



NOTE

Is Death Different to Federal Judges? An Empirical Comparison of Capital and Noncapital Guilt-Phase Determinations on Federal Habeas Review

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Abstract. Legal commentators have long believed that federal judges treat capital appeals more favorably than noncapital appeals. However, due to the bifurcated nature of capital trials and the complexity of the ensuing appeals, no empirical research to date has proven that the guilt-phase claims of capital defendants are more likely to succeed on federal habeas review than the claims of other defendants. This Note addresses that gap in the literature. The Author analyzed 1,368 votes cast by federal appellate judges between 2013 and 2017 in murder cases heard on habeas review. In each of those cases, the defendant was under a sentence of either death or life in prison. Exploiting this unique dataset, this Note finds that federal appellate judges are significantly more likely to grant guilt-phase relief to capital defendants than they are to similarly situated noncapital defendants. It then rules out alternative explanations for this finding of a “sentencing effect,” such as differential attorney investment or dissimilarity between capital and noncapital defendants. After establishing that federal appellate judges do in fact behave differently in capital cases, the Note considers the normative implications of this finding. It ultimately concludes that the behavior of federal judges on habeas review is consistent with a generally shared principle of capital jurisprudence: preventing the execution of innocents.

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The data and code used in this Note’s analysis are posted in the Harvard Dataverse Repository at <https://bit.ly/isdeathdifferent>.

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Introduction

“[D]eath is different,” sayeth the Supreme Court, and so it is in American law.¹ In the last half-century, the federal courts and the states have constructed a sprawling legal architecture around the death penalty, differentiating capital cases from standard-issue criminal cases both procedurally and substantively. Procedurally, capital cases have come to involve notice of prosecutors’ intent to seek the death penalty,² “*Witherspooned*” jurors,³ and, perhaps most importantly, bifurcated trials with a jurisprudence all their own.⁴ Substantively, the death penalty can only be imposed against a limited set of people,⁵ under a limited set of circumstances,⁶ and for a limited set of crimes.⁷ Different too are the legal institutions set up to facilitate and constrain capital punishment. States that retain the death penalty often have separate public defender’s offices to handle capital cases⁸ and special statutes that provide capital defendants

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1. *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion); *see also, e.g.,* *Miller v. Alabama*, 567 U.S. 460, 481-82 (2012); *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002).
 2. *See, e.g.,* 18 U.S.C. § 3593(a) (2018); FLA. STAT. § 782.04(1)(b) (2019).
 3. In *Witherspoon v. Illinois*, the Supreme Court invalidated the practice of excluding all potential jurors who voiced objections to the death penalty, ruling that doing so would violate the Sixth and Fourteenth Amendments. 391 U.S. 510, 518, 521-23 (1968). However, it did not foreclose the practice of states excluding jurors who were unwilling to impose the death penalty under any circumstances. *Id.* at 513-14.
 4. *See, e.g.,* *Gregg*, 428 U.S. at 190-92 (plurality opinion) (“When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)].”); *see also infra* notes 115-17 and accompanying text.
 5. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the execution of individuals who were minors at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of those with certain intellectual disabilities); *Ford v. Wainwright*, 477 U.S. 399 (1986) (prohibiting the execution of “the insane”).
 6. *See, e.g.,* 18 U.S.C. §§ 3591-3592 (requiring the consideration of “[m]itigating and aggravating factors”); CAL. PENAL CODE § 190.2 (West 2019) (describing the “special circumstances” that transform first-degree murder into capital murder); FLA. STAT. § 782.04(1)(a) (similar).
 7. *See, e.g.,* *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting execution for the non-homicide aggravated rape of a child); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the getaway driver in a felony-murder case was insufficiently culpable to be constitutionally executed); *Coker v. Georgia*, 433 U.S. 584 (1977) (eliminating the death penalty for the nonhomicide rape of an adult).
 8. *See, e.g.,* GA. CODE ANN § 17-12-12 (2019). The maximum recommended caseloads for capital defenders also differ from those of conventional public defenders. Compare Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, CRIM. JUST., Summer 2011, at 24, 27 (noting the recommendation of the American Bar Association (ABA) that public defenders handle no more than 150 noncapital felony cases per year), with NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN
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with investigative resources.⁹ Death penalty jurisdictions generally segregate the condemned from the general prison population¹⁰ and provide them with different—often worse¹¹—accommodations. Just as significantly, capital punishment occupies a distinctive place in our national discourse.¹² Candidates for high executive office are expected to take a position on the subject,¹³ and Americans are regularly polled on their support for or opposition to the institution.¹⁴ Indeed, the focus on the death penalty is so great that it sometimes obscures the comparative harshness of other punishments imposed in the United States.¹⁵

PUBLIC DEFENSE 214-15 (2011) (noting the ABA’s recommendation that individuals representing capital defendants should take no more than 20 cases per year).

9. See, e.g., CAL. PENAL CODE § 987.9; N.C. GEN. STAT. § 7A-450(b) (2019); OHIO REV. CODE ANN. § 2929.024 (LexisNexis 2019); S.C. CODE ANN. § 16-3-26(B)-(C) (2019); TENN. CODE ANN. § 40-14-207(b) (2019); TEX. CODE CRIM. PROC. ANN. art. 26.052(e)-(h) (West 2019); see also 18 U.S.C. § 3599(f) (similar, for federal capital defendants).
10. See Gabriella Robles, *Condemned to Death—And Solitary Confinement*, MARSHALL PROJECT (July 23, 2017, 10:00 PM), <https://perma.cc/WX9R-LU2C>; see also ACLU, *A Death Before Dying: Solitary Confinement on Death Row 2* (2013), <https://perma.cc/4F5D-AXN5> (“Death row prisoners are subjected to these harsh conditions not because of their conduct in prison or any demonstrated dangerousness to staff or other prisoners. They are subjected to extreme isolation due to their sentences alone.”); ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., *RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH* (2016), <https://perma.cc/9XEK-2MRF>.
11. See, e.g., *Porter v. Clarke*, 852 F.3d 358, 360-61 (4th Cir. 2017) (discussing conditions on Virginia’s death row); Rachel Weiner, *Virginia Made Conditions on Death Row Better. The State Is Still Being Sued.*, WASH. POST (Mar. 24, 2017), <https://perma.cc/27X9-96PA> (similar).
12. See generally DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2010) (examining why the United States did not abolish capital punishment alongside other Western nations in the twentieth century and discussing the communicative role of the death penalty in the United States).
13. See, e.g., *Meet the Candidates: Do You Support or Oppose the Death Penalty?*, N.Y. TIMES, <https://perma.cc/FDH5-UUXS> (archived May 12, 2020) (interviewing Democratic candidates for the 2020 presidential nomination regarding their views on the death penalty).
14. See, e.g., Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP (Oct. 26, 2017), <https://perma.cc/YQG4-785L>; Peter Moore, *Poll Results: The Death Penalty*, YOUNG (May 5, 2014, 11:38 AM), <https://perma.cc/ET6U-U498>; J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR.: FACT TANK (June 11, 2018), <https://perma.cc/R4MU-28EQ>.
15. For example, life in prison without parole is a common alternative to the death penalty in the United States, while it constitutes impermissible punishment in other countries. Compare LA. STAT. ANN. § 14:30.1(B) (2019) (imposing a mandatory sentence of life imprisonment without parole for second degree murder), and MICH. COMP. LAWS § 750.316(1) (2020) (imposing a mandatory sentence of life imprisonment without parole for first-degree murder), with CONSTITUIÇÃO [CONSTITUTION] 2005, art. 30, § 1 (Port.) (forbidding sentences that are “perpetual” or of “unlimited or undefined

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Yet despite the prominence of capital punishment in the United States, we know comparatively little about the behavior and attitudes of the jurists who make the final decisions in most of these cases: federal appellate judges. Federal appellate judges are called upon to bless practically every execution carried out in the United States,¹⁶ and typically provide the final judicial word on each case.¹⁷ Most death sentences are handed down in state trial court;¹⁸ they are usually appealed to a higher state court, typically the state supreme court or its equivalent.¹⁹ If the defendant is unsuccessful on direct appeal, he typically will petition for a writ of habeas corpus²⁰ (or other postconviction relief) in state court.²¹ That process generally begins in the lower state courts,²² before the

duration,” such as life without parole), and STRAFFELOVEN [PENAL CODE] § 275 (Nor.) (specifying a maximum penalty of twenty-one years in prison for murder).

16. According to the Death Penalty Information Center, 313 executions occurred between the reinstatement of U.S. capital punishment in 1976 and the year 1995. *Execution Database*, DEATH PENALTY INFO. CTR., <https://perma.cc/7PDW-QQRD> (archived May 12, 2020). Andrew Gelman and colleagues indicate that at least 286 of these executions were reviewed by federal courts during that period. See Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 216 fig.3 (2004).
17. See Gelman et al., *supra* note 16, at 216 fig.3.
18. Kalvis Golde, *The Federal Death Penalty at the Supreme Court*, SCOTUSBLOG (Feb. 14, 2020, 1:00 PM), <https://perma.cc/9R42-HSS5> (“The vast majority of death row inmates are convicted and sentenced under state death penalty laws . . .”).
19. Due to the gravity of a death sentence, state statutes usually provide those defendants with an automatic appeal to the state’s highest court, which often cannot be waived. See, e.g., CAL. PENAL CODE § 1239(b) (West 2019) (“When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel.”); *People v. Massie*, 967 P.2d 29, 39 (Cal. 1998) (holding that a capital defendant cannot waive his automatic appeal to the Supreme Court of California); see also *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) (“Society’s overwhelming interest in preventing wrongful executions is evidenced by the fact that almost all of the 37 States with the death penalty apparently have prescribed mandatory, nonwaivable appellate review of at least the sentence in capital cases.”).
20. A writ of habeas corpus is a legal declaration that an individual is being detained in violation of the law. See, e.g., 28 U.S.C. § 2254(a) (2018). It is a civil remedy, see *Ex parte Tom Tong*, 108 U.S. 556, 559-60 (1883), in principle available to anyone being held in government custody. See generally *Boumediene v. Bush*, 553 U.S. 723, 739-52 (2008) (discussing the history and use of the writ).
21. See Gelman et al., *supra* note 16, at 215 (describing “state postconviction review”). Both state and federal courts generally allow convicted individuals to contest their conviction via habeas corpus (or similar) after exhausting their direct appeals. See 28 U.S.C. § 2254(a)-(c); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 351-64 (2003) (discussing various states’ postconviction proceedings).
22. See Gelman et al., *supra* note 16, at 215. But see, e.g., VA. CODE ANN. § 8.01-654(C)(1) (2019) (specifying that the state supreme court “shall have exclusive jurisdiction” over habeas review in capital cases).

case once again works its way up to the state appellate courts.²³ Along the way, some defendants have their convictions or sentences overturned; others receive executive clemency or die of natural causes. The rest can then petition for a writ of habeas corpus in federal district court; those who lose may then appeal to the federal circuit courts.²⁴ There, panels of federal appellate judges make what is usually the last substantive ruling a death row prisoner will receive.²⁵

Scholars have taught us a great deal about the behavior of the *state* trial court judges who are at the front end of this process. Law professors, journalists, and political scientists have extensively documented how electoral and political pressures (among other factors) affect the decisions these judges make when death is on the line.²⁶ By contrast, the behavior of federal appellate judges in capital cases has received only limited study. While a number of scholars have examined federal judicial decisionmaking *within* the subset of cases that involve a capital sentence,²⁷ no research to date has examined whether judicial decisions in capital cases systematically differ from judicial decisions in noncapital (but similarly serious) criminal cases. In short, we are unaware of how a reluctance to let executions proceed²⁸—or alternatively, an eagerness to speed up the seemingly interminable process—affects federal appellate judges in the United States.

Nevertheless, history does provide numerous anecdotes indicating that federal judges are not immune from the moral, religious, and aesthetic pressures that bear on the decision to uphold death sentences. For example, when the Supreme Court in 1972 confronted the constitutionality of the death penalty in *Furman v. Georgia*,²⁹ Justice Stewart was uneasy with the idea

23. See Gelman et al., *supra* note 16, at 215.

24. See 28 U.S.C. § 2254(a) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”); Margaret A. Upshaw, *The Unappealing State of Certificates of Appealability*, 82 U. CHI. L. REV. 1609, 1611-17 (2015) (discussing the right to petition for a writ of habeas corpus in federal district courts and the process for appealing a district court’s denial of that petition).

25. See Gelman et al., *supra* note 16, at 216 fig.3.

26. See, e.g., *infra* notes 104-05 and accompanying text.

27. See, e.g., *infra* notes 95-103 and accompanying text.

28. Cf. *Furman v. Georgia*, 408 U.S. 238, 311-12 (1972) (White, J., concurring) (“[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.”).

29. 408 U.S. 238.

of being responsible for hundreds of executions.³⁰ He reportedly cast the deciding vote to strike down all existing death penalty statutes in part because he did not want the deaths of hundreds of condemned prisoners on his conscience.³¹

It is natural to wonder whether a similar reluctance affects the behavior of federal appellate judges today. These jurists know that a vote to affirm a death sentence often means an execution will actually occur, and that it is unlikely that the U.S. Supreme Court will step in to double-check their work.³² We might expect that, burdened with this knowledge, the average federal appellate judge grants relief—in this context defined as either granting a conditional writ of habeas corpus or remanding to the lower court for further consideration (or reconsideration) of an issue—to death row prisoners more freely than to others. This hypothesis and its jurisprudential implications are the subjects of this Note.

To test whether death is indeed “different,” I develop several quantitative tests of the proposition that federal appellate judges are more likely to grant habeas relief to death row petitioners than to other similarly situated parties. I compare the rates at which federal appellate judges rule in favor of death row prisoners’ *guilt-phase* habeas claims with the rates at which they grant habeas relief to the most comparable set of defendants: convicted murderers serving life sentences.³³ Since the substantive law in the guilt phase—the part of the trial when the jury decides whether the defendant has committed the charged crime—is almost identical for both sets of defendants,³⁴ differences in relief

30. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 209, 215-16 (1979).

31. *See id.* at 209-10, 215-16, 218.

32. *See, e.g.,* Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795, 795 (2016) (observing that in 2013, the Court received 7,376 petitions but granted certiorari in only 76 cases).

33. As discussed in Part III.A below, those serving life sentences for murder largely resemble those sentenced to death for murder. Capital defendants in the sample had on average 0.28 more victims than did noncapital defendants and were slightly more likely to be white. *See infra* Table 1. However, as I explain in Part III.C, these differences do not change my overall conclusion. For the purposes of this Note, I do not distinguish between individuals serving life in prison with or without parole, largely because of the difficulties in determining whether individual defendants were or were not parole eligible. In any event, the tests I perform, holding constant the crime for which a defendant was convicted (for example, first-degree murder or felony murder) and the state in which the defendant was convicted, when taken together, implicitly capture most of the information that would be conveyed by a variable that specifically denotes parole eligibility.

34. There are some minor differences between the law in capital cases and noncapital cases. For example, a capital defendant might theoretically win a guilt-phase reversal for lack of sufficient investigatory funds in a case where a noncapital defendant might not

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rates would indicate a tendency among federal appellate judges to grant relief more freely to the condemned.³⁵ As it turns out, the comparison produces exactly that result. Federal appellate judges are as much as 44.2% more likely to grant guilt-phase habeas relief to a death row petitioner than they are to grant the same relief to a person serving life in prison for the same crime. It appears that the prospect of sanctioning an execution makes some meaningful difference to those judges.

This finding of a “sentencing effect” raises challenging normative questions. Some will undoubtedly be concerned that federal judges allow their feelings—moral, religious, or otherwise—about capital punishment to affect their rulings. In particular, those most committed to limiting the scope of judicial discretion might find this result troubling. However, I suggest an alternative interpretation: The results indicate judicial fidelity to an organizing principle of death penalty jurisprudence—preventing the execution of innocents. Supreme Court dicta suggests as much,³⁶ and the differences in the patterns of relief granted by Democrat- and Republican-appointed judges imply that such fidelity provides a better explanation for the data than does partisan ideology. Since this organizing principle commands near-universal assent,³⁷ judges do not abuse their discretion by adhering to it.

This Note proceeds in four Parts. Part I provides a brief overview of federal habeas procedure. Part II discusses the historical evidence that federal judges are often reluctant to sanction executions. I also examine the existing scholarship on judicial behavior in death penalty cases and explain why it fails to answer the question posed here. Part III develops and presents several quantitative tests of federal judicial behavior in capital cases. It begins with a discussion of methodology³⁸ before moving into the main tests of the hypothesis.³⁹ After presenting preliminary evidence demonstrating that federal

prevail. *See* 18 U.S.C. §§ 3599(a), (f) (2018) (providing investigative resources specifically for capital defendants); *Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (establishing that a denial of habeas relief can be reversed when the district court improperly refuses to grant funds under 18 U.S.C. § 3599(f)). However, these discrepancies are rare, and—according to my review of the cases under study—none affected the data used in this Note.

35. Indeed, since capital trials are bifurcated, judges generally have the option of reversing the sentence alone *without* also invalidating the guilt-phase verdict. Given this alternative, we might expect that judges would be *less likely*, all else equal, to vacate a guilt-phase verdict in a capital case. Accordingly, this research design yields a relatively conservative estimate of any sentencing effect.

36. *See infra* notes 185-90 and accompanying text.

37. *See* Part IV below for evidence that individuals from across the ideological spectrum agree that society should vigorously seek to avoid the potential execution of an innocent person, even at relatively high social cost.

38. *See infra* Part III.A.

39. *See infra* Part III.B.

appellate judges are indeed more likely to grant relief to capital defendants, I consider alternative explanations for these results.⁴⁰ Specifically, I demonstrate that my results cannot be explained by (1) differential attorney investment in capital and noncapital cases, (2) the rules I used to code cases, or (3) dissimilarities between capital and noncapital defendants. Finally, in Part IV I consider the normative implications of my findings. In so doing, I argue that guarding against the execution of innocents is a near-universally shared value and that promoting this value provides some justification for federal judges granting relief more freely in capital cases.

I. An Overview of Federal Habeas Corpus

At some level, the question this Note pursues is a simple one: Do federal appellate judges favor capital defendants over noncapital defendants? However, the context in which I examine this question is slightly more complex. Habeas law is a notoriously difficult subject and is now largely governed by a federal statute that has only been in place since 1996.⁴¹ Accordingly, it makes sense to first provide an overview of basic habeas procedure before turning to the substance of my research.

The right of habeas corpus predates the Bill of Rights and is mentioned in the Constitution's original text.⁴² It is a civil remedy that allows those in government custody to challenge the legality of their detention.⁴³ Prisoners can seek a writ of habeas corpus after exhausting their direct appeals. Those originally convicted in state court generally must also exhaust state habeas appeals before seeking habeas relief in federal court.⁴⁴ Federal courts hearing habeas cases can only entertain claims involving violations of federal law (including federal constitutional law),⁴⁵ and even then the Supreme Court has precluded certain constitutional claims, such as those arising under the Fourth Amendment.⁴⁶

40. See *infra* Part III.C.

41. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

42. U.S. CONST. art. I, § 9, cl. 2 (Suspension Clause).

43. See generally *Ex parte* Tom Tong, 108 U.S. 556, 559-60 (1883) (explaining the writ of habeas corpus).

44. See 28 U.S.C. § 2254(b)(1) (2018).

45. *Id.* § 2254(a).

46. See *Stone v. Powell*, 428 U.S. 465, 480-82 (1976) (precluding habeas review that had been sought on the ground that evidence was obtained in an unconstitutional search or seizure).

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In 1996, Congress sought to narrow the scope of federal habeas relief by passing the Antiterrorism and Effective Death Penalty Act (AEDPA).⁴⁷ For one, AEDPA largely eliminated the ability of defendants to bring multiple habeas petitions.⁴⁸ And perhaps more importantly, it provided substantive standards for adjudicating habeas claims: Federal courts may not grant habeas relief on a claim previously decided by a state court unless that decision (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”; or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁴⁹ By limiting relief to “unreasonable determination[s] of the facts” and incorrect applications of “clearly established” federal law, AEDPA sharply limited the ability of the federal courts—including the Supreme Court—to grant habeas relief by extending existing Supreme Court precedents or by disagreeing with the state court’s reading of the evidence.⁵⁰

Together with Supreme Court precedent from the 1970s and 1980s,⁵¹ AEDPA ensured that federal habeas cases concern a fairly homogeneous set of federal claims. Defendants commonly rely on *Brady v. Maryland*,⁵² *Martinez v. Ryan*,⁵³ and *Napue v. Illinois*,⁵⁴ which have (relatively) forgiving tests for establishing cause and prejudice—more exotic habeas challenges are less prevalent.⁵⁵

When faced with a defendant challenging a conviction via habeas corpus, a federal judge has several options at her disposal. First, she can unconditionally

47. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

48. *See id.* § 106, 110 Stat. at 1220-21 (codified at 28 U.S.C. § 2244(a)-(b)).

49. *Id.* § 104, 110 Stat. at 1218-19 (codified at 28 U.S.C. § 2254(d)).

50. *See* Lincoln Caplan, *The Destruction of Defendants’ Rights*, NEW YORKER (June 21, 2015), <https://perma.cc/P9Q2-GJK4> (discussing AEDPA’s effect on habeas relief rates).

51. *See, e.g.,* *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion) (holding that new constitutional rules of criminal procedure generally do not apply retroactively on habeas review); *Wainwright v. Sykes*, 433 U.S. 72, 87-91 (1977) (holding that claims barred by a state’s procedural default rules generally cannot be raised in federal habeas proceedings); *Powell*, 428 U.S. at 480-82.

52. 373 U.S. 83, 84-86 (1963) (determining that a state violates the Due Process Clause of the Fourteenth Amendment when it withholds material exculpatory evidence from the accused).

53. 566 U.S. 1, 17 (2012) (holding that a defendant may assert a claim for ineffective assistance of state habeas counsel under certain circumstances).

54. 360 U.S. 264, 265, 272 (1959) (declaring that a state violates the Fourteenth Amendment when it allows its witnesses to lie at trial).

55. The Court has ruled entire categories of constitutional challenges ineligible for habeas review, ensuring that most habeas cases are relatively similar, regardless of the underlying conflict. *See, e.g., Powell*, 428 U.S. at 480-82.

grant the writ. Doing so requires the defendant's immediate release.⁵⁶ Judges rarely take this approach, however: Even if the defendant's rights were violated during trial, his innocence is often still in doubt, and judges generally prefer to keep individuals accused of murder in jail until the government decides whether or not to retry the case.⁵⁷ Accordingly, judges more frequently grant *conditional* writs, which overturn a defendant's conviction but allow for his continued incarceration until he is found not guilty in a new trial (or the government decides to drop the charges).⁵⁸ Federal appellate judges also have the option of remanding the case to a federal district court for further proceedings, which they will sometimes do if they believe the lower court applied the wrong standard, failed to address a claim for relief, or should have conducted further hearings.⁵⁹ Finally, a panel of appellate judges can deny the writ, leaving the defendant's conviction intact. Such a denial typically extinguishes the last realistic chance for most defendants to overturn their convictions—as discussed in Part III.A below, further claims are almost certain to fail.

This background will be important to keep in mind in Part III, the empirical portion of this Note. In the next Part, however, I consider judicial behavior in death penalty cases more generally. This discussion aims to motivate the quantitative research that follows—it provides strong circumstantial evidence that federal judges indeed approach capital cases differently.

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56. See, e.g., *Williams v. Birkett*, 697 F. Supp. 2d 716, 718, 729 (E.D. Mich. 2010) (unconditionally granting a writ of habeas corpus for numerous “egregious” violations of a defendant’s constitutional rights), *vacated on other grounds*, 670 F.3d 729 (6th Cir. 2012). Under certain circumstances, a court may also bar the retrial of a defendant when granting an unconditional writ, but an unconditional writ does not by itself require that the charges be dismissed with prejudice. See *Wolfe v. Clarke*, 718 F.3d 277, 288-89 (4th Cir. 2013).
57. See *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) (“Courts *generally* allow for the release of a prisoner *subject to* the state’s right to detain him on the underlying indictment.” (emphasis added)); cf. *Hilton v. Braunskill*, 481 U.S. 770, 779 (1987) (permitting district courts to consider “the dangerousness of a habeas petitioner as part of its decision whether to release the petitioner pending appeal”).
58. See, e.g., *Hamilton v. Ford*, 969 F.2d 1006, 1013 (11th Cir. 1992) (issuing a writ of habeas corpus for a Sixth Amendment violation, contingent upon the State not taking steps to retry the defendant within ninety days); see also Sheila A. Skojec, Annotation, *Finality for Appeal of Federal Habeas Corpus Orders*, 82 A.L.R. Fed. 937, § 8 (1987) (defining and discussing conditional writs of habeas corpus).
59. See, e.g., *Juniper v. Zook*, 876 F.3d 551, 556 (4th Cir. 2017) (holding that the district court abused its discretion in failing to hold an evidentiary hearing, and remanding for further proceedings).

II. Historical and Scholarly Perspectives

Over time, historians and journalists have frequently told stories of how judicial reluctance to authorize executions has affected rulings.⁶⁰ However, that anecdotal evidence, by and large, has not translated into scholarship explaining how judicial behavior in death penalty cases differs from judicial behavior in other cases. Academics have produced extensive scholarship explaining variations in judicial behavior within the subset of capital cases—that is, why a judge upholds a conviction and sentence in one capital case while providing relief in another—but they have spent much less time on the question of how judges behave in capital cases *as compared to noncapital cases*.⁶¹ Part II.A recounts some of the historical examples of this asymmetry that suggest federal judges behave differently in capital cases. Part II.B explores the existing research on judicial conduct in capital cases.

A. Historical and Circumstantial Evidence

Despite the unmistakably challenging moral issues that often attach to capital cases, federal judges are generally loath to admit that their own opinions on those issues influence their rulings. Both liberal and conservative jurists have frequently endorsed the principle that a judge must set aside her own beliefs in capital cases if the law compels a contrary result.⁶² During his Supreme Court confirmation hearing, then-Judge Breyer opined, “if a judge has strong personal views on a matter as important as the death penalty, views that he believes might affect his decision in such a case, he should perhaps, . . . take [him]self out of the case.”⁶³ Similarly, in the 1998 article *Catholic Judges in Capital Cases*, Amy Coney Barrett and a coauthor wrote: “If one cannot in conscience affirm a death sentence the proper response is to recuse oneself.”⁶⁴

Nevertheless, through historical accounts and the occasional candid remark, we have a fairly extensive catalogue of stories that illustrate just how strongly the capital context affects some judges. Many of these tales come from the death penalty wars that rattled the Supreme Court in the 1970s and 1980s, when the very existence of capital punishment in the United States came into

60. See *infra* notes 71-85.

61. See *infra* Part II.B.

62. For a discussion of judicial proponents of this principle, see, for example, Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL'Y & L. 317, 339-41 (2003).

63. Ori Lev, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J.L. & RELIGION 637, 640 (1994-95) (quoting *Excerpts from Senate Hearings on Supreme Court Nominee*, N.Y. TIMES (July 13, 1994), <https://perma.cc/W7QM-VW3Q>).

64. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 343 (1998).

question. The most dramatic examples concern two of the pivotal Justices in those cases—Justice Stewart and Justice Powell—both of whom accepted the constitutionality of capital punishment throughout most of their careers.⁶⁵

One notable episode concerns Justice Stewart, the only Justice to vote for the judgment of the Court in all eight of the cases comprising *Furman v. Georgia* and *Gregg v. Georgia*.⁶⁶ As a general matter, Justice Stewart cut a moderate profile on criminal procedure issues. He wrote the opinion for the Court in *Katz v. United States*, which substantially expanded the reach of the Fourth Amendment,⁶⁷ but dissented from the Court’s pro-defendant rulings in *Escobedo v. Illinois*⁶⁸ and *Miranda v. Arizona*.⁶⁹ Indeed, a mere year before *Furman*, he joined the majority that upheld the “standardless” death sentence in *McGautha v. California*.⁷⁰ Consequently, when the Court considered the question whether the Eighth Amendment prohibited the death penalty in *Furman*, Justice Stewart’s vote was uncertain.

By the time *Furman* was pending before the Supreme Court, states practicing capital punishment had built up substantial backlogs on death row. Furious litigation over the death penalty meant that in 1972 there was a de facto moratorium on executions in the United States⁷¹—when *Furman* was decided

65. This Subpart does not address the views of Justices Brennan and Marshall, both of whom considered capital punishment to violate the Constitution in all circumstances. See *Furman v. Georgia*, 408 U.S. 238, 305-06 (1972) (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring). Given each Justice’s beliefs and position on the Supreme Court, neither is necessarily representative of the population of federal judges, who are required to accept the constitutionality of capital punishment as a matter of law.

66. See *Gregg v. Georgia*, 428 U.S. 153, 158 (1976) (plurality opinion); *Furman*, 408 U.S. at 306 (Stewart, J., concurring). The six cases (and Justice Stewart’s votes for each judgment) considered alongside *Furman* and *Gregg* were: *Branch v. Texas* (consolidated with *Furman*); *Jackson v. Georgia* (same); *Jurek v. Texas*, 428 U.S. 262, 264 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 244 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 327 (1976) (plurality opinion); and *Woodson v. North Carolina*, 428 U.S. 280, 282 (1976) (plurality opinion). Justice Stevens and Justice Douglas did vote with the majority in the subset of cases in which each participated; however, Justice Stevens was not on the Court when the *Furman* cases were decided, and Justice Douglas had retired by the time the *Gregg* cases were decided.

67. 389 U.S. 347, 348-52, 359 (1967) (holding that electronic eavesdropping could violate the Fourth Amendment even without a trespass, and declaring that the Fourth Amendment protects “people, not places”).

68. 378 U.S. 478, 493-94 (1964) (Stewart, J., dissenting) (disagreeing with the Court’s conclusion that the accused have a right to counsel during preindictment custodial interrogation).

69. 384 U.S. 436, 504 (1966) (Harlan, J., dissenting); *id.* at 526 (White, J., dissenting).

70. 402 U.S. 183, 184-86, 204 (1971) (remarking that providing standards for the imposition of the death penalty was a “task[] which [is] beyond present human ability”), *vacated mem. on reh’g sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972).

71. See WOODWARD & ARMSTRONG, *supra* note 30, at 207 (noting that at the time *Furman* was decided there had not been an execution in the United States since 1967).

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there were about 700 prisoners on death row.⁷² While Justice Stewart was initially inclined to approve the constitutionality of capital punishment, he was well aware that if the Court approved the death penalty in *Furman*, a sizable number of inmates would be executed in short order.⁷³ The idea of having the blood of hundreds of individuals on his hands troubled Justice Stewart, and the fate of the death row prisoners kept him awake at night.⁷⁴ Ultimately, his vote to strike down the death penalty as unconstitutionally arbitrary in *Furman* was partially a product of his uneasy conscience.⁷⁵

Justice Powell did not share Justice Stewart's hesitance about capital punishment in *Furman*.⁷⁶ However, over the next fifteen years, he would make curious doctrinal moves for which there is little explanation aside from a reluctance to let executions proceed. Most prominent was his idea to apply *Gregg v. Georgia*, the 1976 ruling that reinstated capital punishment in the United States, in a prospective-only manner.⁷⁷ Such a holding would have required that those already on death row be resentenced, preventing their immediate execution.⁷⁸ As commentator Ori Lev points out, "[t]he problem with this maneuver was that it was unprecedented: the Court simply did not uphold the constitutionality of laws in a prospective-only manner."⁷⁹ By seeking to depart from the Court's ordinary practice, Justice Powell revealed his ambivalence about sanctioning death sentences.

Justice Powell eventually backed away from the unusual tactic he proposed in *Gregg*, but he continued to express heightened concern for capital litigants in other situations. For example, before the formal start of the Court's 1985 Term, Justice Powell received a petition for an emergency stay from a case in the Eleventh Circuit.⁸⁰ The petition came from a Florida inmate, Willie Darden, who had been convicted of a murder he denied committing.⁸¹ Justice Powell initially recommended denying the stay.⁸² However, the full Court nevertheless considered the matter the day before Darden's execution, prompted

72. *Id.* at 209.

73. *See id.* at 208-09.

74. *Id.* at 209.

75. *See id.* at 209, 215-16.

76. *See Furman v. Georgia*, 408 U.S. 238, 414 (1972) (Powell, J., dissenting).

77. *See Lev, supra* note 63, at 666-67.

78. *See* EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 415-16 (2013).

79. *Lev, supra* note 63, at 667.

80. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 164-65 (2005).

81. *Id.* at 165-66.

82. *Id.*

in part by Justice Blackmun's law clerk, Pamela Karlan, who condemned the "incredibly cavalier treatment accorded Darden originally by the Florida Supreme Court."⁸³ Justices Blackmun, Brennan, Marshall, and Stevens voted to grant the stay and to grant certiorari, but none of the remaining Justices were willing to provide the fifth vote necessary to halt Darden's execution.⁸⁴ Hours before Darden was set to die in the electric chair, Justice Powell circulated a memo, declaring:

I find no merit whatsoever in any of the claims advanced in the petition . . . [but] in view of the fact that this is a capital case with petitioner's life at stake, I feel obligated in this case, where the Justices are scattered geographically and unable to meet for a conference, to join in granting the application for a stay.⁸⁵

Unlike his "prospective-only" idea in *Gregg*, Justice Powell's vote on Darden's stay application did not betray any moral compunction about authorizing executions. Yet by halting an execution so as to consider an appeal he found meritless, he demonstrated the added caution he felt the need to exercise in capital cases.

Justices Stewart and Powell are not outliers; several other Justices have admitted to taking different approaches to capital cases than to run-of-the-mill criminal appeals.⁸⁶ More importantly for the purposes of this Note, some federal judges on lower courts have admitted to behaving differently in capital cases. These judges typically insist that their conclusions are in accordance with the law but have nonetheless acknowledged that death changes how they approach a case. One particularly striking illustration of this attitude is the late District Judge G. Thomas Eisele's opinion in *Fairchild v. Lockhart*.⁸⁷ In that case, defendant Barry Lee Fairchild challenged his capital sentence on the basis that his low IQ prevented him from understanding his *Miranda* rights.⁸⁸ Today, Fairchild's IQ of 63 almost certainly would have made him ineligible for the death penalty under *Atkins v. Virginia*.⁸⁹ Unfortunately for Fairchild, Judge Eisele was deciding his habeas case in 1989 and felt compelled to

83. *See id.* at 166-67.

84. *Id.* at 167.

85. *Id.*

86. *See, e.g.,* *Baze v. Rees*, 553 U.S. 35, 84-87 (2008) (Stevens, J., concurring in the judgment) (discussing his views on capital punishment); *Maxwell v. Bishop*, 398 F.2d 138, 153-54 (8th Cir. 1968) (Blackmun, J.) (discussing his views on capital punishment, before his appointment to the Supreme Court), *vacated*, 398 U.S. 262 (1970); MANDERY, *supra* note 78, at 8 (discussing Justice Goldberg's views on capital punishment).

87. 744 F. Supp. 1429 (E.D. Ark. 1989), *aff'd*, 900 F.2d 1292 (8th Cir. 1990).

88. *Id.* at 1430-31.

89. *See* 536 U.S. 304, 306-07, 321 (2002) (prohibiting the execution of those with substantial intellectual disabilities).

affirm Fairchild's sentence under existing law.⁹⁰ Nevertheless, in doing so, he observed:

Death penalty cases are different from all other cases. Courts have an obligation in such cases not only to follow the law but to attempt to carefully explain their rulings. Their opinions can help serve the didactic function of informing the public of the real issues and the non-issues in particular cases. The court can attempt to delineate what is reasonably subject to debate and controversy and what is not. It is for that reason that the court has gone to such lengths to identify the issues and to explain the evidence and the bases for its factual findings and legal conclusions in both the present and the prior habeas proceeding.⁹¹

Judge Eisele's opinion suggests that federal judges do not fulfill their duty in capital cases simply by carefully considering the merits. Rather, they owe it to the public to spend the additional time necessary to explain their conclusions. This practice may well produce the public benefits Judge Eisele envisioned, but it requires judges to devote more energy and attention to capital cases. It is easy to imagine that this extra time and attention occasionally caused Judge Eisele to look more favorably on claims he might have otherwise dismissed.⁹²

Beyond requiring federal judges to exercise heightened vigilance, capital cases appear to alter judicial behavior through the psychological toll they exact. Appellate counsel is acutely aware of the stakes in a death penalty case, and the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases warn that, "[g]iven the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise *every potential ground of error* that might result in a reversal of the

90. See *Fairchild*, 744 F. Supp. at 1449-53, 1461.

91. *Id.* at 1495.

92. Other federal judges have echoed Judge Eisele's position that capital cases require additional scrutiny. For example, in *Mercer v. Armontrout*, Eighth Circuit Chief Judge Donald Lay emphasized that "[t]he severity and finality of the death penalty requires the utmost diligence and scrutiny of the court. . . . To suggest that a life or death decision can be made by simply reading a petition is to advocate dereliction of judicial duty." 864 F.2d 1429, 1431 (8th Cir. 1988).

The Judicial Conference of the United States formalized this recommendation in a 1989 proposal. An ad hoc committee, chaired by Justice Powell (by then retired), wrote that "[t]he merits of capital cases should be reviewed carefully and deliberately, and not under time pressure," and concluded that federal courts should automatically grant a stay of execution covering the duration of federal habeas proceedings. See AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, JUDICIAL CONFERENCE OF THE U.S., COMMITTEE REPORT AND PROPOSAL 5-7 (1989), reprinted in *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the S. Comm. on the Judiciary*, 101st Cong. 7, 12-14 (1991) (emphasis added).

defendant's conviction or punishment."⁹³ Faced with an onslaught of claims, federal judges might simply be worn down by capital cases. At least one federal appellate judge has made comments to this effect: Judge Stephen Reinhardt of the Ninth Circuit wrote that capital punishment "overwhelms the judicial system" and argued that "courts are not functionally equipped to handle death penalty cases."⁹⁴ This added stress could potentially affect judicial behavior in capital cases, perhaps leading federal jurists to occasionally grant relief as a means of limiting the psychological burden.

B. The Existing Academic Research

Given the prominent place capital punishment occupies in our national discourse, it is no surprise that scholars have produced a voluminous literature on the subject. Nevertheless, none of these studies adequately addresses whether and how capital habeas cases differ from similar—but noncapital—habeas cases. Instead, this academic commentary tends to focus exclusively on the universe of capital cases and on explaining why the outcome of one capital case differs from that of another capital case.

Take, for example, a 2014 article by Deborah Beim and Jonathan Kastellec.⁹⁵ In that piece, the two authors considered the impact of ideological diversity and the possibility of a dissent on outcomes in capital cases on habeas review in federal appellate court.⁹⁶ Generally speaking, they found that ideologically mixed appellate panels (that is, those with at least one judge appointed by a Democrat and one judge appointed by a Republican) were less likely to produce outcomes consistent with the panel's ideological majority than were ideologically pure panels (those composed entirely of judges nominated by Presidents of one party).⁹⁷ Entirely Democrat-appointed panels granted relief 51% of the time, and entirely Republican-appointed panels granted relief in 15% of cases; by contrast, Democrat-Democrat-Republican (DDR) panels and Republican-Republican-Democrat (RRD) panels granted relief in 31% and 22% of cases, respectively.⁹⁸ These results strongly suggest that panel makeup

93. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES guideline 6.1 cmt. (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 968 (2003) (emphasis added).

94. Stephen Reinhardt, Essay, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 207 (1992).

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

96. See *id.* at 1074-75.

97. See *id.* at 1080.

98. *Id.*

shapes death penalty case outcomes. However, they cannot determine whether a capital defendant is more likely to win habeas relief than a noncapital defendant.

In a 2004 study, Andrew Gelman and others observed that few death sentences are actually carried out.⁹⁹ However, their work simply cites high reversal rates (87% from start to finish, and 40% at the federal habeas review stage alone), which do not answer the question whether federal judges are more likely to reverse in capital cases than they are in others.¹⁰⁰ For one thing, those statistics include reversals for both guilt-phase *and* penalty-phase errors, perturbing the overall relief rate, as most noncapital habeas appeals challenge only guilt. So whether that 40% number is higher or lower than federal habeas relief rates in noncapital murder rates is anyone's guess, as the authors do not provide statistics from noncapital cases.¹⁰¹ Nor did they have reason to—like Beim and Kastellec, the authors are focused on factors affecting reversal within the universe of capital cases.¹⁰²

Other quantitative works have focused on different aspects of the death sentence review process. For example, Stephen Spurr analyzed the various factors that determine how long an individual will wait prior to execution.¹⁰³ Similarly, a wide variety of pieces have examined the impact of judicial selection methods on capital sentencing, generally concluding that certain types of elected judges are more likely to impose and uphold death sentences than are their appointed counterparts.¹⁰⁴ Elected judges are especially likely to affirm

99. Gelman et al., *supra* note 16, at 214-15.

100. *See id.* at 214-16.

101. Even if the authors had made such a comparison, it would be of limited usefulness today. The data for their paper came exclusively from cases decided before AEDPA came into effect. AEDPA substantially narrows the range of cases in which a federal court can grant habeas relief, and James S. Liebman (one of Gelman's coauthors) estimated that the law reduced reversal rates in state capital cases by 40%. *See* Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), <https://perma.cc/S55U-SU6E>.

102. For instance, the authors find that federal judges are generally more likely to reverse capital convictions arising from rural states than from more urbanized ones, and from states with large populations receiving public assistance. Gelman et al., *supra* note 16, at 244-46.

103. *See* Stephen J. Spurr, *The Future of Capital Punishment: Determinants of the Time from Death Sentence to Execution*, 22 INT'L REV. L. & ECON. 1, 14-19 (2002).

104. *See, e.g.*, Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 33 tbl.3, 34 fig.2 (2014) (concluding that judges selected in nonpartisan elections are, on average, more likely to uphold death sentences than those appointed to their positions); *cf.* Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002) (finding that elected judges impose death sentences more frequently in election years).

capital sentences when public opinion in their state strongly favors capital punishment.¹⁰⁵

Unlike their counterparts in political science, legal scholars have sometimes commented on the distinctiveness of judicial behavior in capital cases. However, their conclusions tend to be drawn from a limited subset of cases, and may not be generalizable to the entire population of federal judges. For instance, Ori Lev has argued that some judges who oppose the death penalty nevertheless find ways of upholding the punishment.¹⁰⁶ These jurists engage in dissonance-reducing behaviors—such as invoking the pro-death penalty mandates of higher courts and legislatures—in order to disclaim responsibility for approving death sentences.¹⁰⁷ Amy Coney Barrett and John H. Garvey have made a similar point, arguing that Catholic appellate judges can uphold capital sentences on collateral review without becoming morally compromised.¹⁰⁸ Both articles suggest that some judges approach death penalty cases differently than they approach other types of cases. Their conclusions are almost certainly true with regard to some subset of judges; however, they are not easily applicable to the larger population of federal appellate jurists.¹⁰⁹

On the other hand, Dwight Aarons suggests that the process of reviewing capital cases has convinced some judges that capital punishment is not viable.¹¹⁰ Some of these jurists then put their convictions into practice, voting against the death penalty at high rates. Like the work of the scholars mentioned above, Aarons's framework is a compelling behavioral model for a small group of judges. However, he would almost certainly not argue that it describes all judicial behavior in capital cases.

Collectively, this scholarship offers a detailed picture of the factors that can influence judicial behavior within the universe of capital cases. Similarly, it suggests reasons why particular judges might act differently in capital cases than they do in other types of cases. What it does not provide is evidence that federal judges generally are more likely to grant relief in capital cases than they are in similar noncapital cases. Such a conclusion requires a study designed specifically to answer that question.

105. Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 367 (2008).

106. See Lev, *supra* note 63, at 656, 672, 684.

107. See *id.* at 656-64.

108. See Garvey & Coney, *supra* note 64, at 305-06.

109. To cite two obvious counterexamples, not all appellate judges are Catholic, and many favor capital punishment.

110. Dwight Aarons, *The Marshall Hypothesis and the Rise of Anti-Death Penalty Judges*, 80 TENN. L. REV. 381, 381-82, 382 n.4 (2013) (providing an introduction to C. Crystal Enekwa, Comment, *Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411 (2013)).

III. Testing Whether Death Is Different to Federal Appellate Judges

Having articulated my hypothesis—that federal judges do grant relief more frequently to capital defendants than to noncapital defendants—in this Part of the Note, I test whether it has empirical support. In Part III.A, I describe my methodology in detail, before presenting my initial results in Part III.B. Finally, in Part III.C I offer further tests demonstrating that these results remain robust in the face of several alternative hypotheses. To the extent possible, the discussion eschews technical jargon; when doing so proved unworkable, I have provided explanations and suggestions for further reading in the footnotes. For those interested in the specifics of the analysis, the Technical Appendix contains further details about modeling choices and statistical tests.

A. Methodology

Given the heightened stakes and the similarities across cases, habeas appeals in the federal appellate courts provide an excellent opportunity to study judicial behavior. However, as mentioned previously, assessing whether federal judges behave differently in capital cases requires more than simply comparing reversal rates on habeas review. Since capital trials are bifurcated—that is, split into a “guilt phase” (in which guilt is determined) and, if necessary, a “penalty phase” (in which a sentence is determined)—defendants pursuing habeas relief can contest both the verdict and the sentence on appeal.¹¹¹ By seeking habeas relief with regard to both guilt and sentence, defendants can significantly increase the potential grounds on which a federal judge might rule in their favor. Moreover, the grounds for sentencing relief are more numerous than grounds for guilt-phase relief. While convictions and capital sentences can both be reversed for ineffective assistance of counsel,¹¹² prosecutorial misconduct,¹¹³ and juror bias,¹¹⁴ the sentences can *also* be

111. *See* *Gregg v. Georgia*, 428 U.S. 153, 190-92 (1976) (plurality opinion).

112. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 377-80 (2005) (holding that the failure to adequately investigate the mitigation case constitutes ineffective assistance of counsel); *Thomas v. Clements*, 789 F.3d 760, 762-63 (7th Cir. 2015) (reversing a district court’s denial of habeas relief because counsel’s failure to obtain an expert to review the pathologist’s report about cause of death in a murder case constituted ineffective assistance).

113. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 421-22 (1995) (holding that a defendant was entitled to a new trial due to prosecutorial failure to turn over exculpatory evidence related to the guilt phase of the trial); *Brady v. Maryland*, 373 U.S. 83, 84-86 (1963) (affirming vacatur of the defendant’s death sentence for prosecutorial failure to turn over exculpatory evidence).

114. *See, e.g., Porter v. Zook*, 898 F.3d 408, 414, 430-32 (4th Cir. 2018) (vacating and remanding for the failure to hold a hearing on a claim that a juror was biased in both the guilt and sentencing phases because of a relative in law enforcement).

reversed for lack of proportionality,¹¹⁵ severe intellectual disability,¹¹⁶ and late-developing insanity,¹¹⁷ among other circumstances. The cumulative effect of these doctrinal protections for capital defendants means that a raw comparison of the relief rates in capital habeas cases and noncapital habeas cases will overstate the difference between the two rates.

Likewise, measuring habeas relief rates for death penalty cases against rates for *all* non-death penalty cases will not produce an accurate estimate of the difference in relief rates addressed by this Note. Capital cases differ from noncapital cases in multiple, salient respects. First, the death penalty is almost exclusively reserved for those who have personally murdered other human beings,¹¹⁸ a crime with which most people would associate a high level of moral culpability. By contrast, noncapital crimes reviewed on habeas often include drug offenses and burglary,¹¹⁹ which may involve more sympathetic defendants or circumstances. Judges might feel a greater inclination to grant relief in such cases. Similarly, death sentences are usually appealed until the defendant exhausts all available remedies, while defendants facing term-of-years sentences may eventually decide to abandon challenges to their convictions (for example, if they receive parole).¹²⁰ Accordingly, the noncapital cases that do reach federal habeas review may contain stronger claims for relief, on average, than capital cases.

To avoid these difficulties, this Note limits comparisons of relief rates in two critical ways. First, it compares death penalty cases on federal habeas review

115. *See, e.g.,* *Enmund v. Florida*, 458 U.S. 782, 784-85, 801 (1982) (holding that the death penalty was disproportional to the culpability of the driver of a getaway car in a robbery).

116. *See, e.g.,* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of “a mentally retarded criminal” would violate the Eighth Amendment).

117. *See, e.g.,* *Ford v. Wainwright*, 477 U.S. 399, 401-02 (1986) (holding that “the execution of the insane” is unconstitutional even where there is no question of competence “at the time of [the defendant’s] offense, at trial, or at sentencing”).

118. *But see, e.g.,* *Tison v. Arizona*, 481 U.S. 137, 151, 158 (1987) (holding that capital sentences for felony murder were not necessarily disproportionate for brothers who helped break their father out of prison and were present when he committed several murders).

119. *See* Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 243 tbl.2 (1995) (finding that 28% of state crimes where cases were reviewed in federal habeas proceedings were drug offenses, burglaries, or thefts).

120. Only 11% of executions occur in cases where the prisoner waived the right to appeal, and the subset of executed prisoners already represents a small fraction of the people sentenced to death (meaning that the actual proportion who waive out of the set of people sentenced to death would be substantially smaller). *See* Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295, 295 (2014); *see also supra* notes 95-102 and accompanying text (discussing reversal rates in capital cases).

only to their closest noncapital counterpart: murder convictions resulting in a sentence of life in prison. And second, it compares relief rates only with respect to convictions, while ignoring relief granted only as to the sentence. In doing so (and controlling for other extraneous variables), it aims to compare two sets of cases that are similar in every respect *but* the sentence. Any remaining difference in relief rates can thus be attributed to the sentence.

To facilitate this comparison, I searched Westlaw for murder cases that reached a federal court of appeals on habeas review between 2013 and 2017, a five-year period.¹²¹ This search included some cases that eventually reached the Supreme Court; in those situations, I included *only* the Supreme Court votes (and not the lower court votes) to avoid double counting.¹²² I then reviewed each case individually, recording the sentence, outcome, and a variety of other details. I did not code cases that turned up under the search but did not fit within the parameters of this study—for instance, cases that did not actually involve a murder or cases in which the defendant was under a sentence that was lower than life in prison. The Technical Appendix discusses my criteria for inclusion in the study in more detail.

During this process, I eliminated cases that concerned § 1983 actions, denials of a certificate of appealability (COA),¹²³ or successive habeas petitions. While

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121. I began by searching opinions from the U.S. Supreme Court and federal courts of appeals using the search string: *advanced: ("habeas" OR "s 2254" OR "s 2255") & DA(aft 12-31-2012 & bef 01-01-2018) & "murder" & ("life in prison" OR "life sentence" OR "sentenced to death" OR "death sentence" OR "capital case" OR "without parole" OR "capital punishment")*. Although it is possible that there could exist relevant opinions not captured here due to differences in how a given opinion phrases its discussion of the crime or sentence, this search produces an internally consistent dataset and I have no reason to believe that the resultant sampling should introduce any bias into the results. Note that while the Westlaw search did not explicitly include claims of actual innocence brought pursuant to 28 U.S.C. § 2241, such claims are still reflected: Adding that search term had no effect on the list of candidate cases Westlaw produced because the first search term, "habeas," captured the cases of interest (and indeed, a wide variety of completely unrelated cases).
122. My primary results are unchanged if I exclude Supreme Court cases altogether—for additional details, see Part D of the Technical Appendix.
123. Under AEDPA, habeas petitioners seeking to appeal an adverse decision must first obtain a COA. 28 U.S.C. § 2253(c) (2018); *see also* U.S. COURTS, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS AND RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS 6, 13 (2019), <https://perma.cc/J49D-TN7C> (describing the procedures for obtaining a COA). A COA is often granted by the district court judge that issued the adverse decision; however, if the district judge denies a COA, the defendant can appeal *that* ruling, and a COA will issue if the defendant can show that "jurists of reason would find [the underlying claim] debatable." *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). The Supreme Court has directed federal appellate courts to make determinations on these appeals without fully addressing the underlying merits of the ruling. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017) ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis."). Since Westlaw does not appear to have a comprehensive listing of COA decisions, *see infra* note 125 and accompanying text, and because they likely have
- footnote continued on next page*

these cases undoubtedly contain interesting insights about judicial behavior, their inclusion would potentially interfere with this Note's analysis. In the context of habeas review, § 1983 actions often challenge the method of execution rather than guilt or the propriety of the sentence—accordingly, they do not have a common noncapital analogue (at least with regard to guilt and sentence).¹²⁴ Likewise, judicial rulings appealing a denial of a COA consider primarily a procedural question: whether the lower court judge erred in failing to allow the appeal. While this determination undeniably has a merit-like element—essentially, whether any issue is sufficiently disputed to warrant appellate attention—a logistical issue precludes their inclusion. While Westlaw provides a comprehensive catalogue of habeas cases receiving full review, research indicates that its collection of opinions addressing COAs is incomplete;¹²⁵ this missing data could potentially lead to inaccurate results. Finally, second or successive petitions are extremely difficult to win post-AEDPA.¹²⁶ Including such cases in the sample would skew relief rates against capital defendants (who are more likely to bring successive petitions) and potentially compromise the study. As in the case of COAs and § 1983 actions, judicial behavior with regard to successive petitions certainly deserves study, but is outside the scope of this Note.

After limiting my sample to an appropriate subset, I was left with 1,773 votes by federal appellate judges in habeas cases where (a) the defendant was convicted of murder, and (b) the defendant was sentenced to either life in

different success rates than habeas appeals generally, I excluded cases that *only* concerned COAs from the dataset.

124. For further discussion of 42 U.S.C. § 1983 in the capital context, see generally Liam J. Montgomery, Note, *The Unrealized Promise of Section 1983 Method-of-Execution Challenges*, 94 VA. L. REV. 1987 (2008) (discussing capital defendants' lack of success in bringing § 1983 challenges). For an example of a representative death penalty § 1983 case, see *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (considering whether execution via midazolam violated the Eighth Amendment prohibition of cruel and unusual punishment).
125. Compare Peter B. Maggs, *The Impact of the Internet on Legal Bibliography*, 46 AM. J. COMP. L. (SUPPLEMENT) 665, 670-71 (1998) (explaining that Westlaw's database contained "all state and Federal cases" even in 1998), and Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 179 (1998) ("With respect to court opinions, West's National Reporter System and its state-specific offprints provide *comprehensive*, and often exclusive, coverage of state and federal case reports . . ." (emphasis added)), with David Goodwin, *An Appealing Choice: An Analysis of and a Proposal for Certificates of Appealability in "Procedural" Habeas Appeals*, 68 N.Y.U. ANN. SURV. AM. L. 791, 797-98 (2013) (noting that, as of 2013, COA orders often did not appear in legal databases).
126. See, e.g., Megan Volin, Comment, *Defining "Second or Successive" Habeas Petitions After Magwood*, 85 U. CHI. L. REV. 1545, 1547 & n.8, 1551 (2018) (discussing the strict statutory limitations on "second or successive" habeas petitions).

prison or death.¹²⁷ The defendant's guilt (as opposed to his sentence) was at stake in 1,368 of those votes.¹²⁸

For each of the 1,368 votes, I tabulated the following twelve variables¹²⁹:

- (1) the judge's vote on the defendant's guilt-phase claims (1 if favorable to defendant, 0 otherwise);
- (2) the defendant's sentence at the time the judge was voting (1 if death, 0 otherwise);
- (3) the defendant's race (1 if white, 0 otherwise);¹³⁰
- (4) the defendant's gender (1 if male, 0 otherwise);
- (5) the party of the President that appointed the judge (1 if Democrat, 0 if Republican);
- (6) the type of court in which the defendant was convicted (1 if federal, 0 if state);
- (7) the specific type of crime (1 if first-degree murder or equivalent, 0 otherwise);¹³¹
- (8) the number of victims of the defendant's alleged crimes;
- (9) the appellate court in which the habeas case was decided (e.g., the Ninth Circuit);
- (10) the number of defense attorneys officially listed as working on the defendant's habeas appeal;
- (11) whether the case was heard en banc (1 if yes, 0 otherwise); and

127. These cases arose primarily under § 2254 or § 2255.

128. This sample size ensures that I have sufficient data to detect the effect I am studying. A conservative power calculation—that is, a measure of how sensitive this research design is to the potential effect of interest—indicates that this sample size yields an 80% chance of detecting an effect size of at least 0.15 standard deviations above the mean probability of a defendant winning relief. In other words, even if federal judges are only slightly more likely to grant relief in capital cases, this study will likely detect that difference.

129. I did not include the lower court habeas outcome in my regressions because it could be determined in part by the sentence and is thus a “post-treatment variable.” Including it could consequently bias my results. However, it is worth noting that I confirmed that including this variable in the analysis would not affect the significance of any variable of interest and would have almost no effect on the size of the coefficients.

130. I would have liked to include the race of the victim(s) in these regressions. Unfortunately, most of the cases in the dataset involve murders that took place at least a decade ago, making it extremely difficult to ascertain the race of the victim(s). It was only through an extensive search of state-by-state prison records that I was able to track down the race of each defendant.

131. I include under the rubric of “first-degree murder” what some states term “malice murder.” I also include federal crimes that are substantially equivalent to first-degree murder, including racketeering murder, carjacking murder, and armed-bank-robbery murder. First-degree murder *does not* include second-degree murder or felony murder, even though felony murder is typically punished as first-degree murder.

- (12) whether the defendant was represented in the habeas appeal (at least in part) by a state or federal public defender service (1 if yes, 0 otherwise).

The dependent variable of interest—that is, my measure of the outcomes this Note studies—is variable 1, how the judge voted on the defendant’s guilt-phase claims. And the independent variable of interest—that is, my measure of the factor I seek to study—is variable 2, the defendant’s sentence at the time of appellate habeas review.

Within the context of variable 1, a vote “favorable to the defendant” means any result other than the total denial of all of the defendant’s claims on appeal. So if a judge voted to deny all but one of the defendant’s claims but voted to remand for further proceedings on that single claim, that vote is considered “favorable to the defendant” for the purposes of this study. This definition undoubtedly has its drawbacks: There is a world of difference between a vote to remand with instructions to grant habeas relief and a vote to remand to decide a single unadjudicated claim. However, it eliminates the researcher bias inherent in determining just how favorable a particular decision is for a particular defendant.¹³² Moreover, since this definition applies to capital and noncapital cases alike, it should not introduce any new bias into my results. To further alleviate any concerns that this process might misrepresent the extent to which the noncapital defendants win relief, I check my results using an ordered logit model in Part III.C, which allows for a greater variety of potential outcomes.

Variables 3 through 9 are covariates—that is, factors other than the sentence that might affect a judge’s vote. These include the judge’s political affiliation (variable 5) and measures of the perceived moral culpability accompanying the crime (variables 7 and 8). I also kept track of the defendant’s race (variable 3), which some studies have suggested plays a role in judicial behavior.¹³³ When possible, I obtained racial data from court records; otherwise, I consulted various databases that contain information on individuals held in state prison.¹³⁴ While I sought more fine-grained racial data about defendants, that level of precision was sometimes unavailable. Accordingly, for the sake of

132. This choice also increases interpretability since understanding the effect of sentencing on a binary variable tends to be easier than parsing the potentially heterogeneous effects of multi-tiered variables.

133. See, e.g., Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, AM. ECON. J.: ECON. POL’Y, Feb. 2019, at 160, 162 (“Republican-appointed judges give substantially longer prison sentences to black offenders versus observably similar nonblack offenders compared to Democratic-appointed judges within the same district court.”).

134. See, e.g., *Inmate Datasearch*, ARIZ. DEPT. CORRECTIONS REHABILITATION & REENTRY, <https://perma.cc/85P7-4Z2H> (archived June 18, 2020); *Inmate/Parolee Locator*, PA. DEP’T CORRECTIONS, <https://perma.cc/79YM-VTTR> (archived June 18, 2020).

completeness, I coded the racial variable as dichotomous: white or nonwhite.¹³⁵ Finally, variable 6 takes into account whether the criminal case is state or federal—an important distinction, given that the standard of habeas review a federal court applies can sometimes differ on this basis.¹³⁶

I would have also liked to include the race of the victim(s) among my covariates—unfortunately, such information frequently did not enter the record in the cases under study.¹³⁷ Likewise, a preliminary search of newspaper archives revealed that it would be essentially impossible to piece together anything resembling a complete record of this covariate. While not ideal, this lack of data likely does not affect my results. Some studies have indicated that the race of the victim plays a role in the *initial* jury decision to impose a capital sentence; however, I am not aware of any similar studies showing that this variable affects the federal appellate rulings that occur years later.¹³⁸ Indeed, at least one study indicates that even trial court judges—who as a practical matter seem more likely to be aware of victims’ race than appellate judges would be—do not appear to be prone to race-of-the-victim bias in capital sentencing.¹³⁹ Moreover, given the difficulty I had in obtaining the race of victims from court records, it stands to reason that such information might escape the attention of appellate judges. Finally, even if the race of the victim had the same effect on federal judges as it often has on jurors (that is, disfavoring minority defendants accused of crimes against white victims),¹⁴⁰ the result would likely be to bias the racial coefficient in my regressions, rather than the

135. If I run the regressions presented in Table 2 using the subset of data with more precise racial codings, the effect of a capital sentence on the probability of relief is even more pronounced. *See infra* Technical Appendix, Part C.

136. *Compare* 28 U.S.C. § 2254(d) (2018) (requiring generally that the defendant demonstrate that the state court proceeding “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”), *with id.* § 2255(a) (requiring only a showing that the sentence in federal court “was imposed in violation of the Constitution or laws of the United States”).

137. *See supra* note 130.

138. For a summary of the literature on race and capital sentencing, see David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486, 499-502 (2002).

139. *Id.* at 590 (finding that trial-level analysis “[did] not support a theory of disparate treatment in capital charging and sentencing decisionmaking on the basis of the race of the defendant or victim”).

140. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 287-88 (1987) (summarizing statistical evidence that black defendants who murder white victims are the most likely to receive the death penalty).

sentence coefficient.¹⁴¹ As such, although I would prefer to have a race-of-the-victim covariate in this study, it would probably have no effect on the outcome.

In addition to the standard covariates mentioned above, I also recorded variables 10 through 12 in order to address the possibility that appellate outcomes could be affected by capital defendants receiving higher quality or better-resourced legal counsel than those sentenced to life in prison. (I keep track of en banc decisions because defendants are likely to be better represented on appeal in these high-profile cases.) While it would be methodologically improper to include these “post-treatment” variables in my initial regressions,¹⁴² I later subset the data by these additional variables to demonstrate that capital defendants are more likely to win relief even when controlling for quality of legal counsel.¹⁴³

As the discussion at the beginning of this Subpart implies, my empirical strategy presumes the similarity of the capital and noncapital defendants under study. The two groups are, of course, facially equivalent; both are comprised exclusively of individuals convicted of murder and handed severe sentences. However, as Table 1 demonstrates, the two sets of defendants also resemble one another across other covariates. They are overwhelmingly male, are typically challenging state-court convictions, and are majority nonwhite.

141. *Cf. id.* at 579 (finding that “the presence of race-of-victim discrimination in a system can bias downward estimates of minority-defendant disparities in analyses that do not also control for the race of the victim”). In my specific case, the likely bias would be toward zero for the racial coefficient. As Tables 2 through 4 indicate, the race coefficient is always negative, indicating that minority defendants tend to have their convictions reversed at higher rates than do white defendants. If some unaccounted-for race-of-the-victim effect biased this coefficient, the true magnitude of that coefficient would be even larger, but it would still be negative.

142. For the purposes of my study, the “treatment” being evaluated is the defendant’s sentence going into appellate habeas review. Because the attorneys representing a capital defendant on appeal may or may not be the same attorneys who represented him at trial, the quality of counsel is sometimes determined “post-treatment.” Conditioning on such a post-treatment outcome in the regression framework could produce bias. *Cf., e.g.,* Alexander Coppock, *Avoiding Post-Treatment Bias in Audit Experiments*, 6 J. EXPERIMENTAL POL. SCI. 1, 1-2 (2019).

143. *See infra* Table 5.

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Table 1
Summary Statistics

Variable	Full Sample	Capital Defendants Only	Noncapital Defendants Only
<i>Vote on Guilt-Phase Claim</i>			
Favorable to Defendant	293	139	154
Otherwise	1,075	490	585
<i>Sentence at Time Case Was Decided</i>			
Death	629	629	-
Life in Prison	739	-	739
<i>Defendant's Gender</i>			
Male	1,309	620	689
Female	59	9	50
<i>Party of Judge's Appointing President</i>			
Democrat	686	323	363
Republican	682	306	376
<i>Type of Court in Which Defendant Was Convicted</i>			
Federal	57	18	39
State	1,311	611	700
<i>Type of Crime</i>			
First Degree Murder or Equivalent	1,216	626	590
Otherwise	152	3	149
<i>Average Number of Victims</i>	1.4	1.55	1.27
<i>Defendant's Race</i>			
White	540	294	246
Nonwhite	828	335	493
<i>Type of Defense Team</i>			
Public	368	222	146
Private	874	404	470
<i>Average Number of Defense Attorneys</i>	1.96	2.38	1.55
<i>En Banc</i>	129	74	55

N = 1,368.

Some differences do exist between the two types of defendants. Capital defendants were more likely to have been convicted of first-degree murder, had a slightly higher average number of victims, and were somewhat more likely to be white. However, the robustness checks discussed in Part III.C and shown in Table 4 below demonstrate that these differences are not determinative of the effects I find.¹⁴⁴

Using the variables discussed above, I performed three types of regression analyses to test my hypothesis: ordinary least squares (OLS), ordinary least squares with standard errors clustered by case (CSE), and a logit model with clustered standard errors. Clustered standard errors take into account the probable correlation between individual judges' votes in a single case—that is, the high likelihood that judge X's vote in case Z is correlated with judge Y's vote in case Z.¹⁴⁵ The functional result is to increase the size of the standard errors associated with a particular regression coefficient, creating a more conservative test of the hypothesis. Logit models are often used when the outcome variable is binary (such as success or failure), and ensure that the predicted probability of success given a set of variables for the independent variable will always fall between zero and one. That, of course, is the situation this Note generally confronts (with the exception of the ordered logit model discussed in Part III.C). However, given the difficulties associated with interpreting the results of logit regressions—in particular, one must map a linear latent index to a probability between zero and one using a nonlinear transformation¹⁴⁶—I concentrate primarily on the other models.

In all of the regressions below, I include at least one of two types of “fixed effects.”¹⁴⁷ The first, “court-level fixed effects,” accounts for the possibility that

144. Subsetting the data to include only defendants convicted of first-degree murder or its federal equivalent does not change my results. *See infra* Table 4. Likewise, matching defendants to reduce disparities in victim number and race affirms the main findings below. *See infra* Part III.C. With these additional assurances in hand, I now turn to the results of the study.

145. Since the facts of each case before each judge on a panel are the same, it is a virtual certainty that the judges' votes will generally be correlated. For instance, if a defendant brings an extremely weak case, each of the judges on the panel will be more likely to vote against him. This correlation means that I would overestimate the amount of “information” in my data if I failed to account for it, which would make the standard errors too low (and thus make my estimates seem too precise). Using clustered standard errors also accounts for the possibility that the regression errors are heteroskedastic—that is, the possibility that the variance in a judge's vote depends on the value of the underlying independent variables—which would also lead to artificially low *p*-values.

146. JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* 197 (2009).

147. “Fixed effects” refers to a set of binary variables that control for large sets of variables. For example, “state-level” fixed effects control for the effect that being convicted in a particular state may have on the outcome of a case (for example, if prosecutors in one state are particularly fastidious and rarely make reversible errors at trial). Accordingly,
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some courts might be more likely than others to favor capital defendants. The second, “judge-level fixed effects,” likewise controls for the tendency of individual judges to be more lenient in capital cases. Since the former set of fixed effects is a function of the latter (as courts are composed of particular judges), I only include one set of fixed effects at a time, and exclude other judge-level characteristics (such as the political party of the appointing President) when using judge-level fixed effects. Where possible, I also include state-level fixed effects, which account for the possibility that convictions from particular states might be more (or less) prone to being overturned.

B. Main Findings

Table 2 presents the results of these initial tests.¹⁴⁸ At the most basic level, it displays estimated relationships between the various independent variables—for example, the defendant’s sentence or the defendant’s gender—and the outcome variable: whether the court granted the defendant any relief. Positive values of the coefficients (the numbers in the table that are not in parentheses) indicate that when the independent variable increases by one unit (generally from zero to one), a judge is more likely to grant relief; a negative value means the opposite. For the purposes of this Note, the most important values in the table are the coefficients associated with the sentence. Positive values (such as those in the first numeric row of the table) will generally indicate that judges treat capital defendants more leniently than noncapital defendants.

the three types of fixed effects I employ here—court-level, judge-level, and state-level—control for the possibility that being in a particular court, being before a particular judge, or being convicted in a particular state might affect the outcome of a case on appellate habeas review. For further discussion of fixed effects, see *id.* at 221-27.

148. All tables omit the values of fixed effects to minimize clutter.

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Table 2
Effects of Death Sentence on Probability of Favorable Habeas Ruling

	OLS		CSE		Logit CSE	
	Yes	No	Yes	No	Yes	No
Court-Level Fixed Effects						
Judge-Level Fixed Effects	No	Yes	No	Yes	No	Yes
State-Level Fixed Effects	Yes	Yes	Yes	Yes	No	No
Death Sentence at Time of Appeal	0.091*** (0.027)	0.092*** (0.030)	0.091** (0.040)	0.092** (0.042)	0.526*** (0.168)	0.632*** (0.231)
Male Defendant	-0.130** (0.058)	-0.073 (0.063)	-0.130 (0.111)	-0.073 (0.118)	-0.711** (0.349)	-0.920* (0.533)
White Defendant	-0.096*** (0.031)	-0.133*** (0.025)	-0.096*** (0.034)	-0.133*** (0.038)	-0.551** (0.245)	-0.880*** (0.218)
Democratic President Appointed the Judge	0.134*** (0.027)	-	0.134*** (0.034)	-	0.904*** (0.183)	-
First Degree Murder or Equivalent	-0.127*** (0.040)	-0.147*** (0.043)	-0.127 (0.080)	-0.147* (0.082)	-0.706*** (0.228)	-0.885*** (0.312)
Number of Victims	-0.035*** (0.013)	-0.043*** (0.014)	-0.035** (0.016)	-0.043*** (0.018)	-0.200** (0.089)	-0.296** (0.118)
Conviction in Federal Court	-0.036 (0.062)	-0.042 (0.069)	-0.036 (0.105)	-0.042 (0.123)	-0.755 (0.473)	-0.136 (0.596)
Interaction of Race and Party	-0.041 (0.042)	-	-0.041 (0.049)	-	-0.257 (0.310)	-
Year	-0.005 (0.008)	-0.003 (0.008)	-0.005 (0.012)	-0.003 (0.013)	0.048 (0.050)	0.048 (0.070)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient. $N = 1,368$.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

The first numeric row of Table 2 contains the coefficients of interest. In both the OLS regression and the CSE regression, the value of the coefficient is 0.091 using court-level fixed effects and 0.092 using judge-level fixed effects. These numbers translate to 9.1 percentage point and 9.2 percentage point increases, respectively, in the probability that a judge votes to grant relief.¹⁴⁹ In short, these figures imply that if a randomly selected judge heard 100 capital and 100 noncapital cases on appellate habeas review, she would on average vote to grant relief nine more times in the former set than in the latter. Given that judges voted to grant relief about 20.8% of the time in noncapital cases, it appears that being sentenced to death (as opposed to life in prison) is associated with a 43.8% or a 44.2% increase in the probability that a defendant will win a vote for some sort of relief. These effect sizes are statistically significant at the $p < 0.05$ level using both the OLS-based test ($p = 0.0008$, $p = 0.002$) and the more rigorous CSE-based test ($p = 0.024$, $p = 0.03$).¹⁵⁰ The logit regressions tell the same story—the topmost coefficients in the rightmost two columns translate to 35.9% and 37.4% increases in the probability of winning a judge’s vote, on average, when a defendant had been sentenced to death instead of life in prison.¹⁵¹ Both values are significant at the $p < 0.05$ level (which is to say

149. A reader may notice that the overall rates of relief in the sets of capital and noncapital defendants are relatively similar (22.1% versus 20.8%), which may seem to be at odds with this conclusion of a change of nearly 10 percentage points. However, that comparison fails to account for factors that generally make capital defendants less sympathetic than noncapital defendants. For example, capital defendants are more likely to be male, are more likely to have been convicted of first-degree murder or its equivalent, and generally have more victims. As the negative values in the second, fifth, and sixth numeric rows of Table 2 show, all of those characteristics correlate with lower rates of relief. Regression models like the one in Table 2 correct for these imbalances between the capital and noncapital defendants and attempt to compare similarly situated defendants from both groups. Once I compare capital defendants to noncapital defendants with the same types of characteristics, capital defendants win relief at the much higher rates mentioned above.

150. Generally speaking, these “ p -values” represent the probability of observing by random chance a result as pronounced as the one actually recorded if the true value of the coefficient were zero (that is, if there were in fact no sentencing effect). For example, the 0.024 p -value mentioned above represents a 2.4% chance of observing an association as strong as the one I do given the sample size ($N = 1,368$) if no association actually existed between being sentenced to death and winning relief. For further discussion of p -values, see Saul McLeod, *What a p-value Tells You About Statistical Significance*, SIMPLY PSYCHOL. (May 20, 2019), <https://perma.cc/RD32-3E3J>.

151. These effect sizes come from setting all other variables to their mean values and calculating the average increase in the probability of relief across all observations. See Justin Grimmer, *Political Methodology III: Model Based Inference 27-28* (2019), <https://perma.cc/5EHM-Q8XH> (describing the appropriate interpretation of logit coefficients). I do not estimate the logit regression using state-level fixed effects because doing so leads to near-perfect separation (and thus uninterpretable regression coefficients). For further discussion of the problem of near-perfect separation in

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that the probability of observing an effect of this size by random chance is low).¹⁵²

These 43.8%, 44.2%, 35.9%, and 37.4% increases in the probability of winning a vote are substantial. Only a judge's partisan affiliation and the racial variables have a larger effect that is statistically significant at the $p < 0.05$ level using CSE.¹⁵³ The results indicate that federal appellate judges are more willing to grant relief to capital defendants than they are to similarly situated noncapital defendants.

Interestingly, a defendant's sentence at the time of habeas appellate review appears to have a stronger effect on Republican-appointed judges than it does on Democrat-appointed judges. As Table 3 illustrates, Democrat-appointed judges are approximately 5.1 percentage points more likely (6.0 with the logit specification) to vote in favor of capital defendants than they are to grant relief to similarly situated noncapital defendants. This result is notable; it represents a 17% increase (20% increase) above the 30.0% probability that a Democrat-appointed judge will vote to grant some form of relief in a noncapital case. However, the effect only approaches conventional standards of statistical significance using the logit specification. The p -values for the OLS, CSE, and logit regressions are only 0.24, 0.42, and 0.08, respectively. By contrast, the Republican-appointed appellate judges are 12.4 percentage points (9.6 with the logit specification) more likely to vote in favor of the defendant when a death sentence is on the table—a 103.3% increase (80% increase) above the 12.0% average rate at which Republican-appointed judges voted in favor of a noncapital

medium-sized datasets, see, for example, Georg Heinze & Michael Schemper, *A Solution to the Problem of Separation in Logistic Regression*, 21 STAT. MED. 2409, 2409-10 (2002).

152. To calculate standard errors for logit regressions in this Note without resorting to the computationally intensive clustered bootstrap, I used a multivariate normal simulation (known as "Clarify") invented by Mike Tomz and coauthors. See Michael Tomz et al., *Clarify: Software for Interpreting and Presenting Statistical Results*, J. STAT. SOFTWARE, Jan. 15, 2003, at 1, 5-8.

153. The racial variables to which I refer are "Race," see *supra* note 130 and accompanying text, and "Interaction of Race and Party." The latter is a variable I obtain by multiplying the value of the race variable by the value of the party variable. This process is meant to capture the different ways Democrat-appointed and Republican-appointed judges might respond to the race of a defendant. Prior research suggests that in some areas of criminal law (such as sentencing), Republican-appointed judges are less likely to favor black defendants than they are to favor white defendants, see Cohen & Yang, *supra* note 133, at 162, making it crucial to include this "interaction" variable in my regressions.

In the accompanying text, when I say that the racial variables "have a larger effect" than the sentencing variable, I am referring to the *joint effect* of the racial variables rather than the effect of either individually. The two variables with a racial component ("Race" and "Interaction of Race and Party") are jointly significant at the $p < 0.001$ level across all specifications, as are the two variables with a party component ("Party of Appointing President" and "Interaction of Race and Party").

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defendant. That value is statistically significant irrespective of whether the regression is OLS ($p = 0.0002$), CSE ($p = 0.001$), or logit with CSEs ($p = 0.004$).

Table 3
Effects of Death Sentence on Probability of Favorable Habeas Ruling:
Effects Separated by Party

	Democrat-Appointed Judges ($N = 686$)			Republican-Appointed Judges ($N = 682$)		
	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>
Court-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>
State-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>
Standard Errors	<i>OLS</i>	<i>CSE</i>	<i>Logit CSE</i>	<i>OLS</i>	<i>CSE</i>	<i>Logit CSE</i>
Death Sentence at Time of Appeal	0.051 (0.043)	0.051 (0.064)	0.352* (0.211)	0.124*** (0.033)	0.124*** (0.039)	0.898*** (0.304)
Male Defendant	-0.111 (0.092)	-0.111 (0.140)	-0.497 (0.435)	-0.139* (0.071)	-0.139 (0.116)	-1.019 (0.628)
White Defendant	-0.127*** (0.037)	-0.127** (0.053)	-0.766*** (0.215)	-0.111*** (0.028)	-0.111*** (0.032)	-0.670** (0.268)
First Degree Murder or Equivalent	-0.089 (0.062)	-0.089 (0.105)	-0.544* (0.297)	-0.144*** (0.048)	-0.144** (0.069)	-1.098*** (0.386)
Number of Victims	-0.070*** (0.022)	-0.070*** (0.025)	-0.392*** (0.135)	-0.005 (0.015)	-0.005 (0.018)	0.032 (0.102)
Conviction in Federal Court	-0.083 (0.105)	-0.083 (0.141)	-0.953 (0.685)	-0.013 (0.071)	-0.013 (0.110)	-0.467 (0.658)
Year	0.007 (0.012)	0.007 (0.018)	0.112* (0.065)	-0.013 (0.009)	-0.013 (0.010)	-0.001 (0.080)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

It is unclear from these analyses why Republican-appointed judges are so dramatically affected by the sentence at stake in the case. One possibility is that Republican-appointed judges are simply much more reluctant to grant relief in noncapital cases, making them appear comparatively more lenient in cases involving the death penalty. Perhaps the inverse is true—Democrat-appointed judges grant relief so frequently in noncapital cases that they have little room to increase that rate in capital cases, making Republican-appointed judges appear comparatively more sensitive to a defendant’s sentence. Distinguishing between these two scenarios goes beyond the scope of this Note and would be an interesting topic for future research. Regardless of the precise underlying mechanism, though, Republican-appointed judges seem to be more defendant friendly in the context of appellate habeas review in capital cases than they are otherwise.

Also noteworthy is the relatively strong association between race and the probability of a favorable ruling. Nonwhite defendants are 12.7 percentage points more likely than white defendants to win relief before Democrat-appointed judges—among Republican-appointed judges, that statistic is 11.1 percentage points. Though not necessarily causal, these results are suggestive that the capital trials of nonwhite defendants are significantly more likely to contain errors than those of white defendants. After all, if appellate judges vote to grant relief to nonwhite defendants at significantly higher rates, it indicates that they typically have more meritorious cases (and thus were more likely to have experienced a redressable violation of their rights at trial). While further exploration of this finding is beyond the scope of this Note, it may be of interest to future researchers.

As mentioned above, I included in my dataset cases concerning *any* type of murder that resulted in a life sentence, including first-degree murder, malice murder, second-degree murder, murder in aid of racketeering, murder during a carjacking, felony murder,¹⁵⁴ and murder during an armed robbery. I did so in order to ensure that I had a sufficient sample in order to run meaningful regressions. However, one might be concerned that this procedure taints the set of noncapital cases included in the dataset, making them dissimilar from the capital cases. After all, second-degree murder is not punishable by death in any state,¹⁵⁵ and one might think that some incidents that trigger the felony-

154. Felony murder is “[t]he doctrine that if a person dies during the course of and in furtherance of a specified type of felony[,] . . . the death is considered a murder regardless of intent.” *Felony-Murder Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019). Under the felony-murder doctrine, an individual can be convicted of murder even if they did not intend or know that an individual would die during the commission of a crime.

155. Michael J. Zydney Mannheimer, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879, 883-84, 883 n.13 (2011) (collecting penal codes and discussing the sentencing differences between first- and second-degree murder).

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murder rule are associated with a lower degree of moral culpability than are first-degree murder and its equivalents.¹⁵⁶ Either of these differences might lead to disparate judicial treatment of first-degree murder and second-degree murder or felony-murder cases. As such, a more stringent test of my hypothesis would be to repeat my initial analysis (as shown in Table 2) while excluding second-degree murder and felony-murder cases. The results of this exercise are shown in Table 4.

156. See, e.g., Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1189-95, 1206 (2017) (criticizing lower court decisions for allowing capital sentences in many felony-murder cases, and proposing a minimum mental state requirement of “reckless indifference to human life for every defendant sentenced to death for felony murder”).

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Table 4
Effects of Death Sentence on Probability of Favorable Habeas Ruling:
First-Degree Murder and Equivalents Only

	OLS		CSE		Logit CSE
	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>
Court-Level Fixed Effects	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>
Judge-Level Fixed Effects	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>
State-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>
Death Sentence at Time of Appeal	0.093*** (0.028)	0.097*** (0.031)	0.093** (0.042)	0.097** (0.046)	0.504*** (0.167)
Male Defendant	-0.145** (0.066)	-0.054 (0.071)	-0.145 (0.134)	-0.054 (0.144)	-0.396 (0.447)
White Defendant	-0.096*** (0.033)	-0.128*** (0.026)	-0.095*** (0.035)	-0.128*** (0.040)	-0.577** (0.264)
Democratic President Appointed the Judge	0.137*** (0.029)	-	0.137*** (0.037)	-	0.913*** (0.197)
Number of Victims	-0.031** (0.013)	-0.041*** (0.015)	-0.031* (0.017)	-0.041** (0.018)	-0.196** (0.091)
Conviction in Federal Court	-0.011 (0.065)	-0.012 (0.075)	-0.011 (0.115)	-0.012 (0.140)	-0.586 (0.490)
Interaction of Race and Party	-0.037 (0.044)	-	-0.037 (0.052)	-	-0.189 (0.331)
Year	-0.012 (0.008)	-0.010 (0.009)	-0.012 (0.012)	-0.010 (0.013)	-0.013 (0.053)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient. $N = 1,216$.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

As shown in Table 4, limiting the sample to just first-degree-murder-caliber convictions ($N = 1,216$) does not change the significance or general magnitude of the sentencing effect (that is, the effect of being sentenced to death as opposed to life in prison); the OLS and CSE methods using court-level fixed effects and judge-level fixed effects produce increases in the probability of relief of 9.3 percentage points and 9.7 percentage points, both of which are significant at the $p < 0.05$ level using clustered standard errors ($p = 0.026$, $p = 0.033$). The logit regression (effect size of 7.1 percentage points, $p = 0.015$) likewise produces significant results.¹⁵⁷ The results of these tests, constrained to include only defendants convicted of first-degree murder and equivalents, serve as further evidence favoring the hypothesis: Holding constant all aspects of a case except for the sentence, federal appellate judges grant relief on habeas review more freely when the sentence is death.

C. Addressing Threats to Causal Inference

While the foregoing analyses strongly suggest that federal judges are more sympathetic to capital defendants than to noncapital defendants, they do not entirely address three potential threats to causal inference: the possibility of differential attorney investment in capital and noncapital cases, the risk that my coding of the dependent variable (relief) exaggerated the differences in outcomes for capital and noncapital defendants, and the possibility that those sentenced to life in prison do not sufficiently resemble those condemned to die. I address each of these objections in turn—however, none of them seriously undermines the conclusions drawn so far.

1. Differential attorney investment

The first of these three concerns is that the tests run so far do not rule out the possibility that capital appeals tend to be more persuasively argued because the legal community invests more time, money, and energy on behalf of capital defendants than on behalf of noncapital defendants.¹⁵⁸ It is worth mentioning that even if capital defendants have better advocates than noncapital defendants, they still might not present more persuasive legal claims; the pressing nature of capital appeals implies that they are actually *less* meritorious than noncapital appeals.¹⁵⁹ However, in order to address this threat to inference, I collected data

157. I do not estimate the logit regression using judge-level or state-level fixed effects here for the same reason discussed in note 151 above.

158. *See supra* notes 8-9, 92 and accompanying text.

159. First, virtually every capital case is appealed, which dramatically increases the rate of frivolous habeas cases. *See supra* notes 93, 120 and accompanying text. Though defendants seeking habeas review are not constitutionally guaranteed a right to an attorney, *see Murray v. Giarratano*, 492 U.S. 1, 6-7 (1989) (plurality opinion) (reversing the Fourth
footnote continued on next page

on the representation afforded to each defendant. In particular, I recorded the number of attorneys each defendant had when his case was heard by the federal appellate court, whether at least one of those attorneys worked for a state or federal public defender service, and whether or not the case was heard en banc. Defendants with multiple attorneys likely have more resources at their disposal than those who have a single counsel or are proceeding pro se. Likewise, while the circumstances and quality of representation can vary substantially when it comes to private attorneys,¹⁶⁰ attorneys from public defenders' offices are, by nature, professionally experienced in handling criminal cases. (Although they deal with problems of resource constraint and excessive caseload, public defenders nonetheless won 23.4% of votes in my sample while those not represented by public defenders won 22.7% of votes.) Accordingly, variance in the quality of representation provided by public defenders is probably lower than the variance in the quality of representation provided by private attorneys. More importantly, those pursuing noncapital habeas appeals are not guaranteed an attorney; accordingly, involvement by a public defender signals that the cause

Circuit's holding that death row inmates are entitled to an attorney on collateral review), nonprofits and federally funded capital habeas units ensure that nearly every capital defendant has access to legal counsel for postconviction proceedings. See *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 461-62 (3d Cir. 2015) (reviewing the differences in resources available to capital and noncapital defendants for federal habeas appeals); see also 18 U.S.C. § 3599(a)(2) (2018) (providing a statutory right to counsel for capital defendants in habeas cases). Since those serving life sentences do not necessarily have the aid of counsel in applying for federal habeas relief, it stands to reason that fewer noncapital defendants will be able to navigate the habeas process successfully. Cf. John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 442-43 (2011) (responding to Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009)) (noting that noncapital prisoners usually proceed pro se when applying for federal habeas review, and describing the process of applying as a "gauntlet"). As such, the appeals that do receive review by a federal appellate court are presumably more meritorious. Second, while capital attorneys presumably spend some time on guilt-phase claims during habeas review, they are often more focused on potentially more fruitful challenges to the sentence. Thus, the marginal difference in resources for capital defense work does not necessarily translate into more effort expended on guilt-phase claims.

160. For example, private attorneys acting pro bono often have less time to spend on their clients than those being paid directly, and may be less invested with the case's outcome. See Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 102 (2013) (discussing the hit-or-miss quality of pro bono representation from major firms); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2395 (2010) (discussing the difficulties inherent in making law firm partners invest in their pro bono cases); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2071 (2008) (finding that about three-fifths of public interest organizations reported problems with the quality of their pro bono partners).

is particularly meritorious.¹⁶¹ Finally, cases heard en banc almost invariably concern an important legal issue, and appellate courts take pains to ensure that both sides have qualified counsel.¹⁶² In any such case, the quality of a defendant's legal counsel is likely relatively high, and his claims for relief plausible—accordingly, capital and noncapital defendants should be on more equal footing.

Since each of these covariates is “post-treatment” (that is, determined after the initial sentence has been pronounced), including them in regressions could produce biased coefficient estimates.¹⁶³ However, we can still subset the data according to these criteria and examine whether the sentencing effect persists in each subgroup. Table 5 shows the results of this exercise. The estimates in the first two columns come from only cases in which the defendant had multiple attorneys on appeal; the estimate in the third column derives from only cases heard en banc; and the regressions in the rightmost two columns use only cases in which the defendant had at least one public defender on appeal.¹⁶⁴

161. See Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83 (2002) (categorizing the right of counsel in habeas proceedings in each state, and observing that some only appoint habeas counsel in potentially meritorious cases).

162. See, e.g., *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) (en banc) (discussing the appointment of counsel for the en banc rehearing to ensure that all positions were well argued).

163. Cf., e.g., Paul R. Rosenbaum, *The Consequences of Adjustment for a Concomitant Variable That Has Been Affected by the Treatment*, 147 J. ROYAL STAT. SOC'Y 656, 657 (1984).

164. Since appellate courts decide relatively few cases en banc, I did not have enough data to estimate the regression for that subset of cases using judge-level or state-level fixed effects.

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Table 5
Sentencing Effect, Controlling for Investment Level

	Multiple Defense Attorneys		En Banc	Public Defender	
	Yes	No	Yes	Yes	No
Court-Level Fixed Effects					
Judge-Level Fixed Effects	No	Yes	No	No	Yes
State-Level Fixed Effects	Yes	Yes	No	Yes	Yes
<i>N</i>	726		94	368	
Death Sentence at Time of Appeal	0.109 (0.073)	0.130 (0.086)	0.211 (0.166)	0.156** (0.077)	0.164* (0.084)
Male Defendant	-0.289 (0.178)	-0.179 (0.180)	-	-0.070 (0.062)	-0.113 (0.124)
White Defendant	-0.067 (0.052)	-0.071 (0.055)	-0.506** (0.202)	-0.129* (0.068)	-0.221*** (0.078)
Democratic President Appointed the Judge	0.147*** (0.053)	-	0.262* (0.137)	0.247*** (0.063)	-
First Degree Murder or Equivalent	-0.064 (0.086)	-0.134 (0.097)	-0.945*** (0.148)	0.039 (0.087)	0.035 (0.115)
Number of Victims	-0.0003 (0.028)	-0.010 (0.035)	-0.226* (0.115)	-0.052 (0.042)	-0.056 (0.050)
Conviction in Federal Court	0.182 (0.151)	0.291 (0.216)	-	0.213 (0.226)	0.419* (0.234)
Interaction of Race and Party	0.001 (0.072)	-	-0.040 (0.198)	-0.166** (0.082)	-
Year	-0.012 (0.017)	-0.011 (0.019)	-0.218** (0.062)	-0.028 (0.023)	-0.021 (0.030)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient. All standard errors are clustered by case.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

The second numeric row of Table 5 contains the central coefficients of interest; all are large and in the expected direction. Capital defendants represented by multiple attorneys were 10.9 percentage points (using court-level fixed effects) or 13 percentage points (using judge-level fixed effects) more likely than noncapital defendants with multiple attorneys to win some form of relief. Likewise, when capital defendants appeared before en banc panels, they were substantially more likely to win votes than when noncapital defendants appeared before en banc panels (effect size of 21.1 percentage points). Finally, capital defendants represented by public defenders were substantially more successful than noncapital defendants represented by public defenders (effect size of 15.6 percentage points or 16.4 percentage points). In all cases, these coefficients were significant at approximately the $p < 0.1$ level and sometimes at the $p < 0.05$ level in one-tailed tests ($p = 0.068$, $p = 0.066$, $p = 0.104$, $p = 0.022$, and $p = 0.026$, respectively), while the public defender specifications were significant at approximately the $p < 0.05$ level in two-tailed tests ($p = 0.044$ and $p = 0.052$). The consistency, magnitude, and statistical significance of these results indicate that the results observed in Tables 2 through 4 cannot simply be attributed to capital defendants having more legal firepower at their disposal.

2. Dependent variable coding

The next potential threat to causal inference is that the main findings might depend on my coding scheme for the outcome variable. Recall that the dependent variable in the dataset was coded “1” if the defendant obtained *any* relief, and “0” if all his claims were denied. This coding rule avoids researcher bias—however, it masks substantial variation within the cases assigned a “1.” As discussed in Part I above, federal appellate judges hearing habeas cases have numerous options at their disposal. They can direct the lower court to conditionally (or unconditionally) grant the writ; they can completely deny the defendant’s claims; or they can remand to the lower court for further proceedings on a particular point of law.¹⁶⁵

To ensure that my coding choice did not affect my results, I reran my basic regression using an ordered logit model and a slightly different coding scheme. I discuss the details of this model in the Technical Appendix, but for present purposes, the key feature is that such a model allows for three different types of outcomes (rather than two). Those outcomes are (1) no relief, (2) partial relief (such as remanding to the district court for reconsideration of an issue), or (3) a conditional grant of habeas corpus. Table 6 shows the basic results of this exercise.

165. See *supra* notes 56-59 and accompanying text.

Table 6
Sentencing Effect Sizes:
Ordered Logit Incorporating Partial Relief

	Increase in Probability of No Relief	Increase in Probability of Partial Relief	Increase in Probability of Granting Habeas
Effect Size in Percentage Points (Standard Error)	-8.16** (3.26)	3.28*** (1.20)	4.89** (2.04)

Standard errors are calculated using multivariate normal simulations. $N = 1,368$.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

Each column of Table 6 represents the change in the probability of that outcome when the defendant arrives at the appellate court having been sentenced to death (as opposed to life in prison). The first column indicates that the likelihood of a defendant failing to win any relief decreases by about 8.16 percentage points when the sentence is death rather than life in prison. And the probabilities of winning partial relief or a writ of habeas corpus increase by 3.28 and 4.89 percentage points, respectively—values which (after accounting for rounding) sum to the 8.16 percentage point reduction for the no-relief outcome. These results indicate that my use of a binary coding scheme did not affect my central conclusions in Part III.B.

3. Different defendant characteristics

While the tests performed thus far address the concerns associated with differential attorney investment and my choice of coding scheme, they might not necessarily assuage those who worry about other potential dissimilarities between those sentenced to life in prison and those sentenced to die. In order to allay these doubts, I perform an additional test that explicitly compares defendants who the data suggests are equally likely to receive a capital sentence. The details of this technique—known as “propensity score matching”—can be found in the Technical Appendix. In short, this method assigns each defendant a “propensity score” (a value between 0 and 1), which represents how likely that person would be to receive a death sentence (based on gender, race, number of victims, etc.). Matching defendants on the basis of this score allows me to pair each noncapital defendant with an extremely similar capital defendant, and to calculate the difference in the probabilities of each defendant winning any relief. Table 7 displays the results of this test.

Table 7
Matching Estimates of the Sentencing Effect

	All Observations		Propensity Scores Between 0.1 and 0.9	
	Without Replacement	With Replacement	Without Replacement	With Replacement
Treatment Effect (Standard Error)	ATT: 0.016 (0.016)	ATE: 0.342*** (Abadie-Imbens: 0.082)	ATT: 0.053** (0.022)	ATE: 0.126*** (Abadie-Imbens: 0.036)
Matched Number of Observations	1,258	1,368	692	829

The standard errors in the third and fifth columns are Abadie-Imbens standard errors. Estimates not using replacement are of the Average Treatment Effect on the Treated (ATT). Estimates using replacement are of the Average Treatment Effect (ATE).

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

The numbers in each column of Table 7 represent the estimated effect of being sentenced to death on the probability of winning at least some relief. The details of each model variant are discussed in the Technical Appendix—however, it is worth noting here that those in the far right column are the most robust. This estimate of the sentencing effect—12.6 percentage points—is consistent with the estimates in Part III.B, and suggests that my results do not depend on dissimilarities between capital and noncapital defendants.

* * *

Collectively, these analyses provide strong evidence that judges behave differently in capital cases than they do in noncapital cases. In fact, the results likely underestimate the judicial tendency to favor capital defendants. Since capital cases are bifurcated into a guilt phase and a sentencing phase, federal judges typically have the option of finding error during the sentencing portion of a capital case, and can thus vacate the death sentence while leaving the conviction untouched. This option provides death-averse judges with a “way out”—they can correct what they see as an unjust sentence without releasing an individual they might consider dangerous. Indeed, in about 5.1% of the votes I reviewed, the judge voted to grant the defendant some form of sentence relief while denying all of that individual’s guilt-phase claims. Given the availability of this alternative, we might expect federal appellate judges to focus less energy

on a capital defendant's guilt-phase claims, and to consequently grant a lower percentage of those claims.

Likewise, individuals sentenced to death almost always pursue every appeal that they can—few willingly accept the punishment.¹⁶⁶ As such, defendants with weak (or even frivolous) cases nevertheless will fight their convictions up through the federal appellate courts. These cases could dilute the concentration of clearly meritorious capital appeals, creating an artificially lower guilt-phase reversal rate.

My finding that capital defendants win guilt-phase votes at higher rates than noncapital defendants is particularly striking in light of these considerations. Between the ubiquity of capital appeals and the alternative route of vacating only the sentence, we might expect guilt-phase capital relief rates to be slightly *lower* than noncapital relief rates even if federal appellate judges were perfectly neutral between the two types of cases. That the sentencing effect is instead consistently positive and large indicates that federal appellate judges are indeed more willing to grant relief to condemned defendants than they are to rule in favor of similarly situated, noncapital defendants.

IV. Is the Disparity in Relief Rates Favoring Capital Defendants Justified?

Some might find the empirical results in this Note troubling. Whether one favors or opposes capital punishment, a significant change in judicial behavior in death penalty cases raises concerns about whether federal appellate judges are properly exercising their authority. Before concluding, it makes sense to briefly elucidate and address these worries.

The first, and perhaps most compelling, potential concern is that federal appellate judges are undermining the punishment apparatus that state legislatures have put in place. One of the most frequently proffered explanations for the death penalty is deterrence: Both scholars and jurists who favor the death penalty have suggested that it saves lives by discouraging potential killers from acting on their inclinations, and many legislators have relied on this reasoning when considering legislation related to capital punishment.¹⁶⁷ At least one

166. *See supra* note 120 and accompanying text.

167. *See, e.g.*, Conn. House of Representatives, Transcript of April 11, 2012, General Assembly Session 96-99 (2012) (statement of Rep. John Hetherington), <https://perma.cc/6WBE-UD48> (opposing a bill that abolished the death penalty in Connecticut); Neb. Legislature, Transcript of April 16, 2015, Floor Debate 25 (2015) (statement of Sen. Dan Hughes), <https://perma.cc/SR5X-TVS8> (opposing a bill that sought to repeal the death penalty in Nebraska); *id.* at 29 (statement of Sen. Beau McCoy) (same); *see also* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 704-06 (2005).

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study argued that each execution saves as many as eighteen lives.¹⁶⁸ However, any deterrent effect the death penalty might have surely depends on the perception of its reliable implementation. It was for this reason that some observers like Justice White supported the constitutionality of the mandatory death penalty for certain crimes.¹⁶⁹ To the extent that federal appellate judges reduce the number of executions below the minimum threshold required for deterrence, they would seem to frustrate state legislative intent and stymie the people's will.

Second, some might interpret the strong sentencing effect as a reflection of the elitist tendencies of federal judges. Such a view would be consistent with comments Justice Scalia made in *Roper v. Simmons*.¹⁷⁰ Dissenting from the majority's decision that capital punishment for juveniles violates the Eighth Amendment, Justice Scalia fumed: "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"¹⁷¹ Justice Scalia's lament is understandable; after all, there is evidence that the views of ordinary Americans on capital punishment differ from those holding high government office. For example, in 2016, the people of Nebraska reversed the judgment of a bipartisan supermajority in their state legislature and reinstated capital punishment.¹⁷² Similarly, that same year, a majority of California voters rejected an initiative to eliminate the death penalty, despite the initiative having the support of prominent state politicians.¹⁷³ Consequently, when federal judges grant relief more freely in capital cases, they might be seen as placing

168. Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 369 (2003). Other studies have come to a similar conclusion. See Sunstein & Vermeule, *supra* note 167, at 706 n.9, 711-13 (collecting literature on the subject). However, the deterrent effect of capital punishment remains under substantial dispute. See generally John J. Donohue, III & Justin Wolfers, 11 AM. L. & ECON. REV. 249 (2009) (reviewing the empirical literature on capital punishment and arguing that the studies that find a deterrence effect are flawed).

169. See *Roberts v. Louisiana*, 428 U.S. 325, 360 (1976) (White, J., dissenting).

170. 543 U.S. 551 (2005).

171. *Id.* at 616 (Scalia, J., dissenting). Justice Scalia reiterated this critique in other death penalty cases. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) ("[T]ime and again, a vocal minority of this Court has insisted that things have 'changed radically,' and has sought to replace the judgments of the People with their own standards of decency." (citation omitted) (quoting *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting))).

172. Timothy Williams, *Pope's Death Penalty Stance Won't Stop Execution, Nebraska's Catholic Governor Says*, N.Y. TIMES (Aug. 3, 2018), <https://perma.cc/2ZPE-W5LN>.

173. See, e.g., Mike McPhate, *Why Californians Kept the Death Penalty*, N.Y. TIMES: CAL. TODAY (Nov. 11, 2016), <https://perma.cc/CYB5-7NEM>; Jazmine Ulloa, *Lt. Gov. Gavin Newsom Endorses Proposition to Abolish the Death Penalty in California*, L.A. TIMES (July 19, 2016, 3:09 PM), <https://perma.cc/T3PY-X3EM>.

their own convictions above those of the voters. To the extent we believe that judges should eschew paternalism, the sentencing effect may appear deeply sanctimonious.

Beyond suggesting disregard for both state legislatures and voters, the gap in relief rates in similar capital and noncapital cases suggests a disconcerting lack of horizontal equity. Life in prison is an undeniably weighty sentence, yet it appears that federal appellate judges are less concerned with such inmates than they are with those condemned to death. Some of the judges quoted in Part II.A above indicated that federal judges devote substantially more time to capital cases than to comparable noncapital cases; if so, it would appear that “lifers” are being shortchanged. Perhaps a larger proportion of that population would win deserved relief if appellate judges gave their cases the same attention they offer death row inmates.

These arguments each have a distinguished pedigree and some intuitive appeal.¹⁷⁴ However, they ultimately do not provide a convincing justification for why guilt-phase capital appeals should be treated identically to noncapital appeals. Each is trumped by one of the fundamental concerns of American capital jurisprudence—preventing the execution of innocents. As the following discussion will illustrate, most people have a strong intuition that putting an innocent individual to death would be a horrific consequence of capital punishment—one that society should make significant efforts to ensure never occurs. This consensus helps to justify the pattern of judicial behavior this Note uncovered. To the extent that a strong majority *wants* judges to exercise unusual caution in these cases, those jurists can hardly be accused of usurping the legislature’s proper role or imposing their own views on the law.

Debates both in legislatures and in law reviews reveal the general feeling that the societal cost of executing an innocent person substantially outweighs any deterrence effect or retributive value associated with that execution. For example, in his speech opposing Nebraska’s death penalty repeal, State Senator Merv Riepe was careful to declare, “I stand in support of the [Innocence] Project and the expanded availability of the DNA testing. . . . I have no interest in the execution of one individual that is innocent.”¹⁷⁵ Likewise, in an article

174. See *supra* notes 168-72 and accompanying text; see also Blume et al., *supra* note 159, at 461-62 (arguing that life-without-parole defendants, like capital defendants, are deserving of federal habeas review); Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 358 (2003) (discussing horizontal equity in the context of capital punishment).

175. Neb. Legislature, *supra* note 167, at 28 (statement of Sen. Merv Riepe). Other proponents of capital punishment also acknowledged the terrible consequences of executing an innocent and linked their support for the death penalty to their certainty that only truly guilty individuals would ever be executed. See, e.g., *id.* at 25 (statement of Sen. Dan Hughes) (arguing that “[DNA] technology is improving, and it’s providing us the tools to make sure that we don’t make those mistakes”); *id.* at 6 (statement of Sen. Bill
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arguing for the morality of the death penalty, scholars Cass Sunstein and Adrian Vermeule observe that “each execution of someone known to be innocent, or whose guilt is doubted, would dilute the deterrent signal that the government would (by hypothesis) be attempting to strengthen.”¹⁷⁶ According to their view, we should seek to avoid the execution of innocent individuals not just because of the inherent repugnance of that act, but also because the wrongful execution *itself* weakens the crucial deterrent effect of capital punishment.¹⁷⁷

Even some of those who suggest that the risk of killing innocents should weigh less heavily in the death penalty calculus still favor extreme caution in carrying out executions. For instance, despite arguing that “the risk of wrongful executions is a vacuous reason to eliminate the death penalty”¹⁷⁸ and that “[i]f capital punishment has any significant deterrent effect, eliminating capital punishment would not minimize the wrongful loss of lives; it would likely substantially increase innocent deaths,”¹⁷⁹ academic Ronald Allen nonetheless “do[es] think that the State should be required to cross all its t’s and dot all its i’s before taking a person’s life.”¹⁸⁰

Proponents of capital punishment have also taken pains to demonstrate that only the guilty will receive the death penalty. During the 2012 floor debate over abolishing the death penalty in Connecticut, State Representative John Hetherington argued:

Here, in Connecticut, at least in modern times, there has not been one person executed where there was a claim, at least a substantial claim, of innocence, and . . . no one currently on death row makes a claim of actual innocence. So . . . with the advance in science, . . . the likelihood that someone will be [wrongly] convicted of a serious crime that would require the death penalty diminishes, diminishes over and over again.¹⁸¹

At least one supporter of Connecticut’s successful repeal effort acknowledged the sincerity of that belief, observing: “There is nobody here that would support the execution of an innocent person. That is not justice for anyone.”¹⁸² Similarly, while not expressing quite the same certainty that no innocent person

Kintner) (“[W]e will hear a lot of data and numbers today. . . . But . . . we won’t hear claims that any of the 11 convicted murders who are currently on Nebraska’s death row are innocent. [T]here is absolutely no claim of actual innocence of these murderers.”).

176. Sunstein & Vermeule, *supra* note 167, at 736.

177. *See id.*

178. Ronald J. Allen, *Ignoring Issues of Morality or Convicting the Innocent, Is Capital Punishment a Good Idea or a Bad Idea?*, 47 TEX. TECH L. REV. 199, 201 (2014).

179. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 73 (2008).

180. Allen, *supra* note 178, at 199.

181. Conn. House of Representatives, *supra* note 167, at 97 (statement of Rep. John Hetherington).

182. *Id.* at 339 (statement of Rep. Auden Grogins).

will ever be executed, Sunstein and Vermeule still note that “the evidence plausibly suggests that there is substantial accuracy, in the sense of avoiding false positives, in the infliction of capital punishment.”¹⁸³ Then-Judge Alex Kozinski and Sean Gallagher went further, asserting that “errors that go to guilt or innocence are exceedingly rare in criminal cases, and even more rare in death cases.”¹⁸⁴ These statements—and countless others like them—indicate that even advocates of capital punishment are careful to condition their stance on the assumption that innocent people will rarely, if ever, be executed.

Like state lawmakers, federal courts have repeatedly emphasized the importance of ensuring the accuracy of capital proceedings. In fact, the Supreme Court has explicitly observed that in a capital case “the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case,”¹⁸⁵ and that “the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”¹⁸⁶ These instructions alone suggest that the Constitution *requires* federal appellate judges to exercise greater caution in capital cases than in noncapital cases. It is a principle that Justice Breyer repeated in dissent in *Schriro v. Summerlin*, observing that in capital cases “the risk of error that the law can tolerate is correspondingly diminished.”¹⁸⁷ Conservative jurists like then-Justice Rehnquist and Chief Justice Burger concurred in their writings. Chief Justice Burger acknowledged in *Ake v. Oklahoma* that “[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.”¹⁸⁸ Similarly, then-Justice Rehnquist concluded in *Woodson v. North Carolina*:

One of the principal reasons why death is different is because it is irreversible; an executed defendant *cannot be brought back to life*. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for especially careful review of the fairness of the trial, the accuracy of the factfinding process, and the fairness of the sentencing procedure where the death penalty is imposed.¹⁸⁹

There are numerous other instances in which Justices have counseled unusual caution in the capital context.¹⁹⁰ Indeed, some observers have argued

183. Sunstein & Vermeule, *supra* note 167, at 736.

184. Alex Kozinski & Sean Gallagher, Canary Lecture, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 21 (1995).

185. *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).

186. *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

187. 542 U.S. 348, 362 (2004) (Breyer, J., dissenting).

188. 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in the judgment).

189. 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting) (emphasis added).

190. *See, e.g., Baze v. Rees*, 553 U.S. 35, 84-85 (2008) (Stevens, J., concurring in the judgment) (“Another serious concern is that the risk of error in capital cases may be greater than
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that these precedents represent a judicial commitment to a sort of “super due process” in capital cases.¹⁹¹ At the very least, these admonitions collectively indicate that federal judges are not flouting the law by ruling more favorably toward defendants in capital cases. Rather, they are merely following the Supreme Court’s interpretation of what the Eighth Amendment demands.

The results discussed in Part III above further suggest that it is accuracy concerns, rather than ideology, that underlie the sentencing effect I found. As mentioned above, Republican-appointed judges are primarily responsible for the sentencing effect, not the “activist liberal” judges that some might presume. Republican-appointed judges were about 103% more likely to vote for reversal when death was at stake; for judges appointed by Democrats, that number was only about 17%. Given that Republican-appointed judges are generally more likely to uphold capital sentences, this disparity suggests that the sentencing

in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender.”); *Walton v. Arizona*, 497 U.S. 639, 704 (1990) (Blackmun, J., dissenting) (observing that the “gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed” (quoting *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976) (in banc), *abrogated in other part* by *State v. Salazar*, 844 P.2d 566 (Ariz. 1992) (en banc))), *overruled* by *Ring v. Arizona*, 536 U.S. 584 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring in the judgment) (“Among the most important and consistent themes in this Court’s death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.”); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (“[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.”).

191. See, e.g., Kozinski & Gallagher, *supra* note 184, at 28-29 (asserting that the “essential teaching of *Furman* is that death really is different, and that the Constitution calls for an extraordinary measure of caution before the state may take human life”); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 n.1 (1980); cf. Derick P. Berlage, Note, *Pleas of the Condemned: Should Certiorari Petitions from Death Row Receive Enhanced Access to the Supreme Court?*, 59 N.Y.U. L. REV. 1120, 1122 (1984) (observing that “[w]hile the Supreme Court has not adopted a rule of ‘super due process,’ it has been especially solicitous about the reliability of capital convictions and sentences” (footnote omitted)). *But see* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (arguing that “despite its putative commitment to special procedures that address the need for heightened reliability in capital sentencing, the Court has never truly insisted on what Margaret Radin has aptly termed ‘super due process for death’” (quoting Radin, *supra*)); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306 (“[T]he Court has reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states just do something—anything—to give the penalty trial a legal appearance.”).

effect is not borne of some progressive desire to undo state death penalty regimes. Instead, it is largely attributable to a group of judges who generally tout strict constructionism and fidelity to text.

Taken together, it seems that the views of state legislators, Supreme Court Justices, and federal appellate jurists provide ample justification for the behavior of federal judges in capital cases. Both supporters and opponents of capital punishment largely agree that death penalty cases require heightened caution to ensure that the accused is actually guilty—everyone acknowledges the horror of executing an innocent individual. To the extent that federal judges are adhering to this principle, it seems there is nothing objectionable about a higher rate of guilt-phase reversals in capital cases than in similar noncapital cases. Moreover, it seems that federal judges do in fact have that principle in mind. If anything, Republican-appointed judges—who we would generally expect to be more supportive of capital punishment—in fact appear to be *more* sensitive to death sentences than Democrat-appointed jurists. This trend indicates that it is a limited judicial tolerance for mistakes in capital cases—not personal opposition to the death penalty—that drives the sentencing effect.

Conclusion

This Note demonstrates that appellate judges are significantly more likely to grant guilt-phase relief to capital defendants than to noncapital defendants. These results cannot be explained away by differential attorney investment or dissimilarities between capital and noncapital defendants—test after test indicates that these differences persist regardless of the context. Indeed, as observed above¹⁹² and at the end of Part III.C, the statistics reported in Part III likely *underestimate* the degree of favorable treatment that capital defendants receive.

My conclusion might appear startling at first: It seems to suggest that federal appellate judges are flouting state legislatures and substituting in their own views of capital punishment. However, as Part IV demonstrates, this concern is both normatively suspect and empirically dubious. Both sides of the death penalty debate acknowledge the importance of caution in the capital context and generally favor more deliberate review of capital cases than noncapital cases. Moreover, it appears that those judges most sympathetic to capital punishment are the main drivers of the sentencing effect, which contradicts the claim that ideology is responsible. As such, far from indicating a problem, the sentencing effect appears to be a triumph for federal habeas review in the death penalty context.

192. *See supra* note 35.

Technical Appendix

This Technical Appendix provides additional methodological details and robustness checks concerning the analyses run in the main text of the Note. Part A offers additional detail regarding my selection criteria; Part B provides information about the ordered logit regression I used to test an alternative coding scheme; Part C describes the methodology deployed for the “matching” tests; and Part D runs regressions from the main text either with Supreme Court cases excluded or with more fine-grained coding of the racial variable.

A. Selection Criteria

As mentioned in Part III.A, the search described above in footnote 121 turned up a number of cases that were outside the parameters I had in mind for this study—as such, this Note only analyzes a subset of the votes produced by that search. However, one should be able to reproduce the same set of votes I considered by eliminating opinions that do not meet all of the following conditions:

- The defendant was convicted of murder (that is, felony murder, first-degree murder, or the federal equivalent, but not manslaughter, negligent homicide, or some non-murder-equivalent offense).
- The defendant was sentenced to death or to some form of life in prison and the sentence was “at stake” when the case was heard on appeal (that is, the issue was not merely whether the defendant could be retried after the conviction and sentence had already been reversed).
- The court was ruling on a habeas petition, not on a case arising under 42 U.S.C. § 1983 or a request for a certificate of appealability.
- The court was not considering a second or successive habeas petition.
- The case was not subsequently reheard en banc or (in the primary specifications) by the Supreme Court. If the case was subsequently reheard en banc or by the Supreme Court, I counted only the superseding decision so as to avoid double-counting the same case.

B. The Ordered Logit Regression

Ordered logit models allow for a dependent variable with multiple ordinally related outcomes.¹⁹³ The benefit of using this methodological tool here is that it allows for three (ordered) categories of rulings rather than just two. A conditional (or unconditional) grant of the writ is considered the most favorable result; a remand for further consideration (or reconsideration) of an

193. See Richard Williams, *Understanding and Interpreting Generalized Ordered Logit Models*, 40 J. MATHEMATICAL SOC. 7, 8-11 (2016).

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issue is ranked as the second most favorable outcome; and a complete denial of the writ is coded as the least favorable ruling possible. The ordered logit model estimates how changes in my covariates affect the probability of falling into one of these categories; and it does so without assuming that the categories are equally “far apart” in a metaphysical sense.¹⁹⁴

The meaning of the regression coefficients that this type of model produces can be difficult to decipher. Accordingly, while I report the raw regression results in Table A.1, I presented a more substantive interpretation of these coefficients in the main text of the Note (in terms of their effect on the probability of winning different kinds of relief).¹⁹⁵

194. For example, going from a remand to a conditional grant of the writ might represent a far greater leap than going from complete denial to a remand.

195. For discussion, see Part III.C and Table 6 above.

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Table A.1
Ordered Logit Estimates of Sentencing Effect

Variable	Effect on Latent Variable for Habeas Outcome
Death Sentence at Time of Appeal	0.554*** (0.146)
Male Defendant	-0.935*** (0.085)
White Defendant	-0.547*** (0.106)
Democratic President Appointed Judge	0.927*** (0.130)
First Degree Murder or Equivalent	-0.731*** (0.190)
Number of Victims	-0.200** (0.093)
Conviction in Federal Court	-0.612*** (0.031)
Interaction of Race and Party	-0.271*** (0.083)
Year	0.036*** (0.0001)

Possible Outcomes (in order): (1) No Relief; (2) Partial Relief; (3) Habeas Granted.
This analysis employs only court-level fixed effects. $N = 1,365$. ψ values: 73.76291,
74.71697.

As this raw output suggests, my initial results remain robust in the alternative coding scheme. Being sentenced to death—rather than life in prison—is associated with an increase of 0.554 in the underlying latent variable.¹⁹⁶ Taken with the “ ψ ” values below Table A.1,¹⁹⁷ this coefficient indicates that

196. The “latent variable” is defined as the sum of the product of each independent variable value and its respective coefficient.

197. ψ values represent latent-variable-scaled cutoffs between categories. Where the latent variable falls with respect to the ψ values determines the predicted outcome given that set of values for the independent variable. In this case, the ψ values are 73.76291 and 74.71697. As such, if the value of the latent variable is less than 73.76291, we would expect the vote associated with that set of values for the independent variable to be for “No Relief.” If the value of the latent variable falls between 73.76291 and 74.71697, we would expect the vote to be for “Partial Relief.” Finally, if the value of the latent

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capital defendants are significantly less likely (8.16 percentage points) to garner no relief than noncapital defendants, but significantly more likely to win partial or complete relief than those not sentenced to death (3.28 and 4.89 percentage points, respectively). These figures align closely with those reported in Tables 2 and 4, providing additional support for the conclusions contained therein.

C. The Matching Tests

The matching technique I employ in Part III.C is known as “propensity score matching.” It calls for using logit (or probit) regression to estimate the probability that a particular unit will be assigned to treatment (here, the probability that a murder defendant with particular characteristics is sentenced to death).¹⁹⁸ The dependent variable in such a regression is the sentence; the independent variables are the defendant characteristics known before sentencing that might affect the sentence (in this case, gender, race, type of crime, number of victims, state of imprisonment, and whether the conviction took place in state or federal court). Once we know the regression coefficients, we can compute the predicted probability that each defendant in the sample would be sentenced to death, and match capital and noncapital defendants based on this probability.

The Figure below depicts the distribution of propensity scores for capital defendants (light gray) and noncapital defendants (dark gray). While there is relatively little overlap when propensity scores are extremely low (less than 0.1) or extremely high (greater than 0.9), there is substantial overlap in the middle region. Accordingly, by matching capital defendants with noncapital defendants on the basis of their propensity scores, we can ensure that our treatment effect results from comparing highly similar defendants.

variable is greater than 74.71697, we would predict the vote to be for “Habeas Granted.” For more information on this method, see Havi Murad et al., *Small Samples and Ordered Logistic Regression: Does It Help to Collapse Categories of Outcome?*, 57 AM. STATISTICIAN 155, 156 (2003).

198. See ANGRIST & PISCHKE, *supra* note 146, at 80-86.

Figure
Propensity Score Overlap



This Figure displays the distribution of propensity scores for individuals sentenced to death and individuals sentenced to life in prison.

The results of this matching exercise are provided in Table 7 in the main text of the Note. Methodologically speaking, there are two ways to match: with replacement and without replacement. Matching with replacement means that a single control observation (a noncapital case) might be matched with multiple treated observations (a capital case); by contrast, matching without replacement ensures that each control observation is used only once.¹⁹⁹ Matching without replacement generally leads to lower standard errors (since it uses more of the dataset), but matching with replacement leads to a better fit between the two observations being compared. I report both results in Table 7, but the relatively small standard errors in the second and fourth columns suggest that the better strategy is matching with replacement. I also report the results from matching only those data points with propensity scores between 0.1 and 0.9, which econometricians sometimes recommend in cases of limited overlap at the distribution tails.²⁰⁰

199. See Elizabeth A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, 25 STAT. SCI. 1, 9 (2010).

200. See, e.g., Guido W. Imbens & Jeffrey M. Wooldridge, *Estimation of Average Treatment Effects Under Unconfoundedness* 1-2, 36 (2007), <https://perma.cc/G7DP-D9C5> (discussing the use of propensity score trimming to improve balance).

These tests, like my other robustness checks, provide additional support for the conclusions drawn from Tables 2 through 4. Across all the matching specifications, capital defendants are more likely than noncapital defendants to win habeas relief from a federal appellate court; in the second and fourth (with replacement) those results are significant at the $p < 0.001$ level. Particularly illuminating is the effect size in the fourth column, computed using the most robust matching procedure given the circumstances. The estimate of a 12.6 percentage point increase in the probability of relief accords with (and in some cases is larger than) the outcomes of the other tests, and covariate balance for this test is relatively even (as shown in Table A.2). The one exception is with regard to race—the treatment group was more likely to include nonwhite defendants than the control group. However, this imbalance does not raise any serious concerns. In Tables 2 and 4, the imbalance runs in the other direction and the sentencing effect remains, indicating that the disparity likely has no effect on my results; moreover, I have run additional robustness checks to address this issue and reach the same conclusion.²⁰¹

Table A.2
Post-Matching Balance Statistics
(Propensity Scores 0.1-0.9, with Replacement)

Variable	Mean Treatment Value	Mean Control Value	<i>p</i> -Value of Difference
Male Defendant	0.952	0.956	0.706
White Defendant	0.345	0.408	0.017
Number of Victims	1.39	1.40	0.647
Conviction in Federal Court	0.058	0.038	0.080

D. Alternative Model Specifications

In the main text of the Note, I mentioned that my results would not change if I were to exclude Supreme Court cases (and substitute in the corresponding federal circuit court opinions).²⁰² Likewise, I asserted that my results would be robust to more fine-grained racial codings (though I could only find this more

201. If I match observations exclusively on race, my results persist (effect size 5.2 percentage points). Moreover, when I subset the data to nonwhite defendants only and repeat the CSE regressions from the third and fourth columns of Table 4, my results continue to hold (effect sizes 11.5 and 5.2 percentage points).

202. See *supra* note 122 and accompanying text.

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precise data for a subset of observations),²⁰³ The tables below contain the results of the regressions I ran to test these propositions. Tables A.3 through A.5 address the first claim—they contain regressions corresponding to those in Tables 2 through 4. Table A.6 presents regressions corresponding to those in the two CSE columns of Table 2, addressing the second claim.²⁰⁴ In each case, the coefficients of interest closely approximate those in the main text of the Note.

203. *See supra* note 135 and accompanying text.

204. The regressions in Table A.6 contain dummy variables representing different racial/ethnic groups.

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Table A.3

Effects of Death Sentence on Probability of Favorable Habeas Ruling (No SCOTUS)

	OLS		CSE		Logit CSE	
	Yes	No	Yes	No	Yes	No
Court-Level Fixed Effects						
Judge-Level Fixed Effects	No	Yes	No	Yes	No	Yes
State-Level Fixed Effects	Yes	Yes	Yes	Yes	No	No
Death Sentence at Time of Appeal	0.095*** (0.027)	0.089*** (0.030)	0.095** (0.040)	0.089** (0.042)	0.511*** (0.169)	0.632*** (0.237)
Male Defendant	-0.162*** (0.057)	-0.190*** (0.063)	-0.162 (0.112)	-0.190* (0.112)	-1.026*** (0.348)	-1.503*** (0.560)
White Defendant	-0.106*** (0.028)	-0.125*** (0.025)	-0.106*** (0.033)	-0.125*** (0.037)	-0.606** (0.249)	-0.862*** (0.220)
Democratic President Appointed the Judge	0.116*** (0.028)	-	0.116*** (0.032)	-	0.813*** (0.185)	-
First Degree Murder or Equivalent	-0.168*** (0.040)	-0.184*** (0.043)	-0.168** (0.077)	-0.184** (0.075)	-0.884*** (0.229)	-1.181*** (0.313)
Number of Victims	-0.034** (0.013)	-0.046*** (0.014)	-0.034** (0.017)	-0.046*** (0.017)	-0.176** (0.087)	-0.273** (0.117)
Conviction in Federal Court	-0.036 (0.062)	-0.042 (0.068)	-0.036 (0.105)	-0.042 (0.122)	-0.781 (0.477)	-0.136 (0.601)
Interaction of Race and Party	-0.015 (0.042)	-	-0.015 (0.048)	-	-0.103 (0.312)	-
Year	-0.003 (0.008)	-0.0005 (0.008)	-0.003 (0.012)	-0.0005 (0.013)	0.061 (0.050)	0.071 (0.072)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient. $N = 1,339$.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

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Table A.4
Effects of Death Sentence on Probability of Favorable Habeas Ruling:
Effects Separated by Party (No SCOTUS)

	Democrat-Appointed Judges (N = 674)			Republican-Appointed Judges (N = 665)		
Court-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>
State-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>
Standard Errors	<i>OLS</i>	<i>CSE</i>	<i>Logit CSE</i>	<i>OLS</i>	<i>CSE</i>	<i>Logit CSE</i>
Death Sentence at Time of Appeal	0.055 (0.043)	0.055 (0.064)	0.298 (0.214)	0.129*** (0.033)	0.129*** (0.039)	0.950*** (0.307)
Male Defendant	-0.179** (0.087)	-0.179 (0.143)	-1.040** (0.422)	-0.132* (0.071)	-0.132 (0.118)	-1.036 (0.646)
White Defendant	-0.121*** (0.037)	-0.121** (0.053)	-0.700*** (0.216)	-0.112*** (0.028)	0.112*** (0.032)	-0.678** (0.268)
First Degree Murder or Equivalent	-0.140** (0.063)	-0.140 (0.099)	-0.780*** (0.291)	-0.177*** (0.049)	-0.177** (0.070)	-1.247*** (0.389)
Number of Victims	-0.067*** (0.022)	-0.067*** (0.025)	-0.351*** (0.131)	-0.005 (0.015)	-0.005 (0.018)	0.038 (0.101)
Conviction in Federal Court	-0.087 (0.106)	-0.087 (0.141)	-1.016 (0.693)	-0.013 (0.072)	-0.013 (0.110)	-0.465 (0.660)
Year	0.010 (0.012)	0.010 (0.018)	0.120* (0.067)	-0.012 (0.009)	-0.012 (0.010)	-0.017 (0.078)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

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Table A.5
Effects of Death Sentence on Probability of Favorable Habeas Ruling:
First Degree Murder and Equivalents Only (No SCOTUS)

	OLS		CSE		Logit CSE
	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>
Court-Level Fixed Effects	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>
Judge-Level Fixed Effects	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>
State-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>
Death Sentence at Time of Appeal	0.089*** (0.028)	0.086*** (0.031)	0.089** (0.042)	0.086* (0.045)	0.477*** (0.169)
Male Defendant	-0.196*** (0.064)	-0.218*** (0.072)	-0.196 (0.134)	-0.218* (0.132)	-1.001** (0.401)
White Defendant	-0.108*** (0.033)	-0.114*** (0.026)	-0.108*** (0.035)	-0.114*** (0.039)	-0.629** (0.265)
Democratic President Appointed the Judge	0.115*** (0.030)	-	0.115*** (0.034)	-	0.797*** (0.199)
Number of Victims	-0.030** (0.013)	-0.044*** (0.014)	-0.030* (0.017)	-0.044*** (0.017)	-0.158* (0.086)
Conviction in Federal Court	-0.011 (0.065)	-0.015 (0.074)	-0.011 (0.114)	-0.015 (0.140)	-0.649 (0.500)
Interaction of Race and Party	-0.006 (0.044)	-	-0.006 (0.051)	-	-0.018 (0.332)
Year	-0.012 (0.008)	-0.008 (0.009)	-0.012 (0.012)	-0.008 (0.013)	0.013 (0.053)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient. $N = 1,193$.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

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Table A.6
Effects of Death Sentence on Probability of Favorable Habeas Ruling:
More Specific Racial Coding

	CSE	
	<i>Yes</i>	<i>No</i>
Court-Level Fixed Effects	<i>Yes</i>	<i>No</i>
Judge-Level Fixed Effects	<i>No</i>	<i>Yes</i>
State-Level Fixed Effects	<i>Yes</i>	<i>Yes</i>
Death Sentence at Time of Appeal	0.097** (0.042)	0.094** (0.043)
Male Defendant	-0.137 (0.112)	-0.077 (0.117)
Democratic President Appointed the Judge	0.120*** (0.024)	-
First Degree Murder or Equivalent	-0.120 (0.074)	-0.135* (0.076)
Number of Victims	-0.039** (0.017)	-0.045*** (0.017)
Conviction in Federal Court	-0.067 (0.096)	-0.080 (0.109)
Year	-0.005 (0.012)	-0.003 (0.013)

In each cell of this table, the first value is the regression coefficient, while the second value (in parentheses) is the standard error of that coefficient. $N = 1,368$.

Asterisks indicate degrees of significance: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.