and is intended to test its reliability.[60] The framework is:

Judicial Outcome = f (Death Penalty, Defendant Status, Legal Issues, Opinion Type, Disposition, e)

Underlying this model is the belief that various legal and institutional factors affect judicial behavior in criminal cases. The presence or absence of the death penalty in a given jurisdiction is the primary, but not the only, factor of interest in this analysis.

The presence of certain issues can theoretically impact judicial behavior both legally and attitudinally. Importantly, different legal issues and types of cases are subject to different standards of review on appeal and utilize different burden-shifting regimes. For example, an appellate court may review an appeal on one issue for clear error, while reviewing another issue de novo – without deferring at all to the trial court. A criminal defendant appealing a trial court decision is much more likely to succeed on de novo review than on clear error review – clear

[60] *See infra* VI.

error review forces appellate courts to be far more deferential to trial courts. Further, judges likely view different legal issues through different lenses. For example, appellate judges are sometimes more willing to overturn the decision of a trial judge than the decision of a trial jury.

The inclusion of dispositional data is related in some ways to the inclusion of issue-related data. The ultimate disposition of a case – whether the state supreme court affirms or reverses the lower court, and to what degree – depends on a wide variety of factors, including the legal issues present in a case. It is worth evaluating whether defendants fare better or worse in cases that have certain final dispositions.

It is also worthwhile to examine the potential impact of the nature of the court's opinion – whether it was unanimous, split, or per curiam. This sheds light on the impact that judicial coalition-building has on ultimate judicial outcomes. Specifically, I examine whether defendants fare better or worse depending on the form or nature of the court's ultimate opinion.

Finally, defendant status can also affect judicial outcomes. Variables focused on defendant status allow the comparison of effects for differently-situated defendants. This is important because different classes of defendants have different legal and procedural rights. A criminal defendant's legal and procedural rights can vary greatly depending on whether they are a pre-trial detainee, a parolee, a criminal suspect, or a convict. Judges are also likely to look at these types of parties differently in ways that might affect their behavior. I focus on defendants challenging convictions in state supreme courts as my reference group.

Overall, the literature clearly indicates – and intuition affirms – that the factors described in this theoretical model are tied to judicial decision making in criminal cases. The theoretical framework described above is well-suited to the empirical model applied to the data.

V. DATA AND METHODS

I apply my model to data collected by the State Supreme Court Data Project at Rice University. The dataset contains more than 21,000 decisions issued by state supreme courts between 1995 and 1998. There are 9,046 criminal cases. I dropped 362 observations that were missing values for the identity of the defendant, and I dropped 186 observations in which the party of interest was a prisoner, parolee, or a pre-trial detainee.[61] This left only those observations where the defendant was: 1) already convicted; or 2) a trial defendant; or 3) an uncharged suspect. In my analysis, I examine the distinction between those sub-groups, focusing on defendants who are appealing their convictions. Ultimately, I analyze 8,498 observations.

The level of observation is the individual case; the dataset contains nearly 400 variables describing each case. The variables describe information about cases including the forum state, the attributes of the parties, the properties and nature of the court's decision, the disposition of the case on appeal, the votes of individual judges, and the legal and procedural issues on which the case was decided. I report the descriptive statistics for all relevant variables in Table 1 below.

TABLE 1. DESCRIPTIVE STATISTICS OF RELEVANT VARIABLES[62]

Variable	Mean	Standard Dev.	Count	Min	Max
POIwins	0.292	0.455	2,481	--	--
abolish	0.215	0.411	1,825	--	--

[61] These variables correspond to the identity of the defendant for the purposes of the litigation. For example, an incarcerated defendant bringing a claim of abuse by prison guards would be coded as a "Prisoner," while an incarcerated defendant challenging his conviction would be coded as a "Convict."

[62] The statistic "Count" represents the number of observations with a value of "1" for each binary indicator variable; it only applies to binary indicators. I did not report minimum and maximum values for binary indicators.

Variable	Mean	Standard Dev.	Count	Min	Max
POIsuspect	0.113	0.316	958	--	--
noconviction	0.152	0.359	1,292	--	--
fedcapital	0.362	0.481	3,076	--	--
constitution	0.438	0.496	3,718	--	--
evidence	0.523	0.500	4,445	--	--
jury	0.287	0.452	2,440	--	--
numberissues	2.311	2.114	--	1	30
r_ofinterest	0.159	0.366	1,354	--	--
d_split	0.236	0.425	2,004	--	--
d_percuriam	0.119	0.323	1,007	--	--
d_unan	0.762	0.426	6,479	--	--
d_reverse	0.272	0.445	2,312	--	--
d_inpart	0.078	0.268	660	--	--
d_affirm	0.601	0.490	5,105	--	--

The dependent variable in my model is a modified judicial outcome variable. The dataset contains judicial outcome variables describing whether the court ruled in favor of the petitioner or the respondent. I modify that variable to focus it on my "parties of interest" – those who are subject to criminal liability or otherwise under threat from the criminal justice system. The final

modified judicial outcome variable is an indicator variable. It takes on a value of 1 if the court ruled in favor of the party of interest, and it takes on a value of 0 if the court ruled against the party of interest.

The primary independent variable in my model is an indicator variable describing the legality of the death penalty in the forum state. As of 1995, only 14 states had abolished the death penalty. I make the reference group for the indicator variable non-abolition states to isolate the impact of abolition on judicial outcomes. Thus, the indicator takes on a value of 1 if the forum state had abolished the death penalty before 1995, and it takes on a value of 0 if it had not.

