
ARTICLE

JUDICIAL POLITICS, DEATH PENALTY APPEALS, AND CASE SELECTION: AN EMPIRICAL STUDY

JOHN BLUME*

& THEODORE EISENBERG**

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* Visiting Professor of Law & Director Cornell Law School Death Penalty Project. B.A., 1978, University of North Carolina; M.A.R., 1982, Yale University; J.D., 1984, Yale University. We would like to thank Jill Abernethy, Kara Copley, Sheila Duke-Mims, Cassie Ehrenberg, Sheila Kieran, Jonathan Metkowsky, Bill Miller, Jay Ong, Paula Swensen, Gil Tabachnik, and Asmara Tekle for able research assistance; Ann M. Eisenberg, Justin Schwab, and Karen Wilson for assistance in designing the database and data input; and Stephen P. Garvey for comments. We would also like to thank Cornell Law School for financial support.

** Henry Allen Mark Professor of Law, Cornell Law School. B.A., 1969, Swarthmore; J.D., 1972, University of Pennsylvania.

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I. INTRODUCTION

Several studies try to explain case outcomes based on the politics of judicial selection methods.¹ Scholars usually hypothesize that judges selected by partisan popular elections are subject to greater political pressure in deciding cases than are other judges. No class of cases seems more amenable to such analysis than death penalty cases. Indeed, strong anecdotal evidence suggests a relation between the politics of selection methods and death penalty appeal outcomes. For example, electoral removals of Chief Justice Rose Bird in California and Justice Penny White in Tennessee were directly linked to decisions in capital cases.² A 1980s study, moreover, suggests that states' judicial selection methods correlate with capital appeal outcomes.³ Thus, one expects judges who must face voters to be more reluctant to overturn death sentences.

1. See, e.g., DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL SELECTION METHOD ON STATE-SUPREME-COURT POLICY* (1996); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13 (1992); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make?*, 5 JUST. SYS. J. 1 (1979); F. Andrew Hansen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEGAL STUD. 205 (1999).

2. See John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50, Nov. 1996, at 50, 51; Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL OF RTS. J. 345, 444-45 & n.462 (1998); Stephen B. Bright, *Hanging the Judge; Demagogues, Politicians Chip Away at U.S. Court System*, ARIZ. REPUBLIC, June 8, 1997, at H1; Maura Dolan, *Rose Bird's Quest for Obscurity*, L.A. TIMES, Nov. 15, 1995, at A1. See also *infra* text accompanying notes 13-18, 25-28.

3. See Gerald F. Uelman, *Elected Judiciary*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 170, 171 (Leonard W. Levy, Kenneth L. Karst & John G. West, Jr. eds., Supp. I 1992). This study shows meaningful differences between judges selected by executive appointment compared

No study, however, accounts both for judicial politics and case selection, the process through which cases are selected for death penalty litigation. Yet, the case selection process cannot be ignored because it yields a set of cases for adjudication that is far from a random selection of cases.⁴ Effects based on judicial selection politics can only reliably be detected if one accounts for this filtering of cases judges adjudicate.⁵

In death penalty litigation, the case filtering process begins with the prosecutor's decision to seek the death penalty. Some prosecutors are said to do so in virtually every case that arguably satisfies their state's criteria for possible imposition of the death penalty.⁶ Others exercise substantially more discretion.⁷ These differences should lead to interstate variation in the death-worthiness of cases trial courts adjudicate. Consider two prosecutors: One prosecutor only seeks the death penalty in cases involving defendants who have been previously convicted of murder, were released, and subsequently murder again. The second prosecutor seeks death in every possible death-eligible case. While acknowledging the difficulty attending any formal definition of "death-worthiness," we expect the first prosecutor's collection of capital cases to be, on average, more death-worthy than the second prosecutor's collection of capital cases.

The case filtering process affecting reviewing courts' case mix continues at the adjudicatory stage. The trial adjudicator, either the judge or the jury, may cushion the effect of extreme prosecutorial death-seeking behavior. Prosecutors may seek death, but the adjudicator need not impose it. So the most extreme variations in death-seeking behavior likely fade by the time reviewing courts address the residue of appealed death penalty cases. Indeed, the adjudicators themselves may skew the reviewing

with judges selected by other methods, such as elections. But it shows no substantial differences between judges selected within the various election methods.

4. See Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. 592 (1997) (analyzing case selection process).

5. See Orley Ashenfelter, Theodore Eisenberg & Stewart Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (accounting for assignment of cases); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (same).

6. See Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6 (Magazine), at 20 (noting that Philadelphia's district attorney "seeks death virtually as often as the law will allow."). But see David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1677 tbl.1 (1998) (showing that death is not sought in all death-eligible cases in Philadelphia).

7. For evidence of intrastate variation in prosecutorial death-seeking behavior in Georgia, see DAVID C. BALDUS, GEORGE WOODSWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 120, 122, 125 (1990).

courts' case mix. Given prosecutors with the same death-seeking behavior, more death-prone adjudicators will present reviewing courts with a different mix of death penalty cases than less death-prone adjudicators. The combined effects of prosecutors' and adjudicators' behavior need not lead to imposing the death penalty in equally death-worthy cases across states. And, in fact, we find that states obtain the death penalty at widely varying rates.

Variation in the rates at which prosecutors seek death penalties and adjudicators impose them thus ought to influence the rate at which reviewing courts overturn capital sentences. In the extreme, a state in which prosecutors seek and obtain the death penalty in every possible case will, on average, submit for judicial review a class of cases that is less death-worthy than a state in which prosecutors seek or obtain the death penalty only in the most egregious of the eligible cases. The group of less death-worthy cases ought to be subject to more frequent reversal than a more selectively filtered group of cases.

In theory, case selection could frustrate efforts to detect political effects. Life-tenured, fully independent judges may challenge death sentences infrequently because they serve in a jurisdiction in which prosecutors and adjudicators are highly selective about the cases in which they seek and impose death. Conversely, judges selected in highly partisan elections may reverse a significantly higher number of death sentences because prosecutors and adjudicators in their jurisdiction show little restraint in seeking and imposing the death penalty. Detecting the effect of judicial selection politics occurs against this background of case selection and must account for it.

Two aspects of the impact of judicial selection politics are worth separating. The first focuses on interstate differences in death penalty case processing. Methods of state judicial selection are believed to correlate with death penalty outcomes. The more independent the state's judiciary, the more likely the judiciary is to scrutinize death sentences without fear of reprisal. A second aspect of judicial selection politics relates to possible differences between state and federal judges. Unlike most state judges, federal judges are independent of the electoral process. Whether or not interstate differences exist in capital case processing, we might expect federal judges to be more willing to question death sentences than state judges.

This Article uses two databases to explore factors affecting grants of relief from death penalties. The first consists of approximately 800 appeals of death sentences decided from 1995 to 1997. It consists solely of

direct appeals in capital cases and is limited to state courts. The second database is the Bureau of Justice Statistics' ("BJS") database of all persons sentenced to death from 1973 to 1995.⁸ It includes information about whether a defendant obtained relief from a death sentence and includes post-conviction relief. The source of relief could be federal or state court but the database does not reveal which court system acted to grant relief.

Accounting for case selection, as measured by states' rates of obtaining death penalties in murder cases, helps explain the pattern of relief from death sentences in the BJS data. The rate at which states impose sentences strongly correlates with the rate at which relief was obtained from those sentences. But case selection does not help explain the pattern of reversals in state court death penalty appeals from 1995 to 1997. That is, we find no correlation between states' rates of obtaining death penalties and state courts' reversing capital convictions or sentences.

Furthermore, we find little evidence that states' methods of selecting judges correlates with outcomes of death penalty cases. The first aspect of judicial selection politics, interstate variation in relief from death sentences, does not depend on mode of judicial selection. The absence of such a correlation holds whether or not one accounts for case selection.⁹ And the absence of correlation holds for both the BJS data and the state court appellate case data.

Although we find no system-wide evidence of the effect of state judicial election methods on case outcomes, developments in individual states do confirm the death penalty's politically charged character. But the pattern of challenges to individual state justices and the responses manifested in subsequent death penalty adjudication are not readily explained by the conventional belief that justices are most vulnerable in states with partisan judicial elections. For example, California is generally not classified as a state with partisan judicial elections. Yet death penalty politics played a major role in reconstituting the California Supreme Court.¹⁰ So interstate differences in death penalty case processing are not readily explicable by judicial selection methods.

8. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CAPITAL PUNISHMENT IN THE UNITED STATES, 1973-1995 (Inter-Univ. Consortium for Pol. and Soc. Research No. 6956, 1997) [hereinafter BJS]. Although the BJS data include federal capital defendants, we exclude them from the analysis.

9. But we obtain a significant negative correlation between partisan judicial elections and reversals when we recharacterize Ohio from a nonpartisan election state to a partisan election state. Excluding Ohio, there is not even a near-significant difference. See *infra* text accompanying notes 73-77.

10. See *infra* text accompanying notes 25-29.

We find indirect evidence that the federal judiciary processes death penalty cases differently than state courts. The correlation in the BJS data between states' death-obtaining behavior and relief from death penalties suggests that death penalty decisionmaking that includes the federal judiciary reflects differences in the underlying death-worthiness of cases. The absence of such a correlation in the state court appellate data could be interpreted as evidence of pressure to affirm death penalty cases with less attention to their death-worthiness.

Studying states' varying death-obtaining behavior also offers a new perspective on states' overall capital case behavior. In particular, states with large death rows are not necessarily the states that most vigorously pursue capital punishment. California and Texas have large death rows. But California obtains death penalties at a lower rate per murder than any other major death penalty state. And Texas' death-obtaining rate is not noticeably different from that in other capital punishment states.

One caveat is in order: Appellate judges of course are not always free to reverse capital case convictions or death sentences based on personal notions of death-worthiness. They are constrained by the requirement that there be legal error—although many states allow for proportionality review.¹¹ We assume that the tendency to detect legal error is related to some underlying notion of death-worthiness, though not solely determined by perceived death-worthiness.

