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# How Judicial Elections Impact Criminal Cases

*By Kate Berry*

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## INTRODUCTION

State courts adjudicate the vast majority of criminal cases. Nearly all felony convictions — 94 percent — occur in state courts, including 99 percent of rape cases and 98 percent of murder cases.<sup>1</sup> The arbiters of these cases, state court judges, are mainly elected. Nationwide, 87 percent of state judges face elections, which occur in 39 states.<sup>2</sup>

Given the extraordinary power state court judges exercise over the liberty, and even lives, of defendants, it is vital that they remain impartial. But mounting evidence suggests that the dynamics of judicial elections may threaten judges' ability to serve as impartial arbitrators in criminal cases.

This paper collects and analyzes social science studies on the relationship between judicial elections and criminal cases. It considers two questions:

- (1) What role do judicial candidates' records in criminal cases, whether as judges or lawyers, play in their campaigns for the bench?
- (2) What, if any, impact do judicial election dynamics have on judges' decision-making in criminal cases?

To assess the role of criminal cases in judicial elections, this paper considers 15 years of television advertising data for state supreme court elections, provided by CMAG/Kantar Media and analyzed by the Brennan Center for Justice, as well as a series of reports synthesizing this data written by the Brennan Center, Justice at Stake, and the National Institute on Money in State Politics.<sup>3</sup> This data reveals that, as television advertising has become a staple in judicial elections,<sup>4</sup> ads discussing criminal justice themes have become increasingly prominent. In 2013-14, a record 56 percent of ads discussed candidates' records in criminal cases — compared with the previous high of 33 percent in both the 2007-08 and 2009-10 cycles.<sup>5</sup> These campaign ads attacking candidates for being “soft on crime,” or touting them as “tough on crime,” have focused voters' attention on candidates' records in criminal cases, often in a misleading way.

To assess the impact of judicial elections on criminal justice outcomes, this paper reviews 10 recent, prominent, and widely cited empirical studies considering this topic. While these studies used varying methodologies and examined a variety of states, court levels, and methods of election, *all found that the pressures of upcoming re-election and retention election campaigns make judges more punitive toward defendants in criminal cases.* (Other studies not addressed here are consistent with those reviewed.)

This effect was present across different election systems, including: (1) partisan contested elections, in which candidates appear on the ballot with a party designation; (2) nonpartisan contested elections, in which party affiliation does not appear on the

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*“Judges are not politicians, even when they come to the bench by way of the ballot.”*

*—Chief Justice John Roberts, Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1662 (2015)*

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ballot; and (3) retention elections, in which judges stand for an uncontested “up-or-down” vote (typically a feature of merit selection appointment systems).<sup>6</sup>

Key findings from these studies include:

- The more frequently television ads air during an election, the less likely state supreme court justices are, on average, to rule in favor of criminal defendants.<sup>7</sup>
- Trial judges in Pennsylvania and Washington sentence defendants convicted of serious felonies to longer sentences the closer they are to re-election.<sup>8</sup>
- In states that retain judges through elections, the more supportive the public is of capital punishment, the more likely appellate judges are to affirm death sentences.<sup>9</sup>
- In the 37 states that heard capital cases over the past 15 years, appointed judges reversed death sentences 26 percent of the time, judges facing retention elections reversed 15 percent of the time, and judges facing competitive elections reversed 11 percent of the time.<sup>10</sup>
- Trial judges in Alabama override jury verdicts sentencing criminal defendants to life and instead impose death sentences more often in election years.<sup>11</sup>

These studies leave open several important research questions. For example, they generally do not compare systems, and thus do not address whether some re-election or retention election systems have more of an impact on criminal justice outcomes than others, or whether reappointment processes may also have an effect. Similarly, it remains unclear whether elections for a single term, absent the pressure to be re-elected, have an impact on decision-making in criminal cases.

Because these studies examine the conduct of sitting judges, they also do not consider what other impacts the emphasis on criminal justice issues in campaigns may have. For example, they do not consider whether these dynamics lead to more former prosecutors and fewer former defense attorneys on the bench. Finally, many of the studies considered use older datasets that do not permit an assessment of recent developments in judicial elections, such as the growing politicization of retention elections. It would be valuable to re-examine their findings using more recent data.



## **I. CRIMINAL JUSTICE IN THE SPOTLIGHT: ADVERTISING AND JUDICIAL ELECTIONS**

Judicial races are now expensive affairs. Between 1999 and 2014, the average spending for state supreme court elections was \$57.7 million in presidential cycles and \$37.1 million in non-presidential cycles. Television advertising is increasingly central to these high-cost elections. From 2000 to 2014, a total of nearly \$129 million was spent on TV airtime in state supreme court races.<sup>12</sup> The 2011-12 election cycle saw record TV spending — \$33.7 million — shattering the previous two-year TV spending record of \$26.6 million in 2007-08.<sup>13</sup>

Outside interest groups, who now play a prominent role in judicial elections,<sup>14</sup> funded many of these ads. In 2013-14, 36 percent of TV ad spending came from special interest groups. This spending is significant because the tone of outside ads is markedly different than those of candidates. In 2013-14, 53 percent of ads sponsored by outside groups were negative in tone, while only 5 percent of candidate ads were negative and political parties sponsored no negative advertisements.<sup>15</sup>

The subject matter of judicial campaign ads has also changed over time. Their focus is increasingly on candidates' criminal justice decisions — with a record high of 56 percent of ad spots in 2013-14.<sup>16</sup> These ads can be broken into two primary categories: (1) ads attacking judicial candidates as “soft on crime,” and (2) ads touting candidates' “tough on crime” records.

These ads both reflect and contribute to the pressures on judges with respect to criminal cases. Their decisions, whether correct or not as a matter of law, are increasingly likely to show up during their campaigns.

### **A. “Soft on Crime”**

The vast majority of television ads attacking candidates seek to portray them as “soft on crime.” In the 2013-14 election cycle, 82 percent of ad spots attacking candidates discussed criminal justice issues.<sup>17</sup> Of the negative criminal justice-themed ads that cycle, all but one attacked candidates for judicial decisions they had made — focusing either on particular decisions or their criminal justice records as a whole.<sup>18</sup> The remaining ad attacked a candidate for his representation of a criminal defendant as a lawyer.<sup>19</sup> Illustrations of both categories of ads in recent cycles are provided below.

#### **1. Attacks on Candidates for their Judicial Decisions**

Frequently relying on ominous music and voiceovers — and sometimes using racially charged imagery — most negative criminal justice-themed ads focus either on judges' rulings in particular criminal cases involving incendiary issues, likely to elicit strong voter reactions, or on their overall criminal justice records.

Illinois Supreme Court Justice Lloyd Karmeier's 2014 retention race became heated in the campaign's closing days. A new political action committee composed primarily of plaintiffs' trial attorneys, called Campaign for 2016, led the effort to oust him, relying on a criminal justice-themed attack ad as part of its strategy.<sup>20</sup> This ad opened with a description of “predators abusing children, rapists, murderers” as

“the worst of the worst” and stated that “in one case Judge Lloyd Karmeier gave easy bail to a woman later found guilty of murdering her 4-year-old stepson” and “gave probation instead of prison to a man who sexually assaulted a child.” The ad went on to describe Karmeier as “the special interest judge who’s failed too many crime victims,” and urged voters to “vote no on Judge Karmeier.”<sup>21</sup> Justice Karmeier narrowly won his race with 60.8 percent of the vote, less than one point above the 60 percent required under Illinois law.<sup>22</sup>



Kentucky’s 2012 Supreme Court race involved a rematch between appeals court judge, and former supreme court justice, Janet Stumbo and Justice Will Scott, who unseated her in 2004.<sup>23</sup> The race featured a number of controversial attack ads criticizing Stumbo both for her decision in a particular murder case as well as her overall record. One ad, sponsored by Scott, declared that two criminal defendants “were sentenced to death for ruthlessly murdering pregnant

women but former Justice Janet Stumbo voted to reverse both convictions.” As the narrator spoke, the ad showed images of the two black murderers against images of pregnant white women. The ad concluded with an attack of her overall record, stating: “Former Justice Janet Stumbo sided with criminals 50 percent of the time. For fairness, re-elect Will T. Scott, Supreme Court justice.”<sup>24</sup> Scott ultimately held onto his seat.<sup>25</sup>

## 2. Attacks on Candidates for Representing Criminal Defendants as Lawyers

A smaller number of negative ads target judicial candidates for their work as lawyers prior to seeking judicial office, particularly for representing criminal defendants.

In 2012, Bridget McCormack, then a professor at the University of Michigan Law School, ran for a seat on the Michigan Supreme Court.<sup>26</sup> The state Republican Party sponsored an ad that targeted McCormack and the other Democratic candidates for being “soft on crime.” The ad stated that “McCormack volunteered to represent terrorists at Guantanamo Bay and fought to protect sexual predators,”<sup>27</sup> referring to work she had undertaken as a lawyer. A second ad, sponsored by the conservative Judicial Crisis Network,<sup>28</sup> featured a mother whose son was killed in Afghanistan and who reprimanded McCormack for her Guantanamo work. The mother said, “my son’s a hero and fought to protect us. Bridget McCormack volunteered to help free a terrorist,” adding, “how could you?”<sup>29</sup> Despite these ads, McCormack won her race.<sup>30</sup>



In Wisconsin’s 2008 Supreme Court election, challenger Michael Gableman unseated Justice Louis Butler, becoming the first candidate since 1967 to defeat an incumbent in a Wisconsin Supreme Court election.<sup>31</sup> Gableman’s campaign ran an ad alleging that Butler “found a loophole” to free Reuben Lee Mitchell, a convicted child rapist who went on to molest another child.<sup>32</sup> The final image from the ad showed Butler on the bench, insinuating that Butler freed Mitchell as a judge.<sup>33</sup> The ad was grossly misleading at best. Butler had been appointed by

the court to represent Mitchell in his appeal. The Wisconsin Supreme Court rejected the appeal and Mitchell served his sentence. Several years after Mitchell’s release, he was convicted of molesting another child. Butler had nothing to do with Mitchell’s release and had never heard a case involving him. The ad also sparked widespread outcry for its racially provocative imagery — it showed Butler, the only black Wisconsin Supreme Court justice, alongside a similar photo of Mitchell, also black, and asked: “Can Wisconsin families feel safe with Louis Butler on the Supreme Court?”<sup>34</sup>

## B. “Tough on Crime”

Television ads portraying candidates as “tough on crime” are likewise increasingly common. In the 2013-14 election cycle, there were 26 ads promoting candidates’ rulings in criminal cases, of which 22 discussed candidates’ overall records, two focused on judges’ decisions in individual cases, and two considered both.<sup>35</sup> Below are illustrations of “tough on crime” ads from recent cycles.



In Arkansas’s 2014 Supreme Court race, the Law Enforcement Alliance of America ran an ad asserting, “Judge Robin Wynne is tough on sexual predators, refusing to allow technicalities to overturn convictions.” In one example, “he refused to grant any leniency to a man convicted of raping his 8-year-old stepdaughter” and “put him in jail for 35 years.” In another case, “Wynne denied a new trial for a habitual sexual offender convicted of assaulting a young boy.” Finally, the ad implores viewers to

“call Judge Wynne” and “tell him keep protecting our children with zero leniency for predators.”<sup>36</sup>

Ads touting candidates’ “tough on crime records” are particularly troubling when they address death penalty cases. Such ads are a fixture in Alabama, the state with the highest per capita rate of death sentences in the country.<sup>37</sup>

In Alabama, all judges — from the trial courts up to the supreme court — run in contested partisan elections every six years, and highlighting their imposition of the death penalty is a standard theme.<sup>38</sup> In their campaigns for a seat on the Alabama Supreme Court, candidates Claud Neilson, Kenneth Ingram, and Sue Bell Cobb all touted their capital punishment records in TV ads. In his 1994 campaign, Neilson stated that he “looked into the eyes of murderers and sentenced them to death.” Ingram’s 1996 ad described a particularly heinous crime before stating that “[w]ithout blinking an eye, Judge Kenneth Ingram sentenced the killer to die.” Judge Ingram’s ad concludes with an endorsement from the victim’s daughter, stating that “it was my mother who was killed, and Judge Ingram gave us justice. Thank heaven Judge Ingram is on the supreme court.”<sup>39</sup> In 2006, Sue Bell Cobb ran an ad stating that she was the only candidate for chief justice “who has sent hundreds of criminals back to death row.”<sup>40</sup>

Similar ads appear at the lower court level. For example, in his 2000 campaign for Mobile County trial judge, Ferrill McRae ran an ad stating that he had “presided over more than 9,000 cases, including some of the most heinous murder trials in our history” while the names of those he had sentenced to death flashed on the screen.<sup>41</sup>



Candidates also tout their capital records in retention races. In 2014, three Tennessee Supreme Court justices endured a bitter and expensive anti-retention campaign that targeted them for being “liberal on crime” and reversing a capital sentence. The justices responded with a TV ad announcing they had “affirmed nearly 90 percent” of death sentences.<sup>42</sup> In the end, the justices retained their seats by a narrow margin.<sup>43</sup>

These examples across states, court levels, and electoral systems illustrate how candidates’ records are used in practice in their campaigns. While this rhetoric in judicial campaigns is alone troubling, the fact that electoral politics may be influencing criminal case outcomes is of even greater concern.

## II. THE IMPACT OF JUDICIAL ELECTIONS ON CRIMINAL CASE OUTCOMES

“Judges who are running for reelection do keep in mind what the next 30-second ad is going to look like.”

– Former Justice Oliver Diaz, Mississippi<sup>44</sup>

Judicial campaigns are now expensive and politicized affairs. But do the pressures of these races shape judicial decision-making? Ten prominent empirical studies examining the relationship between judicial elections and criminal case outcomes all found that retention and re-election pressures impact judges’ rulings — to the detriment of defendants.

One group of studies considered the impact of elections on judges’ adjudication of cases involving serious crimes. Each study found that retention and/or re-election pressures had an effect — making judges more punitive in sentencing and less likely to find in favor of criminal defendants.

Another group considered the impact of election pressures on judges’ decision-making in death penalty cases. The surveyed research found that appellate judges are more likely to affirm death sentences, and less likely to dissent from orders affirming death, when facing re-election or retention. Likewise, one study found that trial judges in Alabama — who have a uniquely powerful role in determining death sentences due to the state’s system of judicial override, by which a judge can override a jury’s sentence in a capital case — are more likely to impose death over jury verdicts of life imprisonment during election years.

These studies all have limitations — most importantly, none are randomized controlled experiments, so there could be hidden variables that explain the observed correlations. Yet, despite using different methodologies, and examining different states, time periods, and level of court, *every* empirical study reviewed found that re-election and retention pressures disadvantage defendants.

### A. Criminal Sentencing Generally

Several studies have found that re-election and retention pressures cause judges to (1) sentence more punitively and (2) vote less frequently in favor of criminal defendants on appeal.

#### 1. More Punitive Sentences

Studies in both Pennsylvania and Washington found that trial court judges hand out significantly longer sentences in serious, violent criminal cases the closer the sentencing judge is to running for re-election.

In a study of more than 22,000 sentences for aggravated assault, rape, and robbery in the 1990s, Gregory Huber and Sanford Gordon considered the effect of retention elections on trial court judges in Pennsylvania.<sup>45</sup> They found that “sentences for these crimes are significantly longer the closer the sentencing judge is to standing for reelection.”<sup>46</sup> Huber and Gordon selected this class of offense because judges sentencing in these cases always exercise some discretion in determining the severity of the punishment and typically assign prison time.<sup>47</sup>

To keep their seats, Pennsylvania trial court judges must be retained by voters every 10 years.<sup>48</sup> According to Huber and Gordon, from 1990 to 1999, for the crimes analyzed, more than 2,000 years of additional incarceration could be attributed to re-election pressures.<sup>49</sup> Significantly, the two researchers demonstrated that the sentencing patterns of particularly punitive judges could not solely account for these results. Instead, “all judges, even the most punitive, increase their sentences as reelection nears.”<sup>50</sup>

Carlos Berdejó and Noam Yuchtman made similar findings about the impact of re-election pressures in their study of sentencing in Washington State.<sup>51</sup> Every four years, Washington’s trial court judges stand for re-election in nonpartisan contests.<sup>52</sup> Relying on a dataset of 276,119 criminal cases heard by 265 full-time trial court judges in Washington from 1995-2006, Berdejó and Yuchtman concluded that sentences were 10 percent longer at the end of a trial judge’s political cycle than at the beginning.<sup>53</sup> Like Huber and Gordon, they focused their empirical analysis on a subset of crimes — assault, murder, rape, and robbery.<sup>54</sup> In determining that it was re-election pressure specifically that caused these higher sentences, Berdejó and Yuchtman found they could “rule out patterns in cyclical sentencing due to factors other than politics...by examining sentencing by retiring judges, who do not face electoral pressure; the sentencing of less serious crimes, about which the public (and potential competitors for a judge’s seat) are likely less concerned; and sentencing in nearby Oregon, where judges are elected on a different cycle.”<sup>55</sup>

## 2. More Rulings Against Criminal Defendants

In their 2014 *Skewed Justice* study for the American Constitution Society, Emory Law School’s Joanna Shepherd and Michael Kang conclude that state supreme court justices are less likely to rule in favor of criminal defendants when faced with the threat of future attack ads.<sup>56</sup> As discussed in Section I, spending on TV advertising, particularly by outside interest groups who are more willing to go negative, has skyrocketed over the past 15 years. To measure the threat of future attack ads, Shepherd and Kang considered two variables: (1) the number of TV campaign ads aired in the most recent supreme court election in each state; and (2) the nonexistence or removal of a ban on independent expenditures.<sup>57</sup>

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*In state supreme court elections with higher levels of TV advertising and more outside spending, judges are less likely to vote in favor of criminal defendants.*

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Using a data set of 3,100 criminal appeals of certain violent crimes — murder, robbery, violent aggravated assault, rape, and other sex crimes — decided in state supreme courts from 2008 to 2013, they produced two primary findings.<sup>58</sup> First, Shepherd and Kang found that “the more TV ads that aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants.”<sup>59</sup> They defined a vote in favor of a defendant as “any vote that improves the defendant’s position—whether it is overturning any part of a criminal conviction or reducing a defendant’s sentence.”<sup>60</sup> Second, Shepherd and Kang discovered that

“unlimited corporate and union independent expenditures are associated with a decrease in justices voting in favor of defendants.”<sup>61</sup> The study concludes that in state supreme court elections with higher levels of TV advertising and more outside spending — often characterized by more negative advertising — judges are less likely to vote in favor of criminal defendants.<sup>62</sup>

Shepherd and Kang’s study provides further statistical support for earlier work by Billy Corriher for the Center for American Progress. Corriher also considered the effect of increases in TV advertising and campaign cash on judicial rulings, arguing that “[a]s state supreme court campaigns become more expensive and more partisan, the fear of being portrayed as ‘soft on crime’ is leading courts to rule more often for prosecutors and against criminal defendants.”<sup>63</sup>

### 3. Differences Between Re-Election Methods

One area that requires further study is whether different re-election methods — nonpartisan contested elections, partisan contested elections, and retention elections — differ in their impact on judicial behavior in criminal cases.

Gordon and Huber considered this question in their study of felony convictions in Kansas trial courts from 1997 to 2003. They found that incumbent judges facing competitive re-election rendered more punitive sentences than judges seeking to keep their seats through non-contested retention races.<sup>64</sup> Kansas’s trial court sentences provided a particularly useful data set for this study since its trial court judges are selected differently depending on the district. At the time of the study, 14 districts used partisan contested elections for both initial selection and reselection of trial judges, whereas 17 districts selected trial judges initially through gubernatorial appointment, based on judicial nominating commission recommendations, with reselection through retention elections.<sup>65</sup> Analysis of their data set of 18,139 felonies — assault, criminal threat, robbery, sexual assault, theft, burglary, and arson — revealed that the sentences imposed by judges facing contested elections were comparatively longer than those of judges with upcoming retention elections.<sup>66</sup> Gordon and Huber concluded, based on this analysis, that there is strong evidence that the threat of a viable challenger in an election affects the behavior of elected judges.<sup>67</sup>

Gordon and Huber’s study ended in 2003, however, and since then election dynamics, particularly with respect to retention elections, have changed dramatically. Once sedate affairs, some retention elections are now highly politicized.<sup>68</sup> These changes warrant a re-examination of how the effects of different forms of re-election and retention in Kansas compare. Indeed, such a comparison is a ripe area for examination across the country.

### B. Capital Sentencing

“If you’re a prosecutor or judge who has to run for reelection, and you have to worry about your identity in the community—frankly, nothing says ‘tough on crime’ like the death penalty.”

– Bryan Stevenson, Executive Director of the Equal Justice Initiative<sup>69</sup>

The surveyed empirical studies conclude that electoral pressures influence judges’ decisions in capital cases as well. Researchers have found that appellate judges facing re-election are more inclined to affirm death sentences, and less inclined to dissent from orders affirming them. In Alabama, with its unique system of judicial override, trial judges are more likely to impose death over jury verdicts of life imprisonment during election years.

## 1. Appellate Decisions

Scholars have examined appellate judges' willingness to oppose death sentences both in cases in which their vote would change the outcome of the case and in cases in which it would not.

Paul Brace and Brent D. Boyea studied the effects of electoral pressure on judges in capital cases in which their vote would be determinative. Looking at supreme court data from 1995 to 1997 for all states that have the death penalty, the authors found that in states that renew judicial tenure through elections, “a direct effect exists which encourages judges to affirm lower court punishments where the public is most supportive of capital punishment.”<sup>70</sup> They concluded that while electoral pressure does not outweigh judicial ideology or case characteristics in making judicial decisions, in close cases electoral dynamics and strong public support for the death penalty “could literally mean the difference between life and death.”<sup>71</sup>

Linda Hall looked at state supreme court decisions from 1983 to 1988 in capital cases in Kentucky, Louisiana, North Carolina, and Texas — states with widespread support for the death penalty during this time frame. She found that greater electoral competition and more experience with electoral politics increases the probability that justices will uphold capital sentences.<sup>72</sup> Specifically, she determined that voting to affirm death sentences in these states' supreme courts is associated, among other factors, with a district-based electoral system, competitive races, close margins of victory, and being in the last two years of a term.<sup>73</sup> Additionally, first-term justices with “electoral experience prior to reaching the supreme court are likely to support the imposition of the death penalty” in their rulings, whereas first-term justices “lacking any type of electoral experience are likely to oppose the death penalty.”<sup>74</sup> These findings demonstrated “the potentially critical role played by individual justices' electoral experiences in the politics of judicial choice.” So, while a judge's decision in a capital case is influenced by a variety of factors, Hall concluded that re-election concern is among them.<sup>75</sup>

Hall also considered judicial decision-making in cases in which the judge's vote would not change the outcome. In another study using the same data set, she found that state supreme court justices with “liberal” views contrary to both a “conservative” electorate and court majority will vote with the court majority rather than dissent when faced with competitive re-election.<sup>76</sup> Public opinion polls in the states examined indicated that a large majority of the population supported the death penalty as a punishment for murder,<sup>77</sup> suggesting, according to Hall, that voting to overturn death sentences would leave dissenting justices vulnerable to criticism.<sup>78</sup> Specifically, Hall found that in these states, “[d]istrict-based elections, close margins of victory, approaching the end of a term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join conservative majorities in death penalty cases.”<sup>79</sup> As a result, she concluded, judicial elections have an impact on voting decisions — justices with minority viewpoints join conservative majorities in capital cases to avoid criticism from their constituents and opponents.<sup>80</sup> Her findings indicate that “justices behave much more strategically than originally believed” and that “basic self-interest” may be “an important consideration to the state supreme court justice when rendering decisions.”<sup>81</sup>

Recent data on state supreme court decisions in capital cases lends further support to these findings. In a 2015 study, Reuters found that over the past 15 years, in the 37 state supreme courts that reviewed capital cases, there was “a strong correlation between the results in those cases and the way each state



chooses its justices.”<sup>82</sup> Specifically, states with appointed justices reversed death penalty sentences at the highest rate — 26 percent. States with judicial elections had substantially lower reversal rates: 15 percent in states with appointed justices who must face retention elections and 11 percent in states where justices are elected in contested elections.<sup>83</sup>

## 2. Trial Court Sentencing

One study, conducted by the Equal Justice Initiative (EJI) — a nonprofit legal advocacy organization in Alabama — considered the impact judicial election pressures have on trial court judges’ decisions in capital cases. The study focuses on capital sentencing in Alabama because of the unique authority granted to its trial judges to override juries in capital cases.

While the ultimate decision of life or death is left to the jury in most states that permit capital punishment, three — Alabama, Delaware, and Florida — allow a judge to override the jury’s decision. Of these, Alabama’s practice stands out for three reasons: (1) in no other state do judges exercise the right to override regularly; (2) Alabama judges can override jury verdicts for any reason; and (3) unlike the two other states, Alabama selects its judges through partisan elections.<sup>84</sup> As of 2013, Alabama judges have imposed death sentences contrary to the jury’s verdict in 95 cases.<sup>85</sup>

The United States Supreme Court upheld this system in *Harris v. Alabama* (1995)<sup>86</sup> and declined to reconsider it in *Woodward v. Alabama* (2013),<sup>87</sup> over the forceful dissent of Justice Sonia Sotomayor, joined in part by Justice Stephen Breyer. Why, Justice Sotomayor asked, do Alabama judges have a particular appetite for death sentences when a jury voted for a sentence of life imprisonment? “The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.”<sup>88</sup>

EJI provided the Court much of the empirical evidence cited in *Woodward*. Bryan Stevenson, EJI’s executive director, found that in “a mini-multiple regression analysis of how the death penalty is applied and how override is applied, there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides take place.”<sup>89</sup> EJI’s research confirmed that there is a higher proportion of death sentences imposed by override in Alabama during election years.<sup>90</sup> The report asserts that even some Alabama judges have acknowledged the impact electoral pressures can have on their decisions in capital cases. For example, C. Tommy Nail, an Alabama criminal court judge who has exercised judicial override to convert a life sentence to a capital one, said in 2011 that while voter reaction is not a conscious part of his sentencing in capital cases, it has to “have some impact, especially in high-profile cases.”<sup>91</sup>

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*Even some Alabama judges have acknowledged the impact electoral pressures can have on their decisions in capital cases.*

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### III. UNANSWERED QUESTIONS

A large — and growing — body of empirical studies finds that re-election and retention pressures systematically disadvantage criminal defendants. Yet many questions remain unanswered.

Much of the empirical research considering the impact of judicial selection dynamics on criminal justice outcomes has focused on elections. Further study is needed to understand the incentive structures created by appointive systems, particularly those that provide for reappointment. The few studies that have considered these dynamics suggest there may be reasons for concern.

For example, in one such study, Joanna Shepherd examined how the political preferences of those determining whether to extend a judge's tenure impact judicial decision-making. Just as the public's preferences may impact case outcomes within electoral systems, Shepherd found that the preferences of governors can have a similar effect in states where they play a role in reappointing judges.<sup>92</sup> Indeed, Shepherd determined that as governorships change hands, so too do judicial rulings; when a Republican governor replaces a Democratic governor, judges' rulings in a variety of cases, including criminal cases, shift.<sup>93</sup> Shepherd's findings suggest that reselection pressures are a concern even outside the election context, and highlight the need for further inquiry into the dynamics of appointive systems.

Several other areas also remain ripe for further research, both quantitative and qualitative. As discussed previously, additional comparative research into the pressures created by contested elections as opposed to retention elections would be valuable, particularly given the trend toward increasingly politicized retention elections. Research comparing partisan and nonpartisan contested races would be valuable as well. In one recent study of death penalty decisions in states' highest courts from 1980 to 2006, Brandice Canes-Wrone, Tom Clark, and Jason Kelly found that judges are "significantly more responsive to majority opinion in nonpartisan than partisan election systems." They determined that "this result derives from judicial incentives, not simply the differences in the types of judges selected between the systems."<sup>94</sup>

Likewise, since existing studies focus on the impact of judges' re-election and retention on criminal justice outcomes, it remains unclear whether being elected for a single term, absent re-election pressures, also impacts judicial decision-making in criminal cases.

Another unanswered question is how pathways to the bench may favor candidates from certain professional backgrounds in a way that impacts outcomes in criminal cases. The fact that some TV ads highlight candidates' experiences representing criminal defendants as evidence that they are "soft on crime" demonstrates one obstacle for candidates from defender, as opposed to prosecutorial, backgrounds.

Finally, there are many other aspects of judicial decision-making not addressed by these studies, such as the scope of judges' deference to prosecutors, many of whom are also elected.

## CONCLUSION

Judges make decisions that affect the liberty, and even lives, of the criminal defendants who come before them. State court judges, most of whom are elected, make most of these decisions. Judicial elections are now expensive and politicized, with candidates' criminal justice records as a centerpiece. Television ads extolling some candidates as "tough on crime" and portraying others as "soft on crime" are increasingly prominent. These appeals to voters have an effect on judicial decision-making. Empirical studies across states, court level, and method of election find that proximity to re-election makes judges more punitive — more likely to impose longer sentences, affirm death sentences, and even override life sentences to impose death. Without reform, terms of incarceration and executions will continue to be determined, in part, by the decision-maker's proximity to re-election.

## ENDNOTES

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- 2 ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 2 (2010), *available at* [http://www.brennancenter.org/publication/buying-justice-impact-citizens-united-judicial-elections#\\_edn9](http://www.brennancenter.org/publication/buying-justice-impact-citizens-united-judicial-elections#_edn9). This figure includes partisan contested elections, nonpartisan contested elections, and retention elections.
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- 8 Huber & Gordon, *Accountability and Coercion*, *supra* note 6, at 258; Berdejó & Yuchtman, *supra* note 6, at 748, 754.
- 9 Brace & Boyea, *supra* note 6, at 370.
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- 12 DEBORAH GOLDBERG, CRAIG HOLMAN & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS OR HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 15 (2002), *available at* <http://www.brennancenter.org/sites/default/files/publications/JASMoneyReport2000.pdf> (providing television spending total for 2000); GREYTAK, BANNON, FALCE & CASEY, *supra* note 5, at 55 (providing television spending totals for 2001-14).
- 13 BANNON, VELASCO, CASEY & REAGAN, *supra* note 4, at 1.
- 14 In 2011-12, interest groups spent \$15.4 million in independent spending to state supreme court races, accounting for more than 27% of total spending in those races. This total for independent interest group spending, reflecting spending in the first full judicial campaign cycle following the United States Supreme Court decision in *Citizens United v. FEC*, was more than 50% higher than the previous record of independent spending by interest groups in 2003-04. The spending of these outside groups combined with that of political parties totaled more than 40% of all spending. *See id.* at 3-5.
- 15 *See* GREYTAK, BANNON, FALCE & CASEY, *supra* note 5, at 54, 56.
- 16 *Id.* at 2-3.
- 17 *Id.* at 3.
- 18 Brennan Ctr. For Justice, Justice at Stake & Nat'l Inst. on Money in State Politics, *TV Ad Archive, State Supreme Court Elections*, NEW POLITICS OF JUDICIAL ELECTIONS, [http://newpoliticsreport.org/spots/?qmt%5Belection\\_cycle%5D%5B%5D=22&qmt%5Btopic%5D%5B%5D=31&qmt%5Btone%5D%5B%5D=40&qmt%5Btone%5D%5B%5D=33](http://newpoliticsreport.org/spots/?qmt%5Belection_cycle%5D%5B%5D=22&qmt%5Btopic%5D%5B%5D=31&qmt%5Btone%5D%5B%5D=40&qmt%5Btone%5D%5B%5D=33) (last visited Nov. 19, 2015) (filtering advertisements from 2