I focus on three groups of secondary independent variables. First, I develop, code, and analyze indicator variables describing the attributes and statuses of the parties of interest. The most important of these is an indicator variable corresponding to the party of interest's status in the criminal justice system. The reference category for this variable is defendants who have already been convicted by a trial court; the baseline group that I seek to analyze is post-conviction defendants challenging their convictions in state supreme courts. Thus, the coefficients on this indicator will represent the effect of changing party status from a post-conviction appellant to a trial defendant or suspect. The other indicator related to the parties' status corresponds to whether the party of interest is a petitioner or a respondent; because most criminal defendants before state supreme courts are petitioners, "petitioner" is the reference category.

Second, I develop, code, and analyze variables describing the legal and procedural issues on which each case was decided. Most of these variables are indicators, which take on a value of 1 if a given legal or procedural issue was addressed in the case and a value of 0 if it was not. The

dataset contains individual indicators corresponding to each relevant legal issue, including the validity of a search or seizure, the suppression of evidence, the proportionality of a sentence, due process, the confrontation clause, and the relevance of evidence, among others. The dataset also contains indicators corresponding to relevant procedural issues, including speedy trial act concerns, the validity and scope of a search warrant, the length and nature of any pre-trial detention, and any potential violations of a suspect's *Miranda* rights. I use those indicators create consolidated indicator variables representing the presence or absence of certain types of issues – evidentiary issues, constitutional issues, procedural issues, and jury-related issues. I also create an indicator variable that describes whether the defendant in a given case would have been eligible for the federal death penalty, had the case been brought in federal court rather than state court. I use one continuous variable, which describes the total number of legal and procedural issues that were relevant to a given case.

Finally, I develop variables describing the nature of the court's decision. I develop indicator variables describing the whether the decision was unanimous or split, and whether the opinion was signed or per curiam. I also develop variables describing the case's ultimate disposition – the extent to which the court affirmed, reversed, or remanded the lower court's decision. I intend for these variables to offer information that goes beyond the judicial outcome variable that my model is attempting to describe.

Age is the primary drawback associated with these data: the data are twenty years old. While age should be considered when interpreting the results of my analysis, the data nonetheless have other qualities that make them ideal for analysis. First, the dataset is broad; it contains more than 21,000 decisions reached by more than 400 justices from all fifty state

supreme courts, and the observations are evenly distributed between the states.[63] Some more recent datasets are dominated by one or a few states. Second, the data can be used for cross-sectional analysis. No states abolished the death penalty between 1995 and 1998; thus, the primary dependent variable in my model does not change during the observed time period. Finally, the dataset is comprehensive. As noted above, there were data collected on nearly 400 variables describing every aspect of a given case. Further, missing data is not an issue; very few observations are missing values for important variables. I believe the downside associated with the age of the data is offset by these positive factors.

The next section, Section VI, contains the statistical notation for the empirical model estimated as part of this study. That model represents a concrete statistical application of the theoretical framework described in Section IV to the data described in Section V. Section VI also contains descriptions of the individual variables included in the model, as well as explanations of their impact on the statistical analysis conducted.

[63] This dataset only contains cases from U.S. states. It does not contain cases from the Supreme Court of Puerto Rico or the District of Columbia Court of Appeals.

VI. EMPIRICAL MODEL

a. MODEL

$$POIwins = ß_0 + ß_1 abolish + ß_2 POIsuspect + ß_3 noconviction + ß_4 fedcapital + ß_5 constitution + ß_6 evidence + ß_7 jury + ß_8 numberissues + ß_9 r\_ofinterest + ß_{10} d\_split + ß_{11} d\_percuriam + ß_{12} d\_unan + ß_{13} d\_reverse + ß_{14} d\_inpart + ß_{15} d\_affirm + \mu$$

b. VARIABLE DESCRIPTIONS[64]

- *POIwins* – dependent variable, indicator: likelihood of success at the state supreme court for the party facing criminal liability.
- *abolish* – indicator: whether the forum state abolished the death penalty prior to 1995.
- *POIsuspect* – indicator: whether the person of interest was a suspect or trial defendant, as opposed to an already-convicted defendant.
- *noconviction* – indicator: whether there were no convictions being challenged in the case.
- *fedcapital* – indicator: whether the crime at the heart of the case would render the defendant eligible for the federal death penalty if the case were brought in federal court.
- *constitution* – indicator: whether a constitutional issue was raised on appeal.
- *evidence* – indicator: whether an evidentiary issue was raised on appeal.
- *jury* – indicator: whether an issue related to the trial jury was raised on appeal.
- *numberissues* – continuous: the number of legal issues contested on appeal.
- *r_ofinterest* – indicator: whether the party of interest was the respondent on appeal, as opposed to the petitioner.
- *d_split* – indicator: whether the state supreme court's opinion reported a split decision.
- *d_percuriam* – indicator: whether the state supreme court's opinion was issued per curiam.

[64] This sub-section names each variable included in the model, notes whether a given variable is binary or continuous, and briefly describes the variable's substantive import. More detailed explanations of each variable can be found below.

- *d_unan* – indicator: whether the state supreme court's opinion reported a unanimous decision.
- *d_reverse* – indicator: whether the state supreme court reversed entirely the lower court decision.
- *d_inpart* – indicator: whether the state supreme court reversed the lower court in part and affirmed the lower court in part.
- *d_affirm* – indicator: whether the state supreme court affirmed entirely the lower court decision.

c. VARIABLE EXPLANATIONS

The *abolish* variable illustrates the impact that prior death penalty abolition has on a criminal defendant's likelihood of success on appeal. It is the primary independent variable in this analysis.

