The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts*

Melinda Gann HALL, *University of Wisconsin–Milwaukee*

Paul BRACE, *Florida State University*

The political nature of the imposition of the death penalty in state supreme courts is explored within the context of decision-making models that include judge-related and case-related forces as well as contextual variables. Pooled probit analysis is used to examine the votes of supreme court justices in six states (California, Kentucky, Louisiana, New Jersey, North Carolina, and Ohio) from 1980 through 1988 in the death penalty decisions issued by these courts. Justices' personal attributes, victim characteristics, and crime characteristics are all found to exert a statistically discernible effect on judicial voting in capital cases. In essence, judgments of death in the United States continue to reflect strong political as well as legal considerations. Who reviews a case can quite literally mean the difference between life imprisonment and death in capital cases, even with case features controlled.

Since the United States Supreme Court's landmark ruling in *Furman v. Georgia* (1972), the American states have struggled with the problem of how to impose death sentences on certain categories of convicted murderers without violating constitutional standards. The Supreme Court has ruled that although the death penalty per se does not violate the Eighth and Fourteenth Amendments (*Gregg v. Georgia,* 1976), the arbitrary and capricious assignment of death sentences does run afoul of constitutional mandates (*Furman v. Georgia,* 1972). The Supreme Court also has squarely rejected mandatory death sentences for capital crimes, noting the importance of individualized sentencing for meeting the requirements of due process (*Roberts v. Louisiana,* 1976; *Woodson v. North Carolina,* 1976).

* Direct all correspondence to Melinda Gann Hall, Department of Political Science, University of Wisconsin–Milwaukee, Milwaukee, WI 53201 or to Paul Brace, Department of Political Science, Florida State University, Tallahassee, FL 32306-2409. This research was truly collaborative. Order of authorship was assigned randomly. We wish to thank Henry R. Glick for his comments on this research. A previous version of this paper was presented at the 1992 annual meeting of the American Political Science Association.

SOCIAL SCIENCE QUARTERLY, Volume 75, Number 1, March 1994

Consequently, the states have engaged in the difficult task of writing sentencing guidelines in capital cases that allow consideration of the characteristics of the offense and the offender in the decision between life imprisonment and death. Yet these guidelines also must sufficiently structure sentencing so that the idiosyncratic assignment of death that results from unfettered discretion will not occur. In light of the statutes approved by the Supreme Court in *Gregg v. Georgia* (1976), *Proffitt v. Florida* (1976), and *Jurek v. Texas* (1976), the states have adopted statutes that provide for bifurcated trials in capital cases, accompanied by guidelines that list specific aggravating circumstances to be weighed against all relevant mitigating factors in sentencing decisions.

Although 14 states refuse to assign death as a sentence, the remaining 36 states currently allow capital punishment for intentional murder (U.S. Bureau of Justice Statistics [USBJS], 1991).[1] These 36 states cover approximately 78 percent of the nation's adult population (White, 1991). This strong support among state governments for the death penalty is consistent with the overwhelming endorsement of capital punishment by the U.S. population. In 1990, approximately 80 percent of U.S. adults favored the death penalty (White, 1991).

Not only is there strong support in principle for the death penalty in contemporary society, but Americans seem much more willing actually to carry out executions now than in the decades immediately following *Gregg*. Twenty-three executions were conducted in 1990, compared to 11 in 1988 and 16 in 1989 (USBJS, 1991).[2] Experts predict that the number of executions may reach up to 80 per year by the mid-1990s (White, 1991). Moreover, several states (e.g., Arkansas, Illinois, Oklahoma) recently have held executions for the first time since the 1960s (USBJS, 1991).

Across the entire country, juries seem much more willing in the 1990s to impose death sentences. The death row population in the United States reached 2,356 in 1990, a 5 percent increase over the previous year (USBJS, 1991). Of those on death row, 58 percent are in the southern states, 21 percent are in the western states, 15 percent are in the Midwest, and 6 percent are in the Northeast (USBJS, 1991). However, the greatest increases in death row populations are occurring in the West, with California having one of the largest death row populations in the United States. From all indications, the death penalty will continue to be imposed in the upcoming years, at increasing rates and across the nation.

In short, there appears to be considerable support for the death penalty as a punishment and an increased willingness to use it. However, as with

[1]Since *Furman v. Georgia* (1972), the United States Congress has enacted four death penalty statutes. However, as of the end of 1990, the five people awaiting execution under federal law were under Armed Forces jurisdiction with military death sentences for murder (USBJS, 1991).