Part II of this Article documents recent campaigns to oust judges based on their decisions in death penalty cases. These campaigns suggest that judges subject to partisan elections will be reluctant to question death sentences. Part III explains our methodology for exploring the relationship among judicial elections, states' death-obtaining rates, and judicial review of capital cases. Finally, Part IV reports our empirical results.

II. CAMPAIGNS TO OUST JUDGES BASED ON DEATH PENALTY DECISIONS

Several initiatives have sought to unseat state supreme court judges because of their votes in capital cases.¹² The most prominent recent cam-

11. See, e.g., Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 CRIM. L. & CRIMINOLOGY 130, 131-32 (1996).

12. For more detailed accounts of these efforts, see Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997), and Stephen B. Bright & Patrick J. Keenan,

paign involved former Tennessee Supreme Court Justice Penny White. White was appointed to the state's highest court in 1995. She participated in only one capital case during her eighteen-month tenure on the court: *State v. Odom*,¹³ a case in which the defendant's death sentence was unanimously reversed.¹⁴ White did not author the court's opinion; a review of the *Odom* decision revealed that reversal of the defendant's death sentence was mandated by previously existing state law which White had no role in creating.¹⁵

Justice White's retention election came soon after the *Odom* decision. The new Republican Governor of Tennessee—Justice White was a Democratic appointee—in conjunction with several victim's rights groups, orchestrated a high profile campaign to unseat White because of her concurring vote in *Odom*. The campaign attacked White as putting “the rights of criminals before the rights of victims,” and as believing that repeatedly raping and stabbing to death a seventy-eight year old woman “wasn't heinous enough for the death penalty.”¹⁶ It worked and White was not retained. Since then, other members of the Tennessee Supreme Court have announced that they will not stand for reelection.¹⁷ When the Governor of Tennessee was asked after White's defeat if a judge should “look over his shoulder” when making decisions, he responded: “I hope so.”¹⁸

Texas went through a similar experience in 1994. A Texas Court of Criminal Appeals decision reversing a high profile capital case led the

Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. REV. 759 (1995).

13. 928 S.W.2d 18 (Tenn. 1996).

14. See *id.* See also Gibeaut, *supra* note 2, at 50.

15. Among the grounds relied on for reversal were at least two violations or misinterpretations of express statutory commands. The State relied on an aggravating circumstance set forth in TENN. CODE ANN. § 39-13-204(I) (8) (Supp. 1998), which allows imposition of a death penalty upon a finding that “the murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of confinement.” The *Odom* court held that an escapee whose escape had been completed was not covered by the escape provision in the statute. See *Odom*, 928 S.W.2d at 27. The court also held that the trial court erred in refusing to admit, as evidence in mitigation, psychological testimony about the defendant's personal and psychological history. This refusal contradicted a Tennessee statute plainly contemplating testimony about the defendants' background. See *id.* at 27-28.

16. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 11 (1997) (quoting TENNESSEE REPUBLICAN PARTY, JUST SAY NO! (1996)).

17. See *id.*

18. Paula Wade, *White's Defeat Poses Legal Dilemma: How Is a Replacement Justice Picked?*, COM. APPEAL (Memphis, Tenn.), Aug. 3, 1996, at A1.

Chairman of the state Republican Party to call for a takeover of the court.¹⁹ Voters answered the call as Republican candidates won every position they sought on the court. One of the new judges, Stephen W. Mansfield, campaigned for the court on promises of expansion of the death penalty, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases."²⁰

In 1992, Mississippi Supreme Court Justice James Robertson was defeated in his reelection bid. The central issue in the campaign was the death penalty. One advertisement used by his opponents urged the citizens of Mississippi to "vote against Robertson because he's opposed to the death penalty and he wants to let all these people go."²¹ His opponent in the Democratic primary ran as a "law and order candidate" with the endorsement of the Mississippi Prosecutors' Association. He declared that Robertson thought that "a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a crime serious enough to warrant the death penalty."²²

Chief Justice Exum of the North Carolina Supreme Court was opposed because of his antideath penalty views.²³ He was forced to fight

19. See Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32. The case was *Rodriguez v. State*, 848 S.W.2d 141 (Tex. Crim. App. 1993).

20. John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUS. CHRON., Nov. 10, 1994, at A29. Ironically, it turned out that Judge Mansfield had misrepresented his prior background, experience, and record, and after winning the election was deemed an "unqualified success." See Janet Elliot, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1.

21. Ronald J. Tabak, Commentary, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 280, 281 n.84 (1994).

22. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 15-20 (1992). See also *Death Penalty Caused Judge's Fall, Critics Say*, GREENWOOD COMMONWEALTH (Miss.), Mar. 13, 1992, at 3; *Incumbent Robertson Defeated*, GREENWOOD COMMONWEALTH (Miss.), Mar. 11, 1992, at 1; Carole Lawes & Beverly Pettigrew Kraft, *High Court Judge Coddled Criminals, Critics Say*, CLARION-LEDGER (Jackson, Miss.), Mar. 13, 1992, at 1B. The resolution of the prosecutors' association asserted that Robertson's opponent "best represents the views of the law abiding citizens" and "will give the crime victims and the good, honest and law abiding people of this state a hearing that is at least as fair as that of the criminal in child abuse, death penalty, and other serious criminal cases." Case, *supra*, at 16 n.108. Robertson was particularly criticized for a concurring opinion maintaining that the Eighth Amendment to the U.S. Constitution did not permit the death penalty for rape where there was no loss of life, a position conclusively established by the United States Supreme Court years earlier. See *Coker v. Georgia*, 433 U.S. 584 (1977). Justice Robertson was also vilified for dissenting opinions in two cases that the Supreme Court subsequently reversed. See Case, *supra*, at 18-19.

23. See Joseph Neff, *Exum Retiring as Chief Justice at End of Year*, NEWS & OBSERVER, (Raleigh, N.C.), July 28, 1994, at A1. On Chief Justice Exum's death penalty views, see *N.C.'s Top Judge Blasts Death Penalty*, ATLANTA J.—CONST., June 15, 1994, at A3.

back with statistics outlining the number of cases in which he had voted to affirm the death sentence. Although he was reelected once, he announced that he would not run again when his current term expired in 1998.²⁴

Perhaps the best known of these incidents occurred in California. In the mid-1980s three members of the California Supreme Court, including Chief Justice Rose Bird, lost their jobs in a retention election dominated by the death penalty.²⁵ The Governor was an active participant in the ultimately successful attempt to replace the judges, and went so far as to indicate to two members of the court that he may change his mind about opposing them if they voted to uphold more death sentences.²⁶ After the court reversed several other capital cases, the governor carried out his threat²⁷ and successfully opposed the retention of all three members of the

24. When asked whether elected justices can survive if they sometimes overturn death sentences, Exum said, "[Y]es, they can, but I believe it is becoming more and more difficult." Symposium, *Politics and the Death Penalty: Can Rational Disclosure and Due Process Survive the Perceived Political Pressure?*, 21 *FORDHAM URB. L.J.* 239, 272 (1994).

For example, in his campaign for reelection to the Nevada Supreme Court, Justice Cliff Young "formed a highly-visible political alliance with the State's attorney general, who in numerous campaign advertisements publicly 'urged all Nevadans' to vote for Justice Young." *Nevius v. Warden*, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting). Justice Young ran campaign advertisements proclaiming that he had a "record of fighting crime," which included voting to uphold the death penalty 76 times. *See id.* Young was reelected. A condemned man whose case came before the court moved to recuse Young because the State was represented by the attorney general. During the pendency of the case, Young had "repeatedly published his appreciation of the attorney general's support and how much he 'welcomed' her support . . . because of the attorney general's 'role as the State's top law enforcement officer.'" *Id.* Nevertheless, the Nevada Supreme Court denied the motion to disqualify Justice Young. *See id.* at 859. Justice Springer dissented saying:

"Tough on crime" claims made by judges in election campaigns are so common in Nevada as to go almost unnoticed. Our judicial discipline authorities customarily ignore this kind of judicial misconduct once the judge becomes elected or reelected. It goes beyond "tough on crime" for a judge to claim that he is a "crime fighter," especially when, on top of this, the judge identifies his principal election supporter as being the State's attorney general. Judges are supposed to be *judging* crime not fighting it.

Id.

25. *See* Scott Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 *HARV. C.R.-C.L. L. REV.* 187, 199 (1996). Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice James Grodin all lost their reelection bids. *See id.*

26. *See* Leo C. Wolinsky, *Governor's Support for 2 Justices Tied to Death Penalty Votes*, *L.A. TIMES*, Mar. 14, 1986, at 3. The Governor had already decided that Chief Justice Rose Bird had to be replaced because of her "anti-death penalty voting pattern." The Governor had initially indicated he might oppose Justice Mosk, but in 1985 Justice Mosk voted to affirm several death penalty convictions and the Governor indicated he supported Mosk's retention. *See* John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, The Electorate and the Issue of Judicial Accountability*, 70 *JUDICATURE* 348, 349 (1987).

27. *See* Henry Unger, *Will Vote Against Grodin, Reynoso, Deukmejian Says*, *L.A. DAILY J.*, Aug. 26, 1986, at 1.

California Supreme Court.²⁸ Today, the California Supreme Court has a high affirmance rate in capital cases.²⁹

Pressure on the judiciary can be more subtle. In South Carolina, for example, judicial elections had never been politicized. No sitting justice of the state supreme court had been challenged since 1893.³⁰ However, when Justice Toal—the supreme court’s first female justice—stood for reelection in 1995, she was attacked as a liberal judge who was “soft on crime.”³¹ Republicans, who had recently gained control of the state House of Representatives, were reported to have encouraged a state trial judge to run against Toal.³² Although Toal was ultimately successful in her reelection bid, the process had become politicized.³³

In 1994, South Carolina’s new state Attorney General, Charlie Condon, was elected on the basis of his strong pro-death penalty views. As a prosecutor, Condon had sent eleven men to death row. Both in his campaign and following his election, he attacked the state and federal courts for the lack of executions in South Carolina, making the widely publicized comment that South Carolina’s death row was one of the safest places in the state because of the courts’ lenient treatment of inmates serving death sentences.³⁴ He was also instrumental in eliminating federal funding for death penalty resource centers, organizations that represented indigent in-

28. See Frank Clifford, *Voters Repudiate 3 of Court’s Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at 1.

29. See Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1136 (1997) [hereinafter Uelmen, *Judicial Politicization*].

30. See Robert Tanner, *Ervin Says He Was Warned Off Toal Challenge*, ASSOCIATED PRESS POL. SERVICE, Dec. 11, 1995, available in 1995 WL 6752386.

31. *Id.* Justice Toal was also criticized for her actions on behalf of an inmate up for parole. See also Gary Karr, *Panel Avoids Vote, Tries to Find Facts on Toal Parole Letter*, ASSOCIATED PRESS POL. SERVICE, Jan. 30, 1996, available in 1996 WL 5364574.

32. See Jesse Holland, *South Carolina Bar Finds Toal, Ervin Highly Qualified*, ASSOCIATED PRESS POL. SERVICE, Jan. 11, 1996, available in 1996 WL 5361501.

33. Justice Toal’s reelection difficulties came on the heels of the failed supreme court bid of Victor Pyle. Judge Pyle, a conservative law and order state trial judge, was widely considered the front-runner for a vacant spot on the South Carolina Supreme Court. However, his campaign was derailed because of a temporary restraining order that he entered preventing antiabortion protesters from picketing within 100 yards of an abortion clinic. Judge Pyle’s decision was based on controlling Supreme Court precedent, but after his decision in this case became an issue, his chances in the race were considered by some to be a “long shot.” Cindi Ross Scoppe, *Abortion Protest Order Hurt Pyle*, STATE (Columbia S.C.), Mar. 21, 1995. He eventually withdrew from the race. See Lisa Greene & Cindi Ross Scoppe, *Burnett Rises to High Court*, STATE (Columbia, S.C.), Mar. 22, 1995.

34. See Lisa Greene, *Condon: Crime Fighter or Aspiring Politician?*, STATE (Columbia, S.C.), Sept. 9, 1995 at A1 (“I really think it’s much safer to be on Death Row than to be a citizen of South Carolina.”).

mates sentenced to death.³⁵ Furthermore, when a federal district court judge granted habeas corpus relief in a capital case, Condon was integrally involved in a well publicized effort to have the judge impeached.³⁶ The Attorney General remarked that “[j]ustice has been mocked”³⁷ and used the case as an example of the need for “dramatic reform”³⁸ of the death penalty system. The message to South Carolina’s state judges from this series of events was unmistakable: Reverse capital cases at your own peril.³⁹

III. METHODOLOGY AND DESCRIPTIVE STATISTICS

Capital punishment-related campaigns may lead those judges subject to partisan elections to be more reluctant than other judges to question capital convictions. By partisan elections, we mean elections in which political parties are directly involved in the selection of candidates.⁴⁰ We

35. See Lisa Greene, *Cuts Target Inmates’ Defenders: U.S. Slashes Funds for Death-Penalty Appeals*, STATE (Columbia, S.C.), Aug. 7, 1995, at A1.

36. See Chuck Crumbo, *2 Killers Granted New Trial*, STATE (Columbia, S.C.), Aug. 29, 1996, at A1.

37. *Id.*

38. Michelle R. Davis, *Death Row Appeal Finds Life*, STATE (Columbia, S.C.), Aug. 4, 1997, at B1.

39. Although this Article focuses on state appellate courts, the politics of death also play out at the local and trial court levels. For example, Judge Norman Landford, a judge in Harris County, Texas, granted state habeas corpus relief in one capital case. The outraged District Attorney convinced one of his assistants to run against Landford; the assistant won. See Mark Ballard, *Gunning for a Judge; Houston’s Lanford Blames DA’s Office for His Downfall*, TEX. LAW., Apr. 13, 1992, at 1. Also, in South Carolina, one state trial judge presiding over a state post-conviction relief action denied relief, but sent counsel a letter stating, “Edward Lee Elmore may well not be guilty. . . and perhaps an appellate court may agree with one of your positions.” Letter from J. Ernest Kirnard, Jr., Judge, to Diana Holt, Attorney (Dec. 2, 1996) (on file with authors).

In Georgia, almost all of the state habeas corpus petitions are heard by two elected superior court judges in Butts County, Georgia, the county where death row is located. They have never once granted relief in a death penalty case. Of the cases reviewed by these judges, federal courts have found constitutional violations in three-fourths of the cases. See Stephen B. Bright, *Capital Punishment and the Criminal Justice System: Courts of Vengeance or Courts of Justice*, 45 AM. U. L. REV. 279, 285 (1995). In states where trial judges have the power to override jury recommendations in capital cases, that power is almost always exercised in favor of imposing a death sentence. In Alabama, for example, judges impose a death sentence 10 times as frequently as they override a jury’s death recommendation. See Uelmen, *Judicial Politicization*, *supra* note 29, at 1141. One Alabama judge sought reelection with the campaign slogan: “Some complain that he’s too tough on criminals, AND HE IS . . . We need him now more than ever.” *Committee to Re-Elect Judge Mike McCormick*, BIRMINGHAM NEWS, Nov. 4, 1994, at 4C (advertisement).

40. See, e.g., Samuel Latham Grimes, Comment, “Without Favor, Denial, or Delay”: Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C. L. REV. 2266, 2273 (1998) (describing the history of the elective process in state judiciaries).

rely on traditional classifications of states as having partisan or nonpartisan elections.⁴¹

Although we report in detail only the differences between states with partisan elections and all states, other categorizations of state judicial selection methods are plausible. One could, for example, distinguish between states with merit selection and other states, or between states with elections (partisan or nonpartisan) and other states. The alternative categorizations we explored do not yield results materially different from those reported here.⁴²

To test hypotheses about the relation between judicial selection methods and capital case outcomes, one needs a measure of the outcome of capital case appeals or other efforts employed by prisoners to obtain relief from death sentences. But that measure should be evaluated in light of the process by which cases are selected for capital treatment. Consequently, one requires not only a measure of capital case outcomes, but also a measure of how cases are selected for capital punishment treatment.

A. MEASURING STATES' DEATH-OBTAINING BEHAVIOR

To assess selection of cases for capital treatment, one would ideally like to know the death-worthiness of each potential capital case considered by prosecutors, as well as the prosecutors' decisions whether to seek death. However, we lack case-level knowledge of individual murder cases; we do not know the details of each case that a prosecutor may have considered for capital treatment. We therefore cannot independently assess whether cases warranted seeking death sentences. Second-best methods of measuring thus have to suffice. To construct indices of states' death-obtaining

41. For a categorization of state electoral systems, see LARRY BERKSON, SCOTT BELLER & MICHELLE GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1981); S.P. Garvey, *Capital Punishment and State Supreme Court Activism in the United States: Prospects for Dialogue* 132 (1989) (M. Phil. thesis, Oxford University, on file with authors). See also Hanssen, *supra* note 1, at 214 fig.1 (classifying states according to their judicial selection methods). Traditional classifications are, however, somewhat suspect. See, e.g., Nicole C. Allbritain, Comment, *One Step Closer to Merit-Based Judicial Selection: Ohio's New Limitations on Judicial Campaign Contributions and Expenditures*, 64 U. CIN. L. REV. 1323 (1996) (noting that Ohio's judicial elections are officially classified as nonpartisan but are de facto partisan elections). The most independent judiciaries tend not to be in states with many death penalties. See Grimes, *supra* note 40, at 2271-72 nn.45-47 (listing states with appointed judiciaries).

42. Differences between partisan election states and merit selection states are attributable almost entirely to Florida, which accounts for approximately 41% of the merit selection state cases. And differences between partisan election states and nonpartisan election states are in a direction opposite of what one would predict. As a group, partisan election states are more likely to reverse death sentences than are nonpartisan states. But this does not account for the merit selection states.

behavior, we estimate the number of potential death penalty cases and the number of death penalties actually imposed. We use these estimates to construct a measure of death-obtaining rates which allows for interstate comparisons.

1. *The Number of Potential Death Penalty Cases in Each State*

We use the number of murders in each state as a proxy for the number of possible death penalty cases. A crucial assumption is that the number of death-eligible murders correlates with the number of murders. The correlation need not be perfect, but it ought to be substantial. The FBI's *Uniform Crime Reports* indicate the number of murders for each state for each year.⁴³ The murder data are considered to be among the most reliable data in the *Uniform Crime Reports*.⁴⁴

2. *The Number of Capital Sentences in Each State*

Given each state's number of murders, we need measures of each state's number of death penalties.⁴⁵ The BJS data supply the number of persons sentenced to death in each state in each year. Portions of those data covering different time periods are used for our two different databases, the BJS data and appellate opinions. For the BJS data covering relief from death sentences, we cumulate the number of persons sentenced to death for the years 1985 to 1994. This yields the total number of death sentences obtained by each state for those years. For the appellate opinion data, we use the number of BJS-reported death sentences for the period

43. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T. OF JUSTICE, UNIFORM CRIME REPORTING PROGRAM, PART 93: SUPPLEMENTARY HOMICIDE REPORTS, 1996 (Inter-Univ. Consortium for Pol. and Soc. Research No. 9028, 1998) [hereinafter FBI]. We relied on the same FBI data for each year beginning with 1985.

44. See John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1153 (1998) (citing David Cantor & Lawrence E. Cohen, *Comparing Measures of Homicide Trends: Methodological and Substantive Differences in the Vital Statistics of Uniform Crime Report Time Series 1933-1975*, 9 SOC. SCI. RES. 121 (1980)). But see Michael Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 675-81 (1989); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 762-63 (1990-91) (noting problems in *Supplemental Homicide Reports* data).

An alternative to the number of murders is the number of murders reported by the FBI in which the offender is known. The FBI data distinguish between incidents with known and unknown offenders. See FBI, *supra* note 43, at 8. Using only known offender incidents eliminates cases in which a suspect is never arrested and therefore never subject to a possible death penalty. We repeated our basic analysis using this measure of possible death penalty cases with no material change in the results.

45. A more complete model would account not only for states' death-obtaining behavior, but also for their death-seeking behavior. Measuring death-seeking behavior requires knowing, *inter alia*, the cases in which prosecutors sought death, regardless of case outcome.

1994 to 1996. The time periods were chosen to coordinate with the periods covered by the BJS and appellate opinion databases, described in more detail below.

3. *States' Death-Obtaining Indices*

We combine our measures of the number of possible death cases (as measured by the number of murders) and the number of death penalties to compute states' death-obtaining rates. For the BJS data, we divide the number of persons reported by the BJS to have been sentenced to death in each state from 1985 through 1994 by the number of murders in the state, based on the 1985 to 1994 FBI *Uniform Crime Reports*. For the appellate opinion data, we divided the number of persons reported to have been sentenced to death from 1994 to 1996 by the number of murders in the state, based on 1994 to 1996 FBI *Uniform Crime Reports*.

The utility of these death-obtaining rates rests on the assumption that different rates of obtaining death sentences correlate with differences in trial level behavior and not solely with different underlying distributions of the death-worthiness of murder cases. In other words, we assume that groups of murders were approximately equally death-worthy across states. The trial-level process involves decisionmaking by prosecutors, judges, and juries. If interstate variation exists in these groups' behavior, appellate courts will review sets of cases with varying levels of death-worthiness from state to state. We suspect that the greatest variant in trial level death-obtaining behavior is the prosecutors' differing propensities to seek the death penalty.⁴⁶

State law could also affect death-obtaining rates. For example, some states are regarded as having death penalty laws that make it easier to obtain death sentences than in other states.⁴⁷ States with laws that facilitate obtaining death penalties might be viewed as generating a less death-worthy set of cases for appellate review. But this need not be the prediction based on laws with varying severity. To illustrate, assume that State A's law favors death more than State B's. Holding constant prosecutor and adjudicator behavior, the potential number of death penalties per 100 murders in State A is ten and the potential number in State B is five. Assume that all potential death sentence cases in fact lead to death sentences. Reviewing courts, applying the same laws as the prosecutors and adjudi-

46. States in which prosecutors consistently seek death in less death-worthy groups of cases should have lower rates of capital sentences at the trial court level. However, some less death-worthy cases will inevitably survive the trial process.

47. See BALDUS ET AL., *supra* note 7, at 235-36.

cators, may affirm these sentences at the same rates. Different death-obtaining rates need not lead to different reversal rates because the states have, in effect, generated different criteria of death-worthiness.

Intrastate differences among laws could confound interpretation of the relation between death-obtaining rates and reversal rates. We might observe constant reversal rates for different death-obtaining rates simply because of different legal rules. We do not address this issue in detail for two reasons. First, it is our judgment that state death penalty laws, despite differing structures, are much more alike than different.⁴⁸ The basic structure is, in one way or another, to define a class of aggravated murders. The circumstances of aggravation probably do not differ dramatically. And nominal difference in statutes may fade in application. Second, we applied one knowledgeable source's categorization of states as having more or less broad death penalty statutes.⁴⁹ We found no material difference in states' death-obtaining behavior based on that categorization.⁵⁰

B. MEASURING RELIEF FROM DEATH SENTENCES

We use two measures of relief from death sentences. One is based on the outcomes of capital sentence appeals reported in our database of state court appellate opinions. The other is based on relief rates reported in the BJS capital punishment database.

1. *The BJS Capital Punishment Database*

The BJS tracks every person who is or has been under a sentence of death since 1973. The available data are current through 1995 and contain 6,228 observations.⁵¹ To avoid the effects of early twists and turns in the post-*Furman*⁵² death penalty era, we limit the sample to those defendants

48. This is not surprising in light of the historical development of the Supreme Court's constitutional limitation on the states' imposition of the death penalty. See Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 997 n.35, 1009-10 (1996).

49. See BALDUS ET AL., *supra* note 7, at 236-37 (categorizing death penalty statutes as of 1983).

50. Although it does not affect the judicial selection method or death-obtaining results we report below, we do find a positive correlation between a broad death-obtaining statute and relief from death sentences.

51. See BJS, *supra* note 8, at i. The same defendant may constitute more than one observation in the data. These defendants presumably were removed from death row, then reentered after a resentencing proceeding or a subsequent conviction and death sentence. In counting the number of death sentences in each state, we limited each defendant to one observation. In the regression models reported below, we accounted for the possibility of multiple observations of individual defendants.

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

sentenced after 1984.⁵³ Thus, our BJS data cover defendants sentenced to death from 1985 to 1995. Defendants being considered for potential relief from death sentences have to be matched with death-obtaining rates from an appropriate time period. Death-obtaining rates used, as discussed above, cover the years 1985 to 1994. This is a reasonable period to use for potential death penalty cases because it substantially overlaps with the sentencing year period, 1985-1995. The one-year difference in ending years allows at least some 1994 and earlier murders to proceed to trial and lead to sentencing through 1995. We further limit the sample to the twenty-one states in our appellate opinion database. These selection criteria yield 3,046 observations in the BJS data.

The BJS data come from the prisons, which collect information under the National Prisoner Statistics Program.⁵⁴ The data include information on inmates whose death sentences were removed, including information about the reason for an inmate's removal from death sentence classification. The BJS data include among the reasons for removal: whether a capital sentence was declared unconstitutional, whether a capital sentence was overturned, and whether both a conviction and capital sentence were overturned.⁵⁵ We define a variable, "relief," meaning relief from a death sentence, to equal one when any of these reasons for removal were present. We define relief to equal zero when a prisoner remains on death row and is executed, or dies from other causes, while on death row.

2. *The Appellate Case Sample*

Our appellate case sample consists of every direct appeal of a death penalty case available on Westlaw for the three-year period 1995 to 1997 for twenty-six states. The states are: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Virginia. These states accounted for 3,112 of the 3,208 state prisoners (97%) under sentence of death as of December

53. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court approved several new death penalty statutes on the grounds that they addressed the problems of arbitrariness and discrimination identified in *Furman*. By 1983, in cases such as *Zant v. Stephens*, 462 U.S. 862 (1983), and *Barclay v. Florida*, 463 U.S. 939 (1983), the Court had dismantled "most of the procedural restrictions that were imposed on capital sentencing by *Gregg* and the other 1976 death penalty cases." SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 13-15 & n.30 (1989).

54. See BJS, *supra* note 8, at xix.

55. See *id.* at 10.

31, 1996.⁵⁶ We do not include Connecticut, Delaware, New Hampshire, New Jersey, and Utah cases in our appellate case analysis because these states had too few death penalty cases to permit meaningful analysis. This leaves twenty-one states in the state appellate case sample.

We used search terms broad enough to identify capital cases in each state. With the help of research assistants, we recorded information about each case, including whether the case involved a resentencing.

To compute a state's reversal rate in capital cases, we divide the number of appellate cases in which the defendant achieved some success by the number of appellate cases found. Success is not a self-defining term in assessing litigation.⁵⁷ It is possible to have a death sentence vacated on appeal, have the case remanded to a trial court, and have a death sentence imposed again. At the end of such a process, the defendant may be no better off than at the beginning, except for the delay, which is itself a nontrivial benefit to a prisoner under sentence of death. For defendants with more than one appeal in the database, we use the most recent appeal. Thus, for example, if a defendant's conviction was affirmed by an intermediate appellate court and a state supreme court, only the latter case is retained. We do not otherwise trace each case's subsequent history. We in effect take a snapshot of the process as of a substantial (three-year) period of time.

We define success (a reversal) to exist when the defendant obtains a ruling that precludes imposition of a death sentence unless further action is taken by some court. Therefore, reversals of convictions, remands for hearings on specific issues, vacation of death sentences, and remands for resentencing are defendant successes. Complications arise when both parties appealed or when the state appealed. We limit our analysis to cases in which the defendant's appeal seeks relief from a death sentence. Thus, appeals by the state are not included.

The 1995 to 1997 appellate opinion data match the defendants' appeals being considered for reversal with the time span covered by the *Uniform Crime Reports* 1994 to 1996 murder data, with a one year lag in the measure of murders. The one year lag in the measure of murders allowed the cases to become ripe for adjudication during the time period covered by the appellate data.

56. See TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1996, at 6 tbl.5 (rev. 1998).

57. See Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 517 (1989) (noting the complications in determining who "wins" an appellate court decision).

3. *Differences Between the Measures of Relief from Death Sentences*

Important differences exist between the BJS-based measure of obtaining relief from death sentences and the measure based on our reported appellate opinions. First, the reported opinions cover the years 1995 to 1997. The BJS data try to include all persons on death row, and any relief they obtained through 1995. Differences in the two measures of capital defendant success rates may result from events relating to a state's capital defendant population for only one of the time periods. For example, a single Supreme Court case may have required reversal of many convictions within a state before 1995.⁵⁸ This, in turn, may have led to a burst of death penalty reversals before 1995, followed by a period of fewer reversals after 1995.

Second, our opinion data are limited to state courts. We are primarily interested in the effect of judicial selection methods across states and therefore do not include federal cases among opinions analyzed. Although the BJS data include relief from death sentences by both state and federal courts, they do not allow us to distinguish between relief granted by the two court systems.

Third, the BJS data include both direct appellate relief and post-conviction relief. The appellate data cover only direct appeals. We also have data on about 500 state post-conviction appeals. Including them would not change the results reported here. We exclude state post-conviction activity only because not all states issue opinions in such cases.⁵⁹

We thus have measures of both trial level death-obtaining behavior in a state, and measures of defendants' success in obtaining relief from death sentences—appellate and otherwise. These measures should be positively correlated. The appellate rate of reversing death penalty cases should be a function of how liberally the state sought and obtained death in murder cases. In a state that obtains death sentences relatively often—as measured by a high ratio of death penalty direct appeals to murders—there should be an increased chance of reversal. A high death-obtaining rate should mean

58. *See, e.g.,* *McKoy v. North Carolina*, 494 U.S. 433 (1990) (invalidating a capital punishment scheme which impermissibly limited juries' consideration of mitigating circumstances).

59. Appeals in Missouri death penalty cases are often described as appeals from post-conviction proceedings. *See, e.g.,* *State v. Butler*, 951 S.W.2d 600, 601 (Mo. 1997); *State v. Kenley*, 952 S.W.2d 250 (Mo. 1997). However, these were more in the nature of direct appeals from denials of post-trial relief and not true post-conviction proceedings. We therefore treated these Missouri cases as direct appeals.

that weaker, less death-worthy cases were brought. Reversals should thus come at a higher rate.

A caveat about the use of appellate opinions is in order: Opinions, both trial level and appellate, may not be representative of all underlying cases.⁶⁰ For example, published opinions in cases involving punitive damages awards have systematically higher awards than the mass of trial level punitive damages cases that do not result in published opinions.⁶¹ But this concern is less of a problem in death penalty cases than in other classes of cases. Common sense, as well as some evidence, indicate that little selection of cases is at work in the decision to appeal a death sentence. A person condemned to death has little to lose by appealing, thus rates of appeal in death penalty habeas corpus proceedings are by far the highest of any area of law for which the Administrative Office of U.S. Courts maintains data.⁶² The great majority of death penalty appeals wind up in state supreme courts,⁶³ which one expects to issue predominantly published opinions.

Table 1 summarizes the sources of data used in this study, as described in Parts III.A and III.B. It separates the sources by our two different studies of death penalty adjudication, the BJS data and the appellate opinion data.

60. See Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (noting the discrepancies between decisions in intent-based Constitutional cases as a whole and the published opinions in that area of the law); Eisenberg & Schwab, *supra* note 57 (rejecting the use of district court level opinions because trial judges tend to publish in a skewed sample of cases); Vicki Schultz & Stephen Petterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (comparing published opinions with filed cases); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990) (noting that a comparison of published and unpublished cases reveals substantial differences between them).

61. See Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 S. CT. ECON. REV. (forthcoming 1999) (concluding that published opinion cases tend to have higher stakes, and therefore higher awards).

62. See Theodore Eisenberg, *Empirical Evidence Relating to Prisoner Filings Presented at the Federal Judicial Center's Workshop on § 1983 Litigation for District and Magistrate Judges* (Aug. 13-14, 1997).

63. See SNELL, *supra* note 56, at 3.

TABLE 1. DATA SOURCES FOR NUMBERS OF MURDERS, DEATH PENALTIES, DEATH-OBTAINING RATES, AND RELIEF RATES

<i>Study based on</i>	BJS data	appellate opinion data
<i>Numbers of murders</i>	FBI data 1985-1994	FBI data 1994-1996
<i>Number of death penalties</i>	BJS data 1985-1994	BJS data 1994-1996
<i>Death-obtaining rates</i>	death penalties/murders	death penalties/murders
<i>Relief rates</i>	BJS data 1985-1995	appellate data 1995-1997

C. DESCRIPTIVE STATISTICS

Table 2 reports descriptive statistics for the key variables in this study. Four pairs of columns should be distinguished: the number of murders in columns one and two, the number of death penalties in columns three and four, states' death-obtaining rates in columns five and six, and rates of obtaining relief from death sentences in columns seven and eight. Column nine reports the number of direct death penalty appeals reported for each state from 1995 to 1997. Column ten reports whether the state has partisan judicial elections.

The first two columns show the number of murders in each state from 1994 through 1996, and from 1985 through 1994, respectively.⁶⁴ For the appellate opinion data covering 1995 to 1997, we use the shorter period of murders to compute a death-obtaining rate. For the BJS-based measure of the number of death penalties, the longer period is appropriate because the data on relief for capital prisoners extend from 1985 through 1995.

The third and fourth columns in Table 2 report our two measures of the number of death penalties. The BJS data in the third column are the number of death penalties imposed from 1985 through 1994. The data in the fourth column are the number of death penalties imposed from 1994 through 1996.⁶⁵

The two death-obtaining rates reported in columns five and six are computed from the number-of-murder and number-of-death-penalty col-

64. The on-line version of the *Uniform Crime Reports* is missing the number of murders in Kentucky for 1988 and the number of murders in Florida for 1988 through 1991. We used interpolation to fill in these missing values.

65. The 1996 data come from SNELL, *supra* note 56.

umns. The first death-obtaining rate column is the percent of murders from 1994 to 1996 that led to a death sentence in that period. The second rate column is the percent of murders from 1985 through 1994 that led to a death sentence from 1985 through 1994, according to BJS. These two measures of death-obtaining behavior are best viewed as indices facilitating interstate comparison rather than as measures of absolute activity levels. Thus, the relations among the states' numbers in the death-obtaining rate columns are important, not their absolute levels. If one wants to relate a death-obtaining rate to real world events, the first row of Table 2 suggests, for example, that in Alabama 2.93% of the murders from 1985 through 1994 led to imposition of the death penalty. In Nevada, that rate was over 5%.

The death penalty relief columns show defendants' rate of success in contesting death sentences. The first relief rate column is the percent of death sentences imposed from 1985 through 1995 for which BJS reports a defendant receiving relief, either through reversal of conviction, reduction of sentence, or both. The second relief rate column shows the percent of 1995 to 1997 death penalty appellate opinions in which the defendant received some relief.

The two death-obtaining rate columns in Table 2, columns five and six, show substantial interstate variation in death-obtaining behavior. For example, both columns show that Oklahoma, Nevada, North Carolina, Mississippi, Arizona, Alabama, and Florida have high death-obtaining rates. Both columns indicate that California has a low death-obtaining rate.

The penultimate column of Table 2 reports the number of direct capital case appeals from 1995 through 1997. These form the basis for computing the appellate reversal rates reported in column eight.

Anecdotal evidence supports the death-obtaining rates reported in columns five and six. The fairly high rate for Pennsylvania is consistent with the Philadelphia district attorney's dedication to seeking the death penalty.⁶⁶ But Pennsylvania's death-obtaining rate is kept from being extremely high by a much lower rate of death-seeking behavior by Pittsburgh's district attorney.⁶⁷ Texas' more moderate rate of death-obtaining

66. See Rosenberg, *supra* note 6.

67. See *id.* (reporting that about one defendant per year receives a death sentence in Allegheny County).

behavior is consistent with reported levels of death-seeking behavior by Dallas and Houston district attorneys.⁶⁸ California's low rate of death-obtaining behavior is consistent with reported low death-seeking and death-obtaining rates in Los Angeles County.⁶⁹ Louisiana's low rate of death-obtaining behavior is consistent with the reported lack of success of the New Orleans district attorney in obtaining death sentences.⁷⁰ Illinois' moderate rate of death-obtaining behavior is consistent with relatively few capital sentences being imposed in Chicago.⁷¹

The relief columns in Table 2 show substantial interstate variation in relief rates. In the appellate opinion relief column, column eight, Arkansas, Florida, Louisiana, Mississippi, and Tennessee have the highest reversal rates. Virginia has the lowest. In the BJS-based relief column, the highest relief rates are found in Kentucky, North Carolina, and Mississippi. We thus find not only interstate variation in relief rates but some variation in relief rates across our two measures of relief.

IV. EXPLAINING THE PATTERN OF RELIEF FROM DEATH SENTENCES

States have a broad range of death penalty reversal rates. The interstate differences in each of Table 2's relief columns are statistically significant ($p < .0001$).⁷² But the differences between the two relief columns, and the different contents of their underlying data, suggest exploring the two relief rate patterns separately.

Table 2's appellate opinion relief column, column eight, is more appropriate to assess the effect of differences in judicial selection methods on

68. *See id.* Although Houston's district attorney has a reputation as a champion of the death penalty, he asked for it in only 10% of the eligible cases in one year. *See id.*

69. *See id.* (reporting that the death penalty was sought in 18 of 2,000 homicides and obtained in six cases).

70. *See id.* (noting that the New Orleans district attorney asks for death in every eligible homicide, but has obtained it only twice in five years).

71. *See id.* (reporting that the Chicago district attorney asks for death in a large majority of eligible cases but obtains only about seven death penalties a year).

72. By convention, the hypothesis being tested is called the null hypothesis. *See* GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, *STATISTICAL METHODS* 64 (8th ed. 1989). The reported significance level is the probability of rejecting the null hypothesis when it is true. That is, the significance level provides an inverse measure of the likelihood that the correlation between death-obtaining rates a real relation rather than mere random variation. The smaller the significance level, the more surprised one would be to observe the relation if the tested hypothesis (no relation) were true. *See id.* at 65. By arbitrary convention, results that are significant at or below the .05 level are described as statistically significant. *See, e.g.,* THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 197 (Stephen E. Fienberg ed., 1989).

interstate case outcomes than the BJS-based column seven, because only the opinion column is limited to decisions by state court judges. By contrast, the BJS-based relief rates include all possible modes of obtaining relief, including habeas corpus cases decided by federal judges.

A. THE ABSENCE OF A CORRELATION BETWEEN SELECTION METHOD
AND REVERSALS

In the appellate data, the hypothesis that partisan election of judges correlates with death penalty affirmance holds up for North Carolina, Pennsylvania, and Texas. All have partisan elections and low reversal rates. South Carolina and Virginia could also be viewed as fitting the pattern because their legislatures elect supreme court justices. But column eight also shows that Alabama, Mississippi, and Illinois, which have partisan elections, have high capital sentence reversal rates. Therefore, partisan elections, standing alone, cannot explain the pattern of appellate results. States without partisan elections also show varying reversal rates. Oklahoma and Florida have high reversal rates. Indiana has a low reversal rate. Overall, we did not find a statistically significant relation between judicial selection method and reversal rate. A test of the significance of their relation is significant at the .727 level.⁷³ If we count South Carolina and Virginia as partisan election states because their legislatures play a role in selecting judges, the significance level is .296.

Part of the reason why judicial selection methods may not explain the data well is that the classification of judicial selection methods is crude. For example, in the customary classification of state judicial selection methods, both New York and Texas are classified as partisan election states.⁷⁴ Yet, one hears much less complaining about the influence of campaign funding and contributions on justice with respect to New York than with respect to Texas.⁷⁵ And nominally nonpartisan judicial elections can take on the characteristics of partisan contests.⁷⁶ Indeed, if we take the

73. The significance level reported in text is based on Fisher's exact test. For a discussion of the benefits of Fisher's exact test over the chi-squared significance test, see ALAN AGRESTI, ANALYSIS OF ORDINAL CATEGORICAL DATA 11 (1984).

74. See, e.g., Hanssen, *supra* note 1, at 214 fig.1.

75. See, e.g., Clay Robison, *Ex-high Court Judges Dispute Payola Claims*, HOUS. CHRON., Aug. 15, 1998, MetFron Section, at 33; Editorial, *Then and Now Texas Justice Has Improved, But Reform Still Needed*, DALLAS MORNING NEWS, July 25, 1998, at 28A.

76. See Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 68, 69 ("Even nonpartisan elections become political tinderboxes when special interests get involved."). In addition, judges elected in a partisan manner may decide cases in ways that make death penalties more likely. We find, however, that death-obtaining rates are lower in partisan election states than in other states.

liberty of reclassifying Ohio, which officially has nonpartisan judicial elections but in fact seems to have partisan elections,⁷⁷ a significant relation between partisan election status and reversal rates does emerge ($p=.041$).

Therefore, a statistically significant relationship between judicial selection methods and death penalty case outcomes depends, in part, on how strictly one adheres to conventional classification of judicial election methods. But the relation depends largely on how one state, Ohio, is classified and does not hold for the mass of states. Whatever the reason, the conventional wisdom about partisan judicial elections at best modestly explains the observed state-level pattern of appellate reversal rates in capital cases.

B. ACCOUNTING FOR CASE SELECTION: APPELLATE OPINION REVERSAL RATES

Prospects for explaining the pattern might improve if we account for case selection. Figure 1 shows the relation between the appellate reversal rate in capital cases (Table 2, column eight) and the rate at which states obtain the death penalty (Table 2, column five). We expect the relation to flow from the Figure's lower left to its upper right. The expected relation between death-obtaining rates and reversal rates does not emerge.

Perhaps, however, a discernible pattern would emerge if we simultaneously accounted for judicial selection methods *and* death-obtaining rates. This requires multivariate analysis of the data. Multiple regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable). Multiple regression works to segregate the effects of various factors such as, for our purposes, case selection and judicial selection.⁷⁸ Since our cases have dichotomous outcomes—death sentences are either reversed or not—we use logistic regression.⁷⁹ We also account for the fact that the data are sampled by state.⁸⁰ For this study, the dependent variable is whether the case resulted in a reversal and the primary

77. See Allbritain, *supra* note 41. However, in New York, partisan elections exist for trial courts but not for the state's highest court.

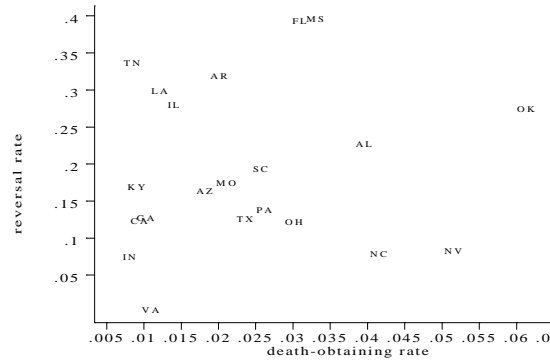
78. See generally MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* ch. 12 (1990).

79. See *id.* at 448.

80. See Martin Frankel, *Sampling Theory*, in *HANDBOOK OF SURVEY RESEARCH* 21, 37-40 (Peter H. Rossi, James D. Wright & Andy B. Anderson eds., 1983) (describing stratified sampling).

FIGURE 1. RELATION BETWEEN STATES' DEATH OBTAINING RATES AND DEATH PENALTY REVERSAL RATES⁸¹

The death-obtaining rate is an index allowing comparison of death-obtaining rates across states. It is based on the number of death sentences from 1994 to 1996 and the state's murder rate from 1994 to 1996. The reversal rate is the proportion of 1995-1997 capital case opinions that reverse death sentences.



independent variables are the death-obtaining (case-selection) rate and a dummy variable that equals one if a state had partisan judicial elections.

Regression analysis allows us to control for another factor. Defendants appealing from the reimposition of previously imposed, but reversed, death sentences are likely, on average, to be weak candidates for reversal. These defendants have been previously sentenced to death. The subsequent resentencing to death, the subject of appeal in our data, could be taken as some evidence that these cases are death-worthy or that the arguments against death were not forcefully marshalled. Whatever the reason for the prior death sentence, it seems appropriate to account for whether an appeal involves a second death sentence. Simple statistics confirmed the possible need to control for this factor. Nine of fifty-seven resentencings (16%) led to reversals compared to 154 of 754 of cases (20%) not involving resentencings.⁸² To control for the kind of appeal, we include a dummy variable equal to one for resentencing cases and zero otherwise.

Table 3 summarizes the independent variables in our model of appellate reversals. It includes a second partisan election variable, which treats South Carolina and Virginia as states with partisan judicial elections. Table 3's next-to-last column shows that no variable is significantly corre-

81. Data obtained from Westlaw; BJS, *supra* note 8; FBI, *supra* note 43.

82. Using Fisher's exact test, this difference is significant at the .494 level.

lated with appellate reversal rates of death sentences (Table 2's column eight).

TABLE 3. DESCRIPTIVE STATISTICS, DEATH SENTENCES IN STATES WITH NINE OR MORE DIRECT CAPITAL CASE APPEALS FROM 1995-1997

	<i>mean</i>	<i>range</i>	<i>significance*</i>	<i>n</i>
Reversal rate	.202	0-1	-	812
State's death-obtaining rate, 1994-96	.028	.008-.061	.444	813
Partisan election state	.464	0-1	.727	813
Partisan election state, including SC & VA	.512	0-1	.296	813
Resentencing	.070	0-1	.494	812

*In relation to reversal rate

Regression analysis confirms the absence of such significant correlations, but it does show that the correlations are in the expected directions.⁸³ Table 4 reports the regression results for a model using the variables in Table 3. The negative sign on the partisan election dummy variable indicates that appellate win rates correlate negatively with judicial selection by partisan elections. But this correlation is not statistically significant. Nor does the death obtaining rate appreciably help in explaining reversals of death sentences. These results provide little support for the influence of case selection or the influence of judicial selection methods on death penalty case appellate outcomes. We do note, however, that reclassifying

83. A word of caution is in order about interpreting the statistical insignificance of the difference between partisan election states' and other states' death-obtaining rates. Understanding why requires considering the power of a statistical test. The power of a test is the likelihood of detecting an effect of a specified size at a specified significance level. If a test is not very powerful, the likelihood of detecting the effect is small. Perfectly executed studies may fail to reveal socially important differences "simply because the sample sizes are too small to give the procedure enough power to detect the effect." STANTON A. GLANTZ, *PRIMER OF BIOSTATISTICS* 178 (4th ed. 1997). It is important to consider a statistical test's power when one claims that no significant effect has been detected.

A power calculation requires specifying what change in the observed death-obtaining rates we would regard as socially meaningful. In order to have a high probability of detecting a statistically significant difference of a socially meaningful size, a larger sample size—a larger number of death penalty states—would need to be present. So our failure to detect a significant difference should not be taken as firm evidence that no such difference exists.

Ohio as having partisan elections would yield a larger and more significant ($p=.044$) coefficient for the partisan election variable.

TABLE 4. LOGISTIC REGRESSION ANALYSIS OF APPELLATE REVERSAL RATES IN CAPITAL CASES, 1995-1997

<i>dependent variable = reversal of death sentence</i>	
Death-obtaining rate, 1994-1996	1.678 (.784)
Partisan election state (including SC and VA)	-.166 (.329)
Resentencing	-.308 (.411)
Constant	-1.324 (.000)
F-test significance of model	.616
Number of cases	811
Number of states	21

Significance levels in parentheses

C. ACCOUNTING FOR CASE SELECTION: BJS DATA

Relief rates based on the BJS data can be compared to the appellate opinion-based results. As in the case of the appellate data, we control for each state's death-obtaining rate. We also use the partisan election dummy variable to control for judicial selection method.

The BJS data allow us to control for other characteristics that might relate to the likelihood of obtaining relief. We control for the defendant's race by using dummy variables for black and hispanic status. We control for the defendant's marital status by dummy variables for married and for whether a defendant was divorced or separated. We also control for the defendant's age and education.⁸⁴ We control for the defendants' legal status at the time of the capital offense through two variables. A dummy variable, "charges pending," has a value of one if the defendant was not under sentence at the time of the capital offense but charges were pending. A second dummy variable, "under sentence," has a value of one if the de-

84. Education is coded on a 1 to 11 scale, with 1 representing less than a seventh grade education and 11 representing more than four years of college. See BJS, *supra* note 8, at 6. The defendant's race, marital status, age, and education are not reported in most appellate opinions.

defendant was on probation, on parole, had escaped, or was imprisoned at the time of the capital offense. Finally, we control for whether the defendant had been convicted of a prior murder through the dummy variable, "prior murder."

For North Carolina, it is appropriate to account for one case that led to an unusual number of grants of relief during the period covered by the BJS data. In *McKoy v. North Carolina*,⁸⁵ the Supreme Court held that North Carolina's requirement that jurors agree unanimously on mitigating factors impermissibly limited jurors' consideration of mitigating evidence. A sharp decrease in relief from North Carolina death sentences occurred for defendants sentenced after *McKoy*.⁸⁶ We therefore include a dummy variable equal to one for North Carolina defendants sentenced to death before March 5, 1990, the date *McKoy* was decided.⁸⁷

Table 5 presents descriptive statistics of the BJS variables used, together with the significance of their relation to whether relief was obtained. It includes death sentences imposed after 1984 in the twenty-one states covered by the appellate data. Strong correlations exist between whether a defendant was under sentence at the time of a capital offense and whether the defendant obtains relief from a capital sentence. Education correlates negatively with relief: The more educated a defendant, the less likely relief is obtained. Education may be functioning as a proxy for the absence of mental illness or retardation. Furthermore, women are significantly more likely than men to obtain relief from death row.

The primary variables of interest are the states' death-obtaining rate and the states' partisan election status. Unlike Table 3, Table 5 shows a significant correlation between death-obtaining rates and obtaining relief from death sentences. Like Table 3, Table 5 shows no significant relation between partisan election of judges and obtaining relief from death sentences. This result is independent of how one characterizes Ohio.

85. 494 U.S. 433 (1990).

86. BJS data show that relief was granted to 38 of 41 North Carolina defendants in the years 1987 through 1989. For 1991 and 1992, relief was granted to 16 of 42 North Carolina defendants. On remand, the Supreme Court of North Carolina decided that the U.S. Supreme Court's decision did not invalidate North Carolina's entire capital sentencing scheme, but only an important judge-made jury instruction requiring unanimity with respect to mitigating circumstances. See *State v. McKoy*, 394 S.E.2d 426 (N.C. 1990).

87. We explored the effect of including a dummy variable for *Skipper v. South Carolina*, 476 U.S. 1 (1986), in which the Supreme Court held South Carolina erroneously excluded mitigating evidence consisting of the testimony of two jailers and a visitor to the effect that the defendant had made a good adjustment during the seven and a half months he had spent in jail between his arrest and trial. Such a variable had no material effect on our results.

TABLE 5. DESCRIPTIVE STATISTICS, DEATH SENTENCES IN 21 STATES, 1985-1995

	<i>mean</i>	<i>range</i>	<i>significance*</i>	<i>number</i>
Relief granted to defendant	0.20	0-1		3,046
Black defendant	0.42	0-1	0.406	3,046
Hispanic defendant	0.08	0-1	0.168	3,046
Female defendant	0.02	0-1	0.016	3,046
Married defendant	0.22	0-1	0.080	3,046
Divorced or separated defendant	0.20	0-1	0.819	3,046
Age of defendant	30.97	16-77	0.283	3,046
Education of defendant	4.80	1-11	0.000	2,637
Charges pending at time of crime	0.06	0-1	0.643	3,046
Under sentence at time of crime	0.30	0-1	0.000	3,046
Prior murder conviction	0.06	0-1	0.272	3,046
State's death-obtaining rate, 1985-94	2.58	0.85-5.24	0.000	3,046
Year of sentencing	1990.03	1985-95	0.000	3,046
Partisan election state	0.43	0-1	0.748	3,046
<i>McKoy</i> dummy variable (for N.C.)	0.02	0-1	0.000	3,046

*In relation to rate of relief from death sentence

Importantly, Table 5 shows that a defendant's year of sentencing is significantly correlated with the grant of relief. In particular, the earlier the sentencing year, the more likely the defendant is to obtain relief from a death sentence. This raises the problem of what is termed data censoring, which we explore in Table 6.

Table 6 reports, by year, the relief rates based on the BJS data. Each row shows the proportion of cases in which relief was granted for a year of sentencing. For example, 42% of the defendants sentenced to death in 1985 obtained, at some point, some relief from their death sentence or conviction. Table 6 shows a decline in relief over time, with the relief rate reaching zero in 1995, the most recent sentencing year in the data. The data are censored in the sense that it apparently takes a substantial period of time to obtain relief from death sentences. Those who have been on death row only briefly are much less likely to have obtained relief from their death sentences. It may also be that obtaining relief in recent years has become more difficult. But the delay between sentence and relief would lead to a declining relief rate being observed even if there were no decrease in the rate that relief was in fact being granted. Enough time has not elapsed for recently sentenced defendants to have obtained relief.

TABLE 6. RELIEF RATES FROM DEATH BY YEAR OF SENTENCING,
BJS DATA, 1985-1995

<i>Year of sentence</i>	<i>Relief rate</i>	<i>Number of death sentences</i>
1985	.423	279
1986	.311	293
1987	.319	273
1988	.274	292
1989	.287	251
1990	.248	254
1991	.167	263
1992	.124	275
1993	.034	268
1994	.010	303
1995	.000	298

The presence of censoring suggests the propriety of survival time models for the BJS data.⁸⁸ Such models account for the fact that the event of interest, in this case relief from a death sentence, may not have occurred simply because sufficient time had not elapsed.⁸⁹ These models also allow for different times of entry into the sample, which we have in the form of different years of sentencing,⁹⁰ and exit from and reentry into the sample, which occurs when defendants obtain relief and are later resentenced to death. These features make a survival time proportional hazard model preferable to a simple logistic regression model, which ignores the time to an event (relief from a death sentence in our case) and censoring.⁹¹ Table 7 reports Cox proportional hazard models.⁹² Logistic regression models do not yield results that differ materially from those reported here.

Table 7 reports two models. The second model excludes the defendant's education variable, which is missing for almost 400 defendants. As is common for proportional hazard models, the coefficients are reported as hazard ratios.⁹³ A hazard ratio of one means that a variable has no effect. A hazard ratio of ten, for example, means that a unit increase in the dependent variable corresponds to a tenfold increase in the likelihood of relief. A hazard ratio of .1 implies that a unit increase in the dependent variable corresponds to a tenfold reduction in the likelihood of relief.

Table 7 confirms the simple statistics presented in Table 5. Of particular interest is the significance of the states' death-obtaining rate. A strong, significant correlation exists between death-obtaining behavior and relief from death sentences. A 1% increase in a state's death-obtaining rate corresponds to about a 20% increase in the likelihood of relief being granted.⁹⁴

88. See D.R. COX & D. OAKES, ANALYSIS OF SURVIVAL DATA 4 (1984); DAVID G. KLEINBAUM, SURVIVAL ANALYSIS: A SELF-LEARNING TEXT 5-7 (1996).

89. See COX & OAKES, *supra* note 88, at 4; KLEINBAUM, *supra* note 88, at 5-8.

90. See COX & OAKES, *supra* note 88, at 2.

91. See KLEINBAUM, *supra* note 88, at 98.

92. Cox models are considered to be the most popular of the survival models. See *id.* at 96-98. For discussion of the choice among survival models, see *id.*

93. See *id.* at 33.

94. To check whether the extreme censoring in the data affects the results, we ran the same model limited to prisoners entering death rows from 1985 to 1990. The results were not materially different from those reported in Table 7 except that the year-of-sentencing variable's hazard ratio was closer to one and insignificant.

TABLE 7. COX PROPORTIONAL HAZARD MODELS OF RELIEF FROM DEATH SENTENCES, 1985-1995

<i>Time variable is months to relief.</i>		
<i>Censoring occurs for cases in which no relief has been granted.</i>		
Black defendant	1.025 (.795)	1.082 (.377)
Hispanic defendant	.775 (.177)	.910 (.588)
Female defendant	1.802 (.014)	1.843 (.009)
Married defendant	1.034 (.758)	1.022 (.827)
Divorced or separated defendant	.818 (.112)	.834 (.130)
Defendant's age	1.009 (.082)	1.009 (.093)
Defendant's education	.944 (.009)	- -
Charges pending at time of capital crime	.926 (.687)	1.024 (.891)
Defendant under sentence at time of capital crime	.735 (.003)	.758 (.006)
Defendant committed prior murder	.634 (.029)	.770 (.167)
State's death-obtaining rate, 1985-1994	1.180 (.000)	1.195 (.000)
Year of sentencing	.933 (.000)	.924 (.000)
State has partisan judicial elections	.901 (.306)	.913 (.336)
<i>McKoy</i> dummy variable for N.C. cases	4.463 (.000)	4.549 (.000)
Prior death sentence	.841 (.485)	.793 (.348)
Number of defendants	2,551	2,956
Number obtaining relief	521	584
Log-likelihood	-3632.140	-4156.275
Chi-squared probability	.0000	.0000

Significance levels are in parentheses.

The other variable of primary interest, whether a state has partisan judicial elections, follows the pattern in the appellate opinion results reported in Table 4. The variable's effect is small and insignificant. This is true whether or not we treat South Carolina, Virginia, or Ohio as partisan election states, although the models reported in Table 7 do not treat them as partisan election states.

Other results are also worth noting. Given equal crimes, available data suggest that women tend to receive shorter sentences than men.⁹⁵ Consistent with these findings, Table 7 contains evidence that women sentenced to death are more likely to obtain relief from their death sentences than are men. Furthermore, defendants who commit capital crimes while under sentence for other crimes and defendants who had prior murder convictions are less likely to obtain relief from their capital sentences.

The explanation of why death-obtaining rates help explain case outcomes in the BJS data but not in the state court appellate data may rest in judicial selection method, but not in interstate differences in judicial selection method. The BJS data include grants of relief by federal courts, whereas the state court appellate data do not. It may be that the independence of federal judges led them to be more likely to grant relief in marginal death sentence cases than state judges. This could lead to the observed correlation between grants of relief in the BJS data and the rates of death-obtaining behavior. That this effect does not emerge in the state court appellate data may show that state judges know they face traditional elections or retention elections at some point in their career. More than a decade ago California's experience proved that the selection method did not provide insulation from politicization of the death penalty. Only the life tenure and independence of federal judges may provide the luxury of assessing death penalty cases based on their death-worthiness.

But other explanations are also possible. As discussed above, possibly important differences exist between the BJS data and the state court appellate data. They cover different time periods and only the BJS data account fully for post-conviction relief. At this point we can only suggest

95. See Kathleen Daly, *Gender and Sentencing: What We Know and Don't Know from Empirical Research*, 8 FED. SENTENCING REP. 163 (1995); Kathleen Daly & Rebecca L. Bordt, *Sex Effects and Sentencing: An Analysis of the Statistical Literature*, 12 JUST. Q. 141 (1995); Michael S. Gelacak, Ilene H. Nagel & Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 353 (1996) (noting downward departure from sentencing guidelines for female white-collar offenders); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 185-87 (1994).

an explanation based on the federal judiciary's greater independence. Expanding the appellate opinion database to encompass more years may yield more conclusive evidence. For example, if we had ten years of data from state courts, as we do for federal and state courts combined in the BJS data, the absence of a correlation between cases' death-worthiness and outcome would be stronger evidence of differences between state and federal court processing of capital cases.

D. ANOTHER MEASURE OF STATES' TENDENCIES TO IMPOSE THE DEATH PENALTY

As a last effort to detect judicial selection effects, we combine Table 2's death-obtaining rates and relief rates to construct a new measure of states' tendencies to impose the death penalty and retain it on appeal. This measure is based on the percent of murders that led to an affirmed death penalty. We then test whether judicial selection methods correlated with this more sophisticated measure of death-obtaining behavior.

To illustrate, the first entry in Table 2, column five, shows that, for 1994 to 1996, 3.97% of Alabama's murders led to imposition of the death penalty. Table 2, column eight, shows that 22.4% of death penalties in Alabama were reversed. Conversely, 77.6% of death penalties were affirmed. So in a state in which 3.97% of murders led to death penalties, 77.6% of the death penalties were affirmed. We multiply the 77.6% affirmation rate by the 3.97% death-obtaining rate to yield an index of the percent of murders that led to an *affirmed* death penalty. In Alabama's case, the multiplication yielded 3.08%. In other words, 3.08 of each 100 murders led to an affirmed death penalty. A similar calculation for each state allows interstate comparison of a death-obtaining rate that accounts for appellate review of death sentences. Table 8 presents the results.

Table 8 confirms that states with large death rows do not necessarily obtain and affirm death penalties at high rates. Although Nevada and Oklahoma obtain and affirm death penalties at higher rates than other states, their death rows were not among the largest. California's death row is one of the largest but its rate of obtaining and affirming death penalties is one of the lowest, and is the lowest of any major death penalty state. Texas is not extreme in its rate compared to other states. Mississippi and Florida combine high trial-level death-obtaining rates with high reversal rates to yield net death-obtaining rates that are moderate compared to other states.

TABLE 8. NUMBER OF AFFIRMED DEATH PENALTY CASES
PER 100 MURDERS, BY STATE, 1995-1997

<i>State</i>	<i>Affirmed</i>	<i>State</i>	<i>Affirmed</i>
Nevada	4.75	Arizona	1.54
Oklahoma	4.48	Arkansas	1.38
North Carolina	3.85	Virginia	1.11
Alabama	3.08	Illinois	0.99
Ohio	2.67	Georgia	0.91
Pennsylvania	2.27	Louisiana	0.86
South Carolina	2.09	California	0.84
Texas	2.08	Kentucky	0.76
Mississippi	2.01	Indiana	0.75
Florida	1.89	Tennessee	0.57
Missouri	1.76		

Does this new “bottom-line” measure of death-obtaining behavior correlate with judicial selection method? Again, the answer is no. We find no correlation between partisan elections and this measure of death-obtaining behavior. The absence of correlation does not depend on how South Carolina and Virginia, the two states with legislative participation in judicial selection, are classified or on how Ohio is classified.

A possible extension of this analysis would be to account for execution rates. Affirmance of death penalties and the absence of relief do not necessarily lead to executions. Some states have large death rows but no or few executions.⁹⁶ The defendants are in a kind of limbo due to executive or judicial obstacles to execution. But this limbo was likely to be unstable overtime. We forego an execution rate analysis because of this volatility.

E. STATE-SPECIFIC EVIDENCE OF POLITICAL PRESSURE

Neither the appellate opinion data, the BJS data, nor our new measure of death-obtaining behavior show a robust correlation between judicial se-

96. See SNELL, *supra* note 56, at 6, 10 tbls.5 & 10.

lection method and treatment of death sentences. Nevertheless, California and a few other states provide state-specific stories worth exploring. These stories support the existence of a relation between politics and death penalty case outcomes, even if that relation cannot be explained by focusing on judicial selection method.

California combines an extremely low pre-1995 relief rate with a merely low appellate reversal rate from 1995 to 1997. As shown in Table 2 (columns seven and eight), California's relief rate from capital sentences was less than 1% through 1995 and increased to about 10% from 1995 to 1997 in the appellate opinion data. This is consistent with a substantial period of extreme reluctance to overturn death sentences after Chief Justice Bird's removal in the mid-1980s, with a softening of that reluctance in recent years. In fact, only California has a pre-1995 relief rate that statistically significantly differs from its 1995 to 1997 appellate reversal rate.⁹⁷ But even that softening left California with a low reversal rate. This contrasts with a more liberal reversal rate prior to the period we studied.⁹⁸

Justice White's removal from office in Tennessee during the period covered by our appellate opinion data allows us to test the hypothesis that her removal affected that state's reversal rate. For the first two years of the appellate data in this study, 1995 and 1996 combined, reversals occurred in eight of thirteen Tennessee cases (61.5%). In 1997, the first year after Justice White's removal, reversals occurred in one of fourteen Tennessee cases (7.1%). This difference is highly statistically significant ($p=.004$).⁹⁹

To assess the effect of the politicization of judicial selection in South Carolina, we added South Carolina appellate capital cases from 1981 to 1994 to the sample. Thus, for South Carolina, we have data from 1981 to 1997. As noted above, the state's attorney general, elected in 1994, ran on strong pro-death penalty views and a politicization of the death penalty. The attorney general's election coincided with a noticeable change in the

97. North Carolina would so differ if pre-*McKoy* cases were included.

98. See Uelmen, *Judicial Politicization*, *supra* note 29, at 1136.

99. This significance level is based on Fisher's exact test. The finding of a relatively high reversal rate for the year prior to 1996 is consistent with another study of death penalty decisionmaking by the Tennessee Supreme Court. Professor Foley finds that, from 1990 to 1996, the Tennessee Supreme Court moved from a low reversal rate to a high reversal rate in capital cases. See Daniel J. Foley, *Tennessee Supreme Court: A Statistical Analysis of an Ideological Shift After the 1990 Election*, 64 TENN. L. REV. 155, 169-70 (1996) (noting that the pre-1990 election court upheld the death penalty in 92% of 12 cases; the post-1990 election court upheld the death penalty in 50% of 16 cases). This difference is statistically significant at the .039 level. It also suggests that one who studied the Tennessee Supreme Court before 1990 and after 1996 would observe little difference in death penalty affirmance rates.

success rates of South Carolina capital cases on direct appeal to the state supreme court. From 1981 through 1993, twenty-eight of sixty-two death penalties (45.2%) were reversed. From 1994 through 1997, five of twenty-five death penalties (20%) were reversed. This difference is statistically significant at the .031 level.¹⁰⁰ Even the 20% recent reversal rate may have been artificially high because of reversals required by United States Supreme Court decisions in South Carolina cases.¹⁰¹

In contrast to developments in California, Tennessee, and South Carolina, the politicization of the death penalty in the 1994 Texas Supreme Court elections seems not to have significantly changed that state's pattern of review in capital cases. Texas capital prisoners had little success in obtaining relief before 1995 and little success in obtaining appellate reversals from 1995 to 1997. But Texas' much publicized taste for death sentences is partly mythical. Texas' prosecutors obtain death penalties at lower rates than at least half the states with substantial numbers of death penalties. Similarly, Mississippi's rates of relief were not discernibly affected by the 1992 campaign against Justice Robertson. Although Mississippi continued to grant relief to capital defendants at high rates, this may have been a function of Mississippi's high death-obtaining rate.¹⁰²

Taken together, the state-specific stories suggest that judicial selection methods can neither insulate judges from political pressure nor always lead to quantifiable manifestations of such pressure. California lacked partisan judicial elections, yet justices were voted out of office on the death penalty issue. California continued to have a fairly low reversal rate in capital cases. Tennessee and South Carolina also supported the belief that political pressure affects judges in capital cases. But judicial behavior in capital cases had been politicized in Mississippi and Texas without noticeable changes in their treatment of capital cases.

Whether a state is classified as having partisan judicial selection methods is not a useful predictor of capital case outcomes. Specific state political campaigns raising the death penalty issue are more helpful in explaining case outcomes, but even they do not always assure measurable change.

100. This significance level is based on Fisher's exact test.

101. See *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Skipper v. South Carolina*, 476 U.S. 1 (1986). See also *supra* note 87 and accompanying text (discussing the effect of the United States Supreme Court's decision on subsequent South Carolina cases).

102. The reluctance of Pennsylvania's Supreme Court to challenge death sentences may be a consequence of the profound effect of a criminal justice incident on a recent gubernatorial election. See *Rosenberg*, *supra* note 6, at 46. But, as Table 2 shows, Pennsylvania did not grant relief at high rates prior to 1995.

V. CONCLUSION

Differences in states' judicial selection methods explain little about interstate differences in capital case outcomes. But politicization of the death penalty issue has affected state court behavior. This seems to have occurred in California, Tennessee, and South Carolina.

We also theorized that judicial behavior in capital cases can only be understood if one accounts for the case selection process.¹⁰³ The BJS data, but not our appellate opinion data, show a strong correlation between states' death-obtaining behavior and reversal rates. In the BJS data, which include federal habeas corpus capital cases, states that obtain death penalties at a high rate tend to have them overturned at a high rate. This finding is consistent with the view that high death-obtaining rates correspond to death penalties being imposed in less death-worthy cases. Courts understandably overturn more capital sentences in such cases.

103. Other factors to consider include states' execution rates, remaining terms of judges, and effects of campaign activity and financing. See Larry Aspin, *Campaigns in Judicial Retention Elections: Do They Make a Difference?*, 20 JUST. SYS. J. 1 (1998); Hanssen, *supra* note 1; Mary Libby Payne, *Mississippi Judicial Elections: A Problem Without a Solution?*, 67 MISS. L.J. 1 (1997) (discussing cost of judicial campaigns).