There are six legal issue variables: *noconviction, fedcapital, evidence, constitution, jury* and *numberissue*s. The only continuous variable – *numberissues* – shows how volume impacts decision making. It controls for the compounded effect of multiple issues on judicial behavior – how each additional legal issue added to a case affects a defendant's odds of success. *Fedcapital* describes whether the defendant would have been eligible for the federal death penalty had the case been brought in federal court. This variable provides a measure of the severity of charged crimes that is equalized across states. This distinction regarding eligibility for the federal death penalty speaks to the importance of the underlying charge – and the nature of the crime therein – in any criminal case. The other four indicator variables support inferences regarding the ways in which judicial behavior may change based on subject matter. Justices may have more or less expertise in certain areas of the law, they may have preconceived notions about them, and they may prefer particular approaches to the analysis of certain types of issues.

There are three opinion variables: *d_split*, *d_percuriam*, and *d_unan*. These variables control for the nature of the opinion issued by the state supreme court. Specifically, they control for whether the court reached a split or unanimous decision, and for whether the court issued its opinion per curiam. As noted below, these variables may be correlated with legal issues, as well as with the underlying merits of a defendant's case.

There are three variables related to case disposition: *d_reverse*, *d_inpart*, and *d_affirm*. They control for the state supreme court's ultimate treatment of the lower court ruling – whether the lower court ruling was reversed entirely, affirmed entirely, or reversed in part and affirmed in part. These variables are likely correlated to some degree with legal issue variables, because they depend in part on the standard of review applied by the state supreme court. They are ultimately critical to understanding the factors affecting judicial decision making.

There is one defendant status variable: *POIsuspect.* It controls for the ways in which judges treat criminal parties differently based on where they stand in the criminal justice system. Specifically, this variable controls for the change in effect when a suspect has not yet been convicted. In some cases, this variable may be correlated with legal issue variables; nonetheless, that multicollinearity is unlikely to be significant or irreparable.

The *r_ofinterest* variable controls for whether the party of interest is the respondent on appeal. In the vast majority of cases, the Government is the respondent and the party facing criminal liability is the petitioner. This indicator controls for the rare exceptions.

VII. EMPIRICAL RESULTS

a. LINEAR PROBABILITY ESTIMATION

I estimated three distinct linear probability models to evaluate the factors affecting outcomes in state supreme court conviction challenges. I report the results from these models in Table 2 below. All three models control for the status of the death penalty in the forum state, as well as for whether or not the defendant is a convict challenging a conviction. Thus, the *POIsuspect* and *noconviction* regressors ensure that the reported results pertain to cases in which a party is challenging a conviction. The models build on each other; Model 2 simply adds variables to Model 1, and Model 3 adds variables to Model 2.

TABLE 2. LINEAR PROBABILITY ESTIMATION

N = 8,498	**Model 1**	**Model 2**	**Model 3**
	$R^2 = 0.0311$ $F_{9, 8487} = 35.95$	$R^2 = 0.0518$ $F_{12, 8484} = 49.17$	$R^2 = 0.3985$ $F_{15, 8481} = 394.68$
abolish	-0.066*** (0.012)	-0.048*** (0.012)	-0.019** (0.009)
POIsuspect	0.075*** (0.020)	0.078*** (0.020)	0.068*** (0.022)
noconviction	-0.063*** (0.016)	-0.062*** (0.016)	-0.051*** (0.016)
fedcapital	-0.074*** (0.012)	-0.074*** (0.012)	-0.036*** (0.008)
constitution	-0.050*** (0.011)	-0.048*** (0.010)	-0.033*** (0.008)
evidence	-0.045*** (0.011)	-0.027** (0.011)	-0.004 (0.009)
jury	-0.025** (0.012)	-0.021* (0.012)	-0.000 (0.009)

N = 8,498	**Model 1**	**Model 2**	**Model 3**
	$R^2 = 0.0311$ $F_{9, 8487} = 35.95$	$R^2 = 0.0518$ $F_{12, 8484} = 49.17$	$R^2 = 0.3985$ $F_{15, 8481} = 394.68$
numberissues	-0.014*** (0.003)	-0.014*** (0.003)	-0.007*** (0.002)
r_ofinterest	-0.039** (0.016)	-0.046*** (0.016)	-0.239*** (0.023)
d_split	**--**	-0.523*** (0.068)	-0.487*** (0.055)
d_percuriam	**--**	0.052*** (0.016)	0.010 (0.011)
d_unan	**--**	-0.661*** (0.068)	-0.540*** (0.055)
d_reverse	**--**	--	0.244*** (0.027)
d_inpart	**--**	--	0.356*** (0.030)
d_affirm	**--**	--	-0.335*** (0.026)

i. LPM MODEL 1

Model 1 is a baseline model. All reported coefficients in this model are statistically significant at the 1 percent level with the exception of *jury* and *r_ofinterest*, both of which are significant at the 5 percent level. The negative *abolish* coefficient indicates that defendants are less likely to win conviction challenges in state supreme courts in states that have abolished the death penalty. Specifically, these results indicate that the likelihood of success in conviction challenges ("*POIwins*") is about six percentage points lower in non-death-penalty states. Below, I interpret this variable through odds ratios estimated from logistic regression.

The regressors controlling for defendant "status" and for the presence of a conviction on appeal also tell an interesting story. *POIsuspect* has a coefficient of 0.075. This indicates that post-conviction defendants are 7.5 percentage points less likely to win conviction appeals than pre-conviction suspects are to win any appeal, regardless of legal issue. This result is not particularly surprising; defendants receive a wide swath of favorable legal presumptions pre-conviction that they lose post-conviction. Indeed, the government bears the burden of proof on almost all legal issues before a conviction is obtained, and defendants bear the burden of proof on almost all legal issues (including on appeal) after a conviction is obtained.

The negative *noconviction* coefficient indicates that post-conviction defendants are more likely to succeed on conviction-related challenges than on appeals related to other issues separate from their conviction. This result likely speaks to the types of legal issues that go up on appeal. A convicted defendant has a variety of ways to challenge his conviction; there are, however, relatively few common issues that convicts bring that are unrelated to the validity of the conviction itself. Many of those appeals are related to sentencing; convicted defendants can challenge their sentences as excessive or improper. The Sentencing Guidelines and sentencing law, however, give broad discretion to trial judges in the calculation and application of criminal sentences. Thus, it is very hard for a defendant to successfully challenge an otherwise lawful sentence on appeal.

This model also controls for *fedcapital* – whether the challenged conviction would have qualified the defendant for the federal death penalty, had the case been brought in federal court. Unsurprisingly, the coefficient on this variable is negative. Only the most heinous crimes are eligible for the federal death penalty, and defendants convicted of particularly heinous crimes are

less likely to succeed on appeal than defendants convicted of more commonplace crimes. Judges are not immune to emotional response when adjudicating a case concerning horrifying crimes.

Model 1 also evaluates the impact of the presence of different legal issues on the rates of success for conviction challenges. Notably, the coefficients on each of the three discrete legal issue categories are negative. This may not speak to any comparison between the three issues, but it certainly speaks to the difficult task that defendants face on appeal in attempting to overturn a conviction – winning any legal issue on appeal is a heavy lift. The presence of a constitutional issue in the case corresponds to a 5-percentage-point decrease in likelihood of success, while the presence of an evidentiary issue corresponds to a 4.5-point drop. The presence of a jury-related issue – a question related to jury error, jury selection, jury instruction, etc. – has the smallest coefficient of the three at -0.025.

Numberissues is the only continuous variable in the model; it indicates that every additional legal issue (beyond the first) added to a case corresponds with a 1.4 percentage point decrease in likelihood of success. While there are multiple plausible interpretations of this coefficient (including judicial fatigue), one stands out as particularly reasonable. This variable may be correlated with the merits of an appeal – both actual and perceived. Most overturned convictions have just one or two fatal flaws; it is relatively uncommon for a conviction to be overturned because the defendant successfully proves the existence of several individually-fatal errors. Thus, if an appeal raises several legal issues, many of them may well be without merit. This could have an effect on the way that judges approach cases. When a judge sees an attorney raise several meritless claims, the judge may well view all of the attorney's claims – even the plausible ones – with more suspicion. Even more fundamentally, appeals that raise more issues

may be less meritorious in reality. This is particularly possible on the extremes; a defendant raising a dozen or more legal issues on appeal is likely "throwing things at the wall," rather than executing a reasoned and targeted legal strategy.

ii. LPM MODEL 2

Model 2 builds on Model 1 by introducing variables related to the nature of the opinion ultimately issued in a given case. Specifically, I added indicators related to whether the decision was unanimous, split, or per curiam. For the most part, the coefficients from Model 1 did not change fundamentally in Model 2. Each of the three legal issue coefficients decreased in absolute values, as did *abolish* and *noconviction*. Two coefficients – *fedcapital* and *numberissues* – were unchanged.

The addition of three new variables in Model 2 did not change the basic effect observed under Model 1. That is, regardless of the form of the opinion, defendants face an uphill battle when challenging convictions. The variable corresponding to split decisions (*d_split*) has a coefficient of -0.523, and the variable corresponding to unanimous decisions (*d_unan*) has a coefficient of -0.661. Both are significant at the 1 percent level. Thus, it appears that defendants fare slightly worse in unanimous decisions than they do in split decisions, but that both types of decisions are negatively related to defendant success. Apparently, it is particularly difficult to get all judges to agree in favor of a criminal defendant; this could speak to the divisive nature of criminal cases within judicial panels. It is worth noting that these two coefficients have, by far, the largest magnitude in the model.

Per curiam decisions appear to exert a slight positive effect on the likelihood of defendant success – the coefficient on *d_percuriam* is 0.052 and is significant at the 1 percent level. One

possible explanation for this relates to the types of cases that are decided per curiam. Per curiam opinions are often short and cursory; they may contain relatively little analysis and may be issued in cases on which the judges agree unanimously but do not feel compelled to walk through the one-sided analysis. In the context of criminal justice, it is possible that judges are less likely to participate in such cursory analysis when the losing party is a criminal defendant. The Constitution affords a great many protections to criminal defendants. Out of respect for those principles, judges may be hesitant to rule against defendants per curiam – instead favoring opinions that dig deeper into the merits of a defendant's claim. Thus, if a decision in a criminal case is per curiam, it's possible that is more likely to be in favor of a criminal defendant.[65]

iii. LPM MODEL 3

Model 3 builds on Model 2 by introducing variables corresponding to the ultimate disposition of a given case. That is, the newly-included variables describe whether the court's opinion completely affirmed the lower court ruling (*d_affirm*) , completely reversed the lower court ruling (*d_reverse*), or affirmed the lower ruling in part and reversed the lower ruling in part (*d_inpart*). Model 3 is by far the most robust model that I estimated – as shown in Table 2, the R^2 jumped by more than 0.34 between Model 2 and Model 3. Further, the introduction of the new variables rendered insignificant some variables in Model 3 that were statistically significant in Model 1 and Model 2. There is a strong intuitive explanation for these effects.

D_reverse represents opinions in which the state supreme court reversed entirely the decision on appeal from the court below. The coefficient on this variable is 0.244; defendants are

[65] Importantly, this inference is not directly supported by the statistical results of Model 2, but it is nonetheless a reasonable theoretical inference.

24.4 percentage points more likely to have won a case if that case reversed entirely the lower court ruling. In the context of conviction challenges, this means that complete reversals are 24.4 percentage points more likely to overturn a conviction than to affirm a conviction. This coefficient is statistically significant at the 1 percent level. The explanation for this result is, to some extent, one of legal structures and processes. Every criminal defendant is guaranteed an appeal if they are unsatisfied with the resolution of their trial, or of a given legal issue within their trial – this is called an "appeal as of right." The government is not entitled to an appeal as of right. The government may appeal pre-verdict trial court rulings, but it is barred from appealing acquittals by the Double Jeopardy Clause of the 5th Amendment.[66] As a result, most criminal appeals feature criminal defendants, rather than the government, appealing unfavorable lower court rulings. In other words, most criminal defendants ask appellate courts to reverse lower court rulings; it is much more rare for a criminal defendant to ask an appellate court to affirm a lower court ruling. So, if a decision in a criminal case from a state supreme court reverses entirely the lower ruling, it is most likely that the criminal defendant won the appeal.

The reverse is true for complete affirmations of lower court rulings. Most criminal defendants are petitioners asking appellate courts to reverse lower court rulings. So, if a state supreme court completely affirms a lower court ruling, it is most likely that the defendant lost the case. This is borne out by the results reported from Model 3. The coefficient reported for *d_affirm* is -0.335; criminal defendants are 33.5 percentage points less likely to have won a case if the case completely affirmed the lower court ruling. In the context of conviction challenges, a

[66] U.S. Const. amend. V.

complete affirmation from a state supreme court is 33.5 percentage points more likely to be affirming a conviction than it is to be affirming a lower court's vacation of a conviction.[67]

The statistical significance of four variables changed markedly between Model 2 and Model 3. First, the coefficient on *abolish* decreased in magnitude to -0.019, and dropped in significance from the 1 percent level to the 5 percent level. This seems to indicate that, in the presence of a full and robust model, death penalty abolition is not as strong a predictor of judicial decision making as other, more intuitive legal variables. The sign of the coefficient remained the same throughout all three models; it is clear that death penalty abolition exerts a negative impact on defendant success. The variable is statistically significant, but its predictive power is modest when compared to those of other variables included in the model.

It is also important to note that *evidence*, *jury*, and *d_percuriam*, all of which were statistically significant in the earlier models, became statistically insignificant in Model 3. *Evidence* was significant at the 1 percent level in Model 1 and at the 5 percent level in Model 2, before becoming insignificant ($p = 0.684$) in Model 3. *Jury* was significant at the 5% level in Model 1 and at the 10% level in Model 2, before becoming insignificant ($p = 0.975$) in Model 3. *D_percuriam* was not included in Model 1 but was significant at the 1 percent level in Model 2 before becoming insignificant ($p = 0.378$) in Model 3.

[67] The results for the *d_inpart* variable are of limited application to this analysis. This variable corresponds to cases in which the state supreme court affirms part of the lower court ruling while reversing other parts. The outcome variable – POI wins – takes on a value of 1 whenever a criminal defendant receives some or all of the relief they requested. The coefficient on *d_inpart* is 0.356; defendants are 35.6 percentage points more likely to receive at least some of the relief requested if the decision is decided "in part." However, the dataset used in this analysis does not specify which issues were affirmed and reversed in "in part" decisions. Thus, it is impossible to evaluate this result in the specific context of conviction challenges, where a conviction challenge is just one of multiple legal issues present in a case.

The lost significance of *jury* and *evidence* is best understood in terms of the standards of review applied by appellate courts in those areas of law. The resolution of most evidentiary issues is considered well-within the discretion of trial judges; indeed, trial judges are given broad latitude, both under the Federal Rules of Evidence ("FRE") and under the common law, to apply evidentiary rules and resolve evidentiary disputes. As a result, appellate judges are usually inclined to defer to trial judges' understanding of the facts of cases and their resulting rulings on evidentiary disputes. The standard of review is deferential in evidentiary cases, so appellate judges must hesitate to overrule evidentiary rulings made in trial courts. The same is true of jury-related issues. Trial judges are given broad discretion in managing jury selection and jury instruction, and in ensuring that the jury fulfills its constitutional responsibility to the defendant and the government. Appellate courts are generally hesitant to question judicial decision making when it comes to jury management. Further, appellate courts are loathe to question or overrule the decisions or actions of a constitutional jury, particularly in criminal cases. The jury process is a central principle that undergirds our entire system of justice, and judges rarely want to "take a case away from a jury" by overruling or abrogating a legal, if imperfect, jury decision.

Considering the nature of these two areas of law, it is not surprising that the corresponding variables became statistically insignificant when I added related variables to the model. Model 3 controls for the disposition of a case – the extent to which the lower court ruling was affirmed or reversed. The standard of review applied by appellate courts in reviewing certain legal issues plays a critical role in determining whether the appellate court will reverse or affirm a lower court decision. Thus, it is unsurprising that variables representing two areas of law with

particularly deferential standards of review would become statistically insignificant in a model that also controls for the ultimate disposition of the case.

The lost significance of *d_percuriam* may be related to the types of cases that are decided per curiam. As briefly noted above, courts often issue per curiam decisions where: 1) the court agreed unanimously on the outcome of the case; or 2) the majority does not want to designate one judge as the opinion writer. Often, courts issue per curiam opinions in cases that are relatively easy to decide – cases that can be disposed of quickly and with little controversy. Per curiam opinions are often short and feature relatively little explanation beyond a brief articulation of the court's decision.[68] As a result, per curiam opinions tend to be complete reversals or complete affirmations of lower court rulings. Decisions in which a court affirms and reverses a lower court ruling in part are likely to be more complex; they require more analysis and explanation, and they may well be more divisive within a group of judges. Thus, there is likely some correlative overlap between the conditions amenable to per curiam opinions and the ultimate disposition of a case.

b. LOGISTICAL ESTIMATION

I also estimated three logistical models on the same dataset. The results are reported below in Table 3. These three logit models run parallel to the three linear probability models discussed above – they feature the same combinations of variables. When estimating these logit models, I calculated both the coefficients and the odds ratios corresponding to each variable. I

[68] On some occasions, the Supreme Court has chosen to issue per curiam opinions in landmark, highly consequential cases. In some of these highly controversial cases, the court agreed unanimously, but in others the Court issued a per curiam decision to avoid naming one justice as the opinion writer. Examples of these cases include *New York Times v. Sullivan* and *Bush v. Gore* – both of which featured long and complex opinions. These cases, however, are examples of an uncommon use of per curiam opinions.

reported the odds ratios, rather than the coefficients, for six variables that I found particularly interesting and important: *abolish*, *fedcapital*, *d_split*, *d_unan*, *d_reverse*, and *d_affirm*. While there were some minor differences in the values of certain coefficients between the logit estimations and the linear probability estimations, none are particularly worthy of note. The total magnitudes and statistical powers of certain coefficients may have varied slightly, but the relative magnitudes and signs remained the same for most coefficients. As a result, I will focus the remainder of my analysis on the six variables for which I chose to report odds ratios instead of coefficients. Those odds ratios are particularly useful for interpreting the impact of these important variables in meaningful ways. Indeed, odds ratios are likely more precise estimators than LPM estimators in this context because the underlying mathematics of odds ratios better fits a binary dependent variable.

TABLE 3. LOGIT ESTIMATION WITH COEFFICIENTS AND ODDS RATIOS

	Model 1		**Model 2**		**Model 3**	
	Coef.	**Odds Ratio**	**Coef.**	**Odds Ratio**	**Coef.**	**Odds Ratio**
abolish	--	0.725*** (0.044)	--	0.791*** (0.050)	--	0.889* (0.063)
POIsuspect	0.348*** (0.092)	--	0.369*** (0.095)	--	0.432*** (0.133)	--
noconviction	-0.309*** (0.079)	--	-0.309*** (0.081)	--	-0.357*** (0.106)	--
fedcapital	--	0.696*** (0.042)	--	0.691*** (0.042)	--	0.748*** (0.050)
constitution	-0.230*** (0.054)	--	-0.223*** (0.054)	--	-0.225*** (0.065)	--

	Model 1		Model 2		Model 3	
	Coef.	**Odds Ratio**	**Coef.**	**Odds Ratio**	**Coef.**	**Odds Ratio**
evidence	-0.138** (0.057)	--	-0.107** (0.057)	--	0.010 (0.068)	--
jury	-0.114* (0.064)	--	-0.098* (0.064)	--	-0.001 (0.074)	--
numberissues	-0.101*** (0.020)	--	0.101*** (0.020)	--	-0.092*** (0.022)	--
r_ofinterest	-0.187** (0.074)	--	-0.224*** (0.076)	--	-1.414*** (0.137)	--
d_split	--	--	--	0.042*** (0.046)	--	0.041*** (0.036)
d_percuriam	--	--	0.257*** (0.074)	--	0.071 (0.080)	--
d_unan	--	--	--	0.022*** (0.024)	--	0.029*** (0.025)
d_reverse	--	--	--	--	--	3.010*** (0.389)
d_inpart	--	--	--	--	1.704 (0.149)	--
d_affirm	--	--	--	--	--	0.115*** (0.016)

The reported odds ratios for *abolish* are statistically significant at the 1 percent level for Models 1 and 2, and statistically significant at the 10 percent level for Model 3. The odds ratios for this variable are as follows: 0.725 (Model 1); 0.791 (Model 2); 0.889 (Model 3). While the *abolish* coefficients from the linear probability estimations made clear that death penalty

abolition exerts a negative impact on likelihood of defendant success, they offer a somewhat muddy interpretation as to the magnitude of that impact. Odds ratios provide us with a more concrete sense of the extent to which death penalty abolition exerts negative pressure on defendant success.

These odds ratios are calculated with the individual probabilities of defendant success for each value of a given indicator variable. Here, the odds ratio on *abolish* is a ratio of the probability of defendant success in a death penalty state and the probability of defendant success in an abolition state. The resulting ratio is a direct comparison of those two probabilities. An odds ratio between zero and one indicates a lower probability of the dependent variable equaling one. Model 3 is the most robust logit model I estimated. For Model 3 (OR = 0.889), a defendant challenging a conviction in an abolition state is 0.889 times as likely to win in the state supreme court as an otherwise identical defendant in a death penalty state. So, defendants in abolition states are about 11 percent less likely to successfully challenge their convictions than defendants in death penalty states. The same logic applies to the interpretation of the other odds ratios on *abolish*. Under Model 1, defendants in abolition states are 0.725 times as likely to win as defendants in death penalty states; under Model 2, defendants in abolition states are 0.791 times as likely to win.

I also calculated the odds ratios for *fedcapital*. Like the odds ratios on *abolish*, the odds ratios on *fedcapital* increased as I added variables to the model; the odds ratios for *fedcapital* were statistically significant at the 1 percent level in all three models. The odds ratios for this variable are ratios of the probability of success for a defendant whose crime would not be eligible for the federal death penalty, over the probability of success for a defendant whose crime

would be eligible for the federal death penalty. Unsurprisingly, those in the latter group are less likely to succeed. The odds ratio for Model 3 is 0.748 – defendants who would qualify for the federal death penalty are 0.748 times as likely to succeed as defendants who would not qualify.

As noted in the discussion of the linear probability estimations, defendants generally fared slightly better in cases yielding split decisions than in cases yielding unanimous decisions. The odds ratios on those two variables provide a clear understanding of the magnitude of that disparity. The odds ratios on *d_split* and *d_unan* remained statistically significant at the 1 percent level in both Model 2 and Model 3. Further, the magnitudes of the odds ratios for these two variables did not change significantly between Models 2 and 3. The odds ratio for *d_split* represents the ratio of the probability of success, given that the decision was split, and the probability of success given that the decision was not split. The ratio for Model 3 was 0.041. The ratio for *d_unan* was the ratio of the probability of success, given a unanimous decision, to the probability of success given a non-unanimous decision. The ratio for Model 3 was 0.029.

Another set of particularly interesting odds ratios concerned *d_reverse* and *d_affirm*. As noted above, the likelihood of a defendant having won a certain case is heavily impacted by whether that case reversed or affirmed the lower court ruling. Cases reversing lower court rulings are more likely to favor defendants, and cases affirming lower court rulings are more likely to favor the government. The odds ratios allow us to truly pinpoint the magnitude of those effects, and of the disparity between them.

For *d_reverse*, the odds ratio is the ratio of: 1) the probability that a defendant won, given that the decision entirely reversed the lower court ruling; and 2) the probability that a defendant won, given that the decision did not entirely reverse the lower court ruling. The odds ratio for

d_reverse in Model 3 was 3.010 – a defendant in a case where the decision entirely reversed the lower court was more than three times as likely to win that case as an otherwise identical defendant in a case where the lower court was not reversed.

For *d_affirm*, the odds ratio is the ratio of: 1) the probability that a defendant won, given that the decision entirely affirmed the lower court ruling; and 2) the probability that a defendant won, given that the decision did not entirely affirm the lower court ruling. The odds ratio for *d_affirm* in Model 3 was 0.115 – a defendant in a case where the decision affirmed the lower court was 0.115 times as likely to win as a defendant in a case where decision did not affirm the lower court. In other words, defendants are slightly more than $1/10^{th}$ as likely to win if the lower court is affirmed, and they are more than three times as likely to win if the lower court is reversed.

In the next section, I discuss the conclusions I drew from my analysis and the political and legal implications thereof.

VIII. IMPLICATIONS

Through this study, I sought to evaluate and compare the myriad factors affecting judicial outcomes in conviction appeals before state supreme courts. I was specifically interested in the effect that state-level death penalty abolition has on the rates at which criminal defendants succeed in challenging their convictions before state supreme courts. I noted that there were equally strong arguments supporting two competing hypotheses: 1) that abolition serves as a proxy for a more lenient judicial climate and therefore positively affects defendant success; and 2) that abolition negatively affects defendant success by removing the possibility that affirming a conviction would condemn a defendant to die, and in doing so decreasing incentives for judges to vacate convictions. My findings support the latter hypothesis. In my sample, criminal defendants in states that abolished the death penalty were about 11 percent less likely to win their appeal before state supreme courts. I also found that dispositional information – whether the state supreme court affirmed or reversed the lower court – was more predictive of judicial outcomes than the presence or absence of certain legal issues in a case.

a. THE NEGATIVE IMPACT OF ABOLITION ON DEFENDANT SUCCESS

One critical conclusion arising from these results concerns the primary independent variable: state-level death penalty abolition. The results indicate that defendants are less likely to win conviction challenges in states that have abolished the death penalty. Specifically, Model 3 indicates that defendants in abolition states are 11 percent less likely to win their appeal than otherwise-identical defendants in non-abolition states. As discussed above, this finding could have a variety of explanations. One seems particularly likely – that judges are more willing to uphold convictions when they know that doing so will not condemn the defendant to die. Judges

surely grapple with their responsibility for the results of their decisions, and it follows that decreasing the severity of possible punishment might alter decision making in this way. There are other reasonable explanations – including possible consistent differences in sentencing law and criminal law between abolition states and death penalty states. These alternative explanations are all worthy of independent study.

This is an important result for criminal justice reform advocates to consider. More research is needed to understand the depth of this harmful effect and to think about ways in which it might be mitigated. Nonetheless, if future research confirms and builds upon this finding, abolitionists might need to consider the possibility that abolition will create unintended consequences by disadvantaging defendants appealing their convictions. Regardless of this finding, abolition surely remains a critical and worthy goal of all criminal justice reform advocates. Advocates may simply need to consider additional policy proposals and reforms to couple with death penalty abolition that would avoid the unintended consequence illustrated by my analysis.

I did not examine race as part of this analysis, although race is a critical vector along which the death penalty should be studied. Recent social science research overwhelmingly indicates that race plays a role in the application of the death penalty at both the state and federal levels.[69] Specifically, there is significant evidence showing that defendants of color are more likely to receive the death penalty than white defendants who commit the same crimes. There is further evidence showing that the death penalty is more likely to be applied to crimes with white victims than to crimes with victims of color. Future research could add nuance to my findings by

[69] See *supra* III. a.

evaluating how the impact of death penalty abolition differs based on: the race of the defendant; the race of the judge; the racial makeup of the forum state; and the racial makeup of the forum state's prison population.

b. CONSIDERING STANDARDS OF REVIEW AND LOWER COURT RULINGS

As shown in Tables 2 and 3 above, the inclusion of dispositional data – the extent to which the state supreme court reversed or affirmed the lower court – drastically increased the predictive power of the models I estimated. This was true for both the linear probability models and the logistical models. Indeed, the variable *d_reverse* had, by far, the largest positive odds ratio of any variable in the model; defendants were more than three times as likely to win a case that reversed a lower court ruling, as opposed to one that affirmed a lower court ruling. On its face, this finding is easily explained: successfully appealing a lower court ruling is hard, regardless of the context. The legal burdens on appellants are heavy, and most appellate judges consider humility and deference to lower courts to be a core ethic of their role in the judicial system. Indeed, the existence of standards of review stems from the deference our judicial system affords to lower court rulings; an appellate court will almost always be statistically more likely to affirm the lower court than to reverse. In this regard, these findings provide further empirical support for Craig F. Emmert's integrated model of judicial decision making.[70]

In the context of conviction appeals, this finding likely speaks to the specific legal issues that are often contested and the standards of review applied to them. The inclusion of dispositional information rendered variables corresponding to the relevance of evidentiary issues and jury issues statistically insignificant. This finding clearly speaks to the importance of

[70] *See* Emmert, *supra* note 37.

standards of review as predictors of judicial outcomes. As noted throughout this paper, evidence and jury trials are two areas of the law in which initial decision makers have broad discretion. The law requires that appellate judges defer where reasonable to the initial evidentiary decisions of trial judges – the only judges who participate in the initial fact-finding process. Further, judges are always loathe to overturn a decision of a jury if they don't have to. Thus, in many cases, the appellate court's ultimate decision will be heavily affected, if not determined, by the standards of review applied to the legal issues in the case.

With that in mind, those advocating criminal justice reform might decide to target their efforts at altering or relaxing the standards of review applied to evidentiary issues in state courts. Relaxing those standards might enable appellate courts to more freely correct evidentiary errors made by trial judges. This, in turn, could improve the likelihood that convictions obtained through or despite evidentiary error are vacated by state supreme courts. Such a shift would also, however, cut the other way; evidentiary errors that favor defendants would also be more easily reversed by appellate courts. It would be important to research the ways in which evidentiary rulings and errors affect defendants – whether evidentiary errors are more likely to benefit or injure defendants – before deciding to advocate a shift in standards of review.

This finding also indicates that focusing solely on state supreme courts provides an incomplete picture of these issues. If state supreme court decisions in conviction appeals are in large part affected by lower court rulings and standards of review, then state intermediate appellate courts take on greater importance in this analysis. The analytical framework articulated in this paper could be applied to state intermediate appellate courts; indeed, such analysis is

likely necessary in the long run in order to fully illustrate the complex set of factors affecting conviction appeals in state courts.

It is unclear whether this analytical framework could be applied to courts below the state supreme court in the nine states with two-tiered state court systems.[71] Those nine states only have trial courts and supreme courts; they do not have intermediate appellate courts.[72] It might be difficult to apply this analytical framework – much of which evaluates factors that only exist in the context of an appeal – to trial courts.

c. THE NEED FOR MORE RECENT DATA

I chose these data for my analysis because they were the most recent data available and because they represented observations from a time period during which no states abolished the death penalty. Nonetheless, data from 1995 to 1998 may be somewhat limited in their ability to definitively illustrate modern trends. Thus, it is critical for future studies to apply this analytical framework to more recent data. Since 1998, ten additional states have abolished the death penalty – New Hampshire did so most recently, in 2019.[73] Those ten states are diverse politically, geographically, and demographically, and they could therefore add nuance to any findings without skewing them along any particular vector. Further, New York (abolished in 2007) and Illinois (abolished in 2011) are two of the most populous states in the union.[74] Abolition in those states affects a significant number of observations and could affect the

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[71] *Supra* note 9.

[72] *Id*.

[73] *States with the Death Penalty and States with Death Penalty Bans*, PROCON.ORG (May 30, 2019), https://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/.

[74] *US States – Ranked by Population 2020*, WORLD POPULATION REVIEW, http://worldpopulationreview.com/states/.

findings of this analysis. Applying my analytical framework to more recent data that take into account states that recently abolished the death penalty could add helpful nuance and context to my findings.

IX. CONCLUSION

It is often hard to pin down the factors affecting judicial behavior. Judges are primarily influenced by the law – legal issues, the standards and principles that govern them, and the range of legally permissible outcomes. However, judges can also be influenced by other factors, including the factual underpinnings of a case, their own political or moral positions, and the institutional structures within which they operate. It's complicated, and judicial decision making will likely always retain an aura of mystery to outsiders.

Countless studies have advocated theories of judicial behavior and proposed frameworks for evaluating judicial decision making; few have quantitatively analyzed the effect of specific factors on outcomes in particular types of cases. This requires isolating and evaluating the specific factors affecting judicial behavior. The importance of such research is perhaps greatest in criminal law, where the individual liberty and, at times, the lives of defendants are at stake.

Issues with political or moral implications are particularly likely to impact judicial behavior – these issues are especially worthy of study. The death penalty is one of many such issues. The findings of this study indicate that state-level death penalty abolition negatively impacts defendant success rates in conviction appeals in state supreme courts. To some extent, the importance of this finding exists independent of the sign or magnitude of the effect observed. Indeed, it is notable that there is any measurable effect at all. Judges strive to properly and fairly administer justice, but they are forced to grapple with the moral, personal, and practical implications of their decisions. Understanding that calculus – the factors, both discrete and diffuse, affecting judicial behavior – is critical to both effective advocacy and informed observation.

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