[2]The number of executions in the United States annually from 1977 through 1990 was as follows: 1, 0, 2, 0, 1, 2, 5, 21, 18, 18, 25, 11, 16, 23.

any controversial issue, the death penalty has its critics. Most notable were Supreme Court Justices Marshall and Brennan, who argued in concurring and dissenting opinions that the death penalty inherently violates the United States Constitution. While current statutes are designed to limit the capricious application of the death penalty, opponents have charged that the arbitrary and discriminatory imposition of death sentences that plagued the pre-*Furman* years continues.

As opponents (and even some proponents) of the death penalty have noted, some aggravating and mitigating circumstances remain relatively subjective, despite revision to provide as much specificity in definition as possible (see, e.g., White, 1991). Even the most casual reading of current statutes makes it readily apparent that such aggravating factors as "heinous" and "cruel" action require a great deal of subjective interpretation, despite states' efforts to clarify those terms.[3] Moreover, the process of creating formulas for balancing aggravating and mitigating circumstances has proved formidable.

Issues about racial discrimination in the imposition of the penalty also have been raised. Perhaps the most famous example demonstrating racial discrimination in sentencing is the Baldus study, which formed the basis of the defendant's arguments in *McClesky v. Kemp* (1987). In a very comprehensive statistical analysis of sentencing in Georgia, the Baldus study found that black defendants who killed white victims were significantly more likely to receive the death penalty, with virtually every other conceivable variable controlled. More surprisingly, a report recently issued by the General Accounting Office concluded unequivocally that race is a factor in imposing death as a punishment in the United States (Loughlin, 1990).

Despite extensive revisions in state statutes since 1972, sentencing in death penalty cases has not been reduced to the simple application of a legal formula.[4] The fact remains that tremendous discretion lies in the hands of jurors, who must interpret the meaning of aggravating and mitigating circumstances and then weigh them to reach a judgment about life or death.[5]

[3]For example, the United States Supreme Court invalidated a portion of Oklahoma's death penalty statute on the grounds that "especially heinous, atrocious or cruel" murders, which constituted an aggravating circumstance, were not defined adequately (*Maynard v. Cartwright*, 1988).

[4]Despite the Supreme Court's insistence on precise statutory guidelines for sentencing, several decisions of the Court actually have increased discretion. *Lockett v. Ohio* (1978) required that any type of mitigating factor remain admissible in the penalty phase of a capital case, a decision that should work in favor of defendants. However, in *Payne v. Tennessee* (1991), the Court overturned several past precedents by allowing the use of victim impact statements to be considered during the penalty phase. This decision should serve to forward the interests of the prosecution in capital cases. The *Payne* decision produced very bitter dissents from Justices Marshall, Blackmun, and Stevens, who were quick to point out the tremendous subjectivity and emotionality that now legitimately will be injected into the process.

[5]There are seven states that leave the final sentencing decisions in death cases to the trial court judges. These states are Alabama, Arizona, Florida, Idaho, Indiana, Montana, and Nebraska.

The degree of jury discretion is sentencing in capital cases seems obvious. However, the central and critical role that state supreme courts play in the assignment of death sentences in the United States is virtually ignored. Statutory schemes for capital sentencing focus on means to limit jurors' discretion. While it is certainly true that juries initially impose death sentences, 34 of the 36 states that utilize capital punishment mandate automatic review of death sentences by the state's highest appellate court, usually irrespective of the defendant's preferences (USBJS, 1991). In other words, the final decisions on the imposition of death in America rest with justices of state supreme courts, who are required by law to render judgments in these cases. These justices have the same latitude as juries in deciding whether to affirm or reverse judgments of death.[6]

Given the substantial discretion remaining in sentencing decisions, the politically charged nature of the issue, and the fact that the ultimate decisions on sentencing rest with state supreme courts who cannot remove these cases from their agendas, a variety of political influences should play an important role in judicial decision making on the death penalty. Legal theory proposes that case facts and circumstances largely determine case outcomes, especially since statutes are specifically written to take into account these forces. However, modern judicial politics scholarship also suggests the vital role of justices' political preferences in shaping judicial choice. In this paper, we explore the political nature of the imposition of the death penalty in state supreme courts in the context of models that also include case-related forces. We anticipate that even with the effects of case-related factors controlled, political influences will continue to be prominent in state supreme court justices' voting on the imposition of the death penalty. Most basically, we predict that judgments of death in the United States continue to reflect strong political as well as legal considerations, despite extensive statutory revisions to prevent such a pattern.

Major Influences on Judicial Choice

From studying appellate court decision making in a variety of institutional settings and on any number of political issues, scholars have identified several important influences on judicial choice. As the following review reveals, each of these forces should be important for understanding voting on the death sentences in state supreme courts.[7]

Policy Preferences. As early as the 1940s, C. Herman Pritchett (1941) asserted that, in the United States Supreme Court, "private attitudes become

[6] Although death penalty decisions can be appealed from state supreme courts to the United States Supreme Court, the overwhelming majority of these cases are not reviewed.

[7] We are engaged in an active and ongoing research program to develop integrated models of judicial choice. Consequently, limited portions of the following sections appear in earlier form in previous articles.

public law" (p. 890). Since Pritchett's (1941, 1948) seminal work, studies have established conclusively that the personal policy preferences of the justices, operationalized either from past votes (Rohde and Spaeth, 1976; Schubert, 1965, 1974) or from speeches or newspaper editorials (Danelski, 1966; Segal and Cover, 1989), affect voting in the Court. Indeed, judicial policy preferences, which are organized so as to constitute well-defined ideologies, are believed to be the primary determinant of choices in the Court at all stages of the decisional process (Rohde and Spaeth, 1976). These studies reflect an application of attitudinal theory to the courts, which conceptualizes the judicial actor as one who pursues, in a rational fashion, policy outcomes most proximate to the individual judge's political preferences (Rohde, 1972; Rohde and Spaeth, 1976).

Closely related to the attitudinal studies are works that have associated various types of judges' background characteristics with their voting behavior. Such features as partisan affiliations, prior career patterns, religious orientations, and age have been identified as important in judicial decision making (e.g., Goldman, 1966, 1975; Hall and Brace, 1992; Ulmer, 1970, 1973a). Personal attributes originally were conceptualized as an indirect link to voting. More recently, attributes have been identified as a direct influence on the vote in the United States Supreme Court (Tate, 1981; Tate and Handberg, 1991). Indeed, Tate has suggested that attitudes and attributes are related in the United States Supreme Court to the extent that attitudes and personal attributes operationally may be interchangeable.

Case Characteristics. Other variables identified in the literature as determinants of the judicial vote relate to the case itself. The traditional literature in public law and the very essence of the legal culture suggest that judges render decisions by applying legal rules and precedents in a manner appropriate to the specific facts of each case. In other words, legal rules and case facts intersect to produce decisions.

Segal (1984, 1986) has been particularly successful in demonstrating the importance of various case characteristics in United States Supreme Court decision making. In analyses of search and seizure cases, Segal found that fact patterns are highly predictive of the Court's decisions and of individual justices' behavior. Additionally, George and Epstein (1992), Songer and Haire (1992), and Emmert (1992) have documented the impact of legal variables on judicial choice in the Supreme Court, courts of appeals, and state supreme courts, respectively.

As Segal and Cover (1989) have argued, there is a high degree of compatibility between the attitudinal model and the fact model of judicial decision making, although neither considers internal or external influences on courts. Similarly, Schubert (1965, 1974) noted that justices' attitudes representing ideal points in multidimensional space (*i* points) interact with various case stimuli (*j* points) to produce judicial decisions. According to Schubert, case facts serve as referents for individual attitudes.

Institutional Arrangements. Institutional arrangements consist of formal rules and organizational structures. Many institutional variables, procedural and structural, have been identified as determinants of judicial behavior. Such features as the presence or absence of an intermediate appellate court (Beiser, 1974; Brace and Hall, 1990; Canon and Jaros, 1970; Glick and Pruet, 1986; Hall and Brace, 1989; Handberg, 1978), method of judicial selection (Brace and Hall, 1990; Hall, 1987, 1992; Hall and Brace, 1989, 1992), the type of opinion assignment procedure (Beiser, 1974; Brace and Hall, 1990; Hall and Brace, 1989, 1992; Sickels, 1965), and order of voting among the members of a court (Brace and Hall, 1990; Hall and Brace, 1989, 1992) are associated with the judicial vote. Essentially these variables are seen as forces that lead either to greater consensus or dissent by inhibiting or promoting the expression of personal preferences in decisions.

Environmental Context. State environmental characteristics have been associated with judicial behavior at the aggregate level, also primarily as forces that either promote or inhibit dissent. Environments characterized by socioeconomic and political complexity are believed to penetrate courts, causing them to be more divisive. Levels of expenditures by state governments, partisan competition, and urbanism have been identified as important dimensions of environmental complexity (Canon and Jaros, 1970; Glick and Vines, 1973; Glick and Pruet, 1986; Jaros and Canon, 1971).

We anticipate that the above four categories of variables—personal preferences, case characteristics, institutional arrangements, and environmental context—will influence judicial votes on the death penalty. Indeed, we have devoted a great deal of attention in our previous research (Brace and Hall, 1990; Hall and Brace, 1989, 1992) to the critical role played by institutional arrangements and contextual variables in the process of judicial choice. In this paper we turn our attention more specifically to attribute characteristics and jurisprudential variables, and how they affect decisions on the death penalty in state supreme courts.

Research Design

This study focuses on the individual votes of the supreme court justices in six states (California, Kentucky, Louisiana, New Jersey, North Carolina, and Ohio) from 1980 through 1988 in the death penalty decisions issued by these courts. We selected these particular state supreme courts for evaluation because they exhibit substantial variability in their propensity to uphold death sentences. These courts also exhibit wide and sufficient variation in all the variables to be examined in this analysis and provide regional representation.

We collected the voting data for this study from the various West reporters following a standardized coding scheme. We include in the analysis only votes cast on the sentencing phase of each appeal. Specifically, we examine each vote cast by an individual justice in cases challenging the imposition of

the death penalty. In each case, a justice can cast a vote either in favor of the defendant by overturning the defendant's sentence (usually deemed a liberal vote) or in favor of the state by upholding a defendant's sentence (generally considered a conservative position). These judicial votes constitute a dichotomy, where individual votes to support the death penalty are coded 1 and votes opposing the death penalty are coded 0.

In the literature, much has been written about the special problems encountered in analyzing dichotomous relationships (see, e.g., Aldrich and Nelson, 1984). Because standard regression (OLS) models place no restrictions on the values of the dependent variable, the use of this technique on a dichotomy may yield meaningless estimates (i.e., probabilities greater than one or less than zero). While estimates derived from OLS are unbiased, these estimates do not have the smallest sampling variance (i.e., they are not efficient estimators) and hypothesis tests of coefficients are invalid as a result. Several alternative estimation procedures have been developed to remedy this problem. Probit is one suitable technique (see, e.g., Brace, 1984, 1985). Probit assesses the probability that a justice's vote is conditioned by the values taken by explanatory variables.[8]

In the following analysis, we utilize probit to estimate an integrated model that includes attribute characteristics, victim characteristics, and crime features.[9] This integrated model allows us to draw conclusions about the effects of political forces operating on judicial votes on the death penalty when the effects of the case-related variables are controlled.

Because the specific focus of this research is on the impact of attitudinal and jurisprudential variables on death penalty votes in six state supreme courts from 1980 through 1988, we employ a pooled cross-sectional time series design. In a pooled analysis, cross-sectional data are combined with longitudinal data yielding a pool of states over time. The specific variables we selected for inclusion in the models are those that were identified in previous research as important influences on judicial choice and that were available for the justices and states in this analysis.

Personal Attributes. We include in our model of judicial voting on the death penalty three personal attributes identified in past research to be critical to judicial choice. These attributes, which are used as surrogate measures

[8]Probit models are estimated using the method of maximum likelihood estimates (MLE), which produces parameter estimates from an objective function. This objective function is a statement of a relationship between a set of independent variables and a dependent variable. Where ordinary least squares minimizes the sum of squared residuals, MLE maximizes the probability of generating the sample observed.

[9]Several studies have been published recently that are aimed at developing integrated models of judicial voting. However, none has yet specified a model across micro and macro levels of analysis that includes features of institutions as variables. Such models as those constructed by George and Epstein (1992), Songer and Haire (1992), and Emmert (1992) fail to evaluate the effects of alternative institutional and contextual variables on judicial choice. Therefore, the models cannot be considered completely integrated.

of judicial attitudes, are partisan affiliation, prior prosecutorial experience, and age.

Partisan affiliation taps ideological differences among the justices. Studies of the United States Supreme Court (e.g., Tate, 1981; Tate and Handberg, 1991), other federal courts (e.g., Carp and Rowland, 1983; Goldman, 1966, 1975; Songer, 1982; Songer and Davis, 1990), and state appellate courts (e.g., Hall and Brace, 1992; Nagel, 1961; Ulmer, 1962) have found distinctive voting patterns between Democratic and Republican judges, with Democratic judges being more liberally inclined on a variety of issues. Based on these previous works, we expect Democratic state supreme court justices to be less likely to uphold death sentences than their Republican counterparts, other things being equal. In the analysis, we coded justices who are Democrats as 1, or 0 otherwise.

The second personal attribute that should affect death penalty decisions is prosecutorial experience. As previous studies of the United States Supreme Court have reported (e.g., Tate, 1981; Tate and Handberg, 1991), justices who have served as prosecutors are more likely to be sympathetic to the state's position. Consequently, we expect justices with prosecutorial experience to be more supportive of the imposition of the death penalty than justices who lack such experience. We coded any justice having prosecutorial experience as 1, or 0 otherwise.

The third attribute we include in our models is age. A judge's age can provide a crude but effective measure of the generational experiences brought to the bench. Previous studies (e.g., Hall and Brace, 1992; Tate, 1981; Ulmer, 1973a) have presented rather conflicting findings about the influence of a judge's age on voting. However, as we have argued in past research (Hall and Brace, 1992), judges of a common birth cohort should have been exposed to many of the same legal teachings and are likely to have been influenced by similar jurisprudential trends in their lives. In terms of the death penalty, because older judges can be expected to have been influenced less by the liberal judicial activism of the fifties and sixties, we predict that older state supreme court justices will be more inclined to support capital punishment, *ceteris paribus*.

While age can serve to summarize generational experiences, age also can capture life cycle effects. It may be the case, as has been considered elsewhere (e.g., Segal, 1986; Ulmer, 1973b, 1979), that judges become more conservative with age. Although the data will not allow us to decide whether the effects of age are generational or life cycle in nature, we nonetheless expect that older justices in state supreme courts will be more likely than their younger colleagues to support the imposition of the death penalty. We incorporate the age in years of the justice casting each death penalty vote as a variable in the models. We obtained information about partisan affiliation, prosecutorial experience, and age for each justice in this study from *The American Bench*.

Victim Characteristics. We also include two separate sets of variables that address different types of case-related considerations. First, we incorporate several variables representing the characteristics of murder victims. These variables consist of factors that are likely to increase the probability of a justice voting to uphold the imposition of the death penalty.[10] We coded each case according to whether the victim was an adult female, whether the victim was elderly (age 65 or over), and whether there were multiple victims. While not necessarily part of the legal rules themselves,[11] victim characteristics are closely related to the aggravating circumstance of heinous action. A compelling argument can be made that American society is more likely to consider a crime heinous and therefore support the imposition of the death penalty when the victim generally is perceived within the culture to be among the more vulnerable classes of society. Also, murdering more than one person clearly places the defendant in the category of most dangerous to society at large.

We read and coded the death penalty decisions of the six courts being examined using a standardized coding scheme. Based on the opinions reported in the cases by the West reporting series, we coded each case as 1 if any of the above factors was present, or otherwise 0.

Crime Characteristics. We include a second set of case-related variables that focus specifically on the nature of the offense. These variables represent variations in the nature of the crimes committed. Like victim characteristics, these features of crimes are likely to increase the likelihood of a justice voting to uphold the imposition of the death penalty.

Based on our reading of the aggravating circumstances provisions in the death penalty statutes of the states under consideration here, we coded each case as to whether the crime involved the killing of a law enforcement officer, whether a sexual assault was committed during the commission of the murder, and whether a robbery took place during the murder. The six states in this study, like most states, specifically list all of the above crime factors as aggravating circumstances in their death penalty statutes. While mitigating circumstances can overcome these aggravating features and result in sentences of life imprisonment rather than death, the presence of any one of these particular crime features should make justices more likely to uphold the application of the death penalty. We coded each case involving any of the above factors as 1, or otherwise 0.

[10] Another victim characteristic that may be critical in capital cases is race of the victim combined with race of the defendant. As noted previously, several studies have concluded that race is a factor in imposing death as a punishment in the United States, with black defendants who kill whites much more likely to receive the death penalty. Unfortunately, information about the race of defendants and victims simply is not readily available. We recognize that the omission of this variable lessens the performance of the models.

[11] These states actually do specify as an aggravating circumstance that multiple victims were involved. However, none of the states under consideration here includes as an aggravating factor that the victim was a child, elderly, or female.

Institutional and Environmental Influences. Our previous research (Brace and Hall, 1990; Hall and Brace, 1989, 1992) has demonstrated the vital role that institutional and environmental forces play in judicial choice. Indeed, we have commented at length on the importance of institutional arrangements as a force on appellate court decision making and have also provided a comprehensive theoretical framework for specifying models that include institutional and contextual forces, as well as attribute and case characteristics.

Rather than concentrating as we have in the past on specific institutional and environmental features affecting judicial behavior, we utilize in this analysis state dummy variables to capture the effects of these variations. The use of these variables greatly simplifies our current presentation and allows us to focus more on the political and case-related features of interest in this analysis.[12] These variables clearly represent a great deal of specific ignorance (see Maddala, 1971). However, to omit them would leave the model severely underspecified.

Temporal Influences. Finally, we capture general trends that may be influencing the results by including in the model time-point indicator variables. The temporal variables distinguish between forces affecting specific courts and those affecting all courts simultaneously over time. We include dummy variables representing the span of the data minus one period (period 2 = 1983, 1984, 1985; period 3 = 1986, 1987, 1988) in the model. As with the unitwise variables, omission of these variables leaves the model underspecified.

Results

Table 1 presents the results of estimating our model of death penalty decision making. As the table shows, all variables hypothesized to affect judicial voting emerge as statistically significant. The political party affiliations of the justices, prior prosecutorial experience, and age are related to judicial votes on the death penalty. Likewise, murders involving female victims, elderly victims, and multiple victims emerge as important determinants of judicial choice. Finally, killing a police officer and committing rape or robbery in the course of the murder affect judicial outcomes. Personal attributes, victim characteristics and crime characteristics all exert strong and directionally plausible influences on death penalty decisions in the state supreme courts being examined.

The model reported in Table 1 also provides fascinating estimates of the probability of a justice voting to uphold a death sentence. To obtain these estimates, the model reported in Table 1 was used to generate predicted

[12] More generally, the unitwise variables modify any problems with nonconstant error variance between states that may be affecting the results.

TABLE 1

An Integrated Model of Death Penalty Decision Making

Independent Variable	Estimated Coefficient	*t* Score
Party	−1.22	−11.44**
Prosecutor	0.22	2.03*
Age	0.03	6.07**
Female victim	0.22	3.03**
Elderly victim	0.17	1.71*
Multiple victims	0.23	2.76**
Police officer killed	0.69	3.92**
Murder involved rape	0.22	2.49**
Murder involved robbery	0.23	3.34**
Intercept	−2.04	−6.86**
Period 2 (1983, 1984, 1985)	0.44	3.97**
Period 3 (1986, 1987, 1988)	0.43	3.89**
Louisiana	1.35	13.32**
Kentucky	1.33	8.54**
Ohio	1.10	8.70**
North Carolina	0.85	8.19**
New Jersey	−4.57	−0.26
N	1,906	
Chi-square	509.4	
% in modal category/ % correctly predicted	50.2/71.7	

*Significant at $p = .05$, one-tailed test.

**Significant at $p = .01$, one-tailed test.

probabilities for each observation. The average prediction for a given level of an explanatory variable reveals the estimated probability of a death sentence being upheld with the effects of other variables controlled.[13] These results are reported in Table 2.

The personal attributes of the justices exert significant influences on the likelihood of justices voting to uphold the death penalty. The estimated average probability for Democrats upholding a death sentence is .46. The probability for Republicans supporting a death sentence is .68. The estimated average probability for justices with prosecutorial experience to support death sentences is .63. The probability of justices without prosecutorial

[13] A two-step process was used to estimate conditional probabilities. First, the probabilities of supporting the death penalty were estimated using the integrated model. Next, the average probability of upholding the death penalty was computed for the various categories of the independent variables. For instance, the average estimated probability for supporting a death vote under the condition of being a Democrat (party = 1) is .46 and for a Republican (party = 0) is .68.

TABLE 2

Conditional Probabilities of Supporting the Death Penalty

Personal attributes of judge	
Democrat	.46
Republican	.68
Prosecutorial background	.63
No prosecutorial background	.48
Age <50	.37
Age 51–60	.46
Age 61–70	.61
Age >70	.45
Victim characteristics	
Female	.54
Male	.45
Elderly	.57
Nonelderly	.49
Multiple	.51
Single	.49
Case characteristics	
Killing of police officer	.58
No killing of police officer	.49
Rape	.57
No rape	.48
Robbery	.51
No robbery	.49

backgrounds to support the imposition of the death penalty is .48. For justices who are under the age of 50, the estimated average probability of a pro–death sentence vote is .37. For justices age 61 through 70, this probability jumps to .61. Partisanship, prior experience as a prosecutor, and the age of justices could dramatically shape the outcome of a capital case. If we take .50 as the cutoff point for a pro-death vote, the model indicates that these characteristics could mean the difference between life and death for a defendant convicted of a capital crime.

Similarly, in cases that did not involve the murder of a woman, the estimated probability of a justice voting to uphold a death sentence is .45. When a case did involve a female victim, the estimated probability of a justice voting to uphold a death sentence jumps to .54. With elderly victims, the probability of justices upholding death sentences is .57. With victims who are not elderly, however, the estimated probability of justices supporting the imposition of the death penalty is .49. In cases involving multiple victims, the probability of justices upholding death sentences is .51. However, the probability of justices supporting capital punishment in cases involving only one victim is .49.

Finally, in cases in which the offense of murder was accompanied by a sexual assault, the estimated probability of a justice voting to uphold a death sentence is .57. Without the rape, the estimated probability is .48. Again, the difference is that between life imprisonment and death. Similar results are present with murders of law enforcement officers or where the murder was accompanied by robbery. The probabilities for upholding death sentences are .58 if a police officer was killed and .51 if a robbery took place. Without these actions, the probabilities for supporting capital punishment are .49 and .49, respectively.

Discussion

Our model of death penalty decision making presents a striking challenge to the notion that political considerations have been removed from the process of assigning the death penalty. Clearly there are particular characteristics of crimes and also of victims that increase the probability of justices voting to uphold death sentences. Murders of police officers, murders accompanied by sexual assaults or robberies, attacks on women and the elderly, and crimes involving multiple victims influence justices to support capital punishment, a pattern precisely intended by state statutes governing such decisions.

However, what may be surprising to many legal scholars, and certainly to defendants in capital cases, is the distinct partisan dimension to voting on the death penalty. Democrats are significantly less likely than Republicans to support death sentences. Similarly, there is a strong age cohort effect in death penalty cases. Older state supreme court justices are significantly more likely to support the death penalty than their younger associates. Also, justices with previous prosecutorial experience are more likely to uphold death sentences than their counterparts who lack such experience. In essence, who reviews a death sentence quite literally can mean the difference between life and death for a defendant convicted of a capital crime. This pattern is remarkable and seemingly not what was intended by legislatures writing capital punishment statutes. Indeed, it is rather chilling to recognize that decisions about executions as a punishment continue to depend to some extent upon partisan preferences and other such political factors.

Stated broadly, legal rules, no matter how detailed, seemingly do not remove discretion from the process of judicial decision making. Moreover, this discretion, inherent in the system, is exercised predictably according to the judges' preferences and other political calculations, within particular sets of institutional constraints. More basically, irrespective of the constraints of the law, judicial decisions intrinsically are political in nature. Given this empirical reality, whether death is acceptable as a punishment should remain a matter of vigorous public debate. SSQ

REFERENCES

Aldrich, John H., and Forrest Nelson. 1984. *Linear Probability, Logit, and Probit Models.* Beverly Hills: Sage.

Beiser, Edward N. 1974. "The Rhode Island Supreme Court: A Well-Integrated Political System." *Law and Society Review* 8:167–86.

Brace, Paul. 1984. "Progressive Ambition in the House: A Probabilistic Approach." *Journal of Politics* 46:556–71.

———. 1985. "A Probabilistic Approach to Retirement from the U.S. Congress." *Legislative Studies Quarterly* 10:107–24.

Brace, Paul, and Melinda Gann Hall. 1990. "Neo-Institutionalism and Dissent in State Supreme Courts." *Journal of Politics* 52:54–70.

Canon, Bradley C., and Dean Jaros. 1970. "External Variables, Institutional Structure and Dissent on State Supreme Courts." *Polity* 4:185–200.

Carp, Robert A., and C. K. Rowland. 1983. *Policymaking and Politics in the Federal District Courts.* Knoxville: University of Tennessee Press.

Danelski, David. 1966. "Values as Variables in Judicial Decision-Making: Notes toward a Theory." *Vanderbilt Law Review* 19:721–40.

Emmert, Craig F. 1992. "An Integrated Case-Related Model of Judicial Decision Making: Explaining Supreme Court Decisions in Judicial Review Cases." *Journal of Politics* 54:543–52.

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

George, Tracy E., and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making." *American Political Science Review* 86:323–37.

Glick, Henry R., and George W. Pruet, Jr. 1986. "Dissent in State Supreme Courts: Patterns and Correlates of Conflict." Pp. 199–214 in S. Goldman and C. Lamb, eds., *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts.* Lexington: University Press of Kentucky.

Glick, Henry R., and Kenneth N. Vines. 1973. *State Court Systems.* Englewood Cliffs, N.J.: Prentice-Hall.

Goldman, Sheldon. 1966. "Voting Behavior on the United States Courts of Appeals, 1961–1964." *American Political Science Review* 60:374–83.

———. 1975. "Voting Behavior on the United States Courts of Appeals Revisited." *American Political Science Review* 69:491–506.

Gregg v. Georgia, 428 U.S. 153 (1976).

Hall, Melinda Gann. 1987. "Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study." *Journal of Politics* 49:1117–24.

———. 1992. "Electoral Politics and Strategic Voting in State Supreme Courts." *Journal of Politics* 54:427–46.

Hall, Melinda Gann, and Paul Brace. 1989. "Order in the Courts: A Neo-Institutional Approach to Judicial Consensus." *Western Political Quarterly* 42:391–407.

———. 1992. "Toward an Integrated Model of Judicial Voting Behavior." *American Politics Quarterly* 20:147–68.

Handberg, Roger. 1978. "Leadership in State Courts of Last Resort: The Interaction of Environment and Procedure." *Jurimetrics* 19:178–85.

Jaros, Dean, and Bradley C. Canon. 1971. "Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges." *Midwest Journal of Political Science* 15:322–46.

Jurek v. Texas, 428 U.S. 262 (1976).

Lockett v. Ohio, 438 U.S. 586 (1978).

Loughlin, Sean. 1990. "GAO: Race Affects Death Penalty." *New York Times*, 31 March.

McClesky v. Kemp, 481 U.S. 279 (1987).

Maddala, G. S. 1971. "The Use of Variance Components Models in Pooling Cross Section and Time Series Data." *Econometrica* 39:341–58.

Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

Nagel, Stuart. 1961. "Political Party Affiliation and Judges' Decisions." *Political Science Review* 55:843–50.

Payne v. Tennessee, 111 S.Ct. 2597 (1991).

Pritchett, C. Herman. 1941. "Divisions of Opinion among Justices of the U.S. Supreme Court, 1939–1941." *American Political Science Review* 35:890–912.

———. 1948. *The Roosevelt Court*. New York: Macmillan.

Proffitt v. Florida, 428 U.S. 242 (1976).

Roberts v. Louisiana, 428 U.S. 325 (1976).

Rohde, David W. 1972. "Policy Goals and Opinion Coalitions in the Supreme Court." *Midwest Journal of Political Science* 16:208–24.

Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: Freeman.

Schubert, Glendon. 1965. *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946–1963*. Evanston, Ill.: Northwestern University Press.

———. 1974. *The Judicial Mind Revisited: A Psychometric Analysis of Supreme Court Ideology*. New York: Free Press.

Segal, Jeffrey A. 1984. "Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases (1962–1981)." *American Political Science Review* 78:891–900.

———. 1986. "Supreme Court Justices as Human Decision Makers: An Individual Level Analysis of Search and Seizure Cases." *Journal of Politics* 48:938–55.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and Votes of U.S. Supreme Court Justices." *American Political Science Review* 83:557–65.

Sickels, Robert. 1965. "The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals." *American Political Science Review* 59:100–104.

Songer, Donald R. 1982. "Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals." *American Journal of Political Science* 26:225–39.

Songer, Donald R., and Sue Davis. 1990. "The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986." *Western Political Quarterly* 43:317–34.

Songer, Donald R., and Susan Haire. 1992. "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals." *American Journal of Political Science* 36:963–82.

Tate, C. Neal. 1981. "Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978." *American Political Science Review* 75:355–67.

Tate, C. Neal, and Roger Handberg. 1991. "Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88." *American Journal of Political Science* 35:460–80.

Ulmer, S. Sidney. 1962. "The Political Party Variable in the Michigan Supreme Court." *Journal of Politics* 11:352–62.

———. 1970. "Dissent Behavior and the Social Background of Supreme Court Justices." *Journal of Politics* 32:580–98.

———. 1973a. "Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases, 1947–1956 Terms." *American Journal of Political Science* 17:622–30.

———. 1973b. "The Longitudinal Behavior of Hugo Lafayette Black: Parabolic Support for Civil Liberties, 1937–1971." *Florida State University Law Review* 1:131–53.

———. 1979. "Parabolic Support for Civil Liberties Claims: The Case of William O. Douglas." *Journal of Politics* 41:634–39.

U.S. Bureau of Justice Statistics. 1991. *Capital Punishment 1990*. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics.

Woodson v. North Carolina, 428 U.S. 280 (1976).

White, Welsh S. 1991. *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment*. Ann Arbor: University of Michigan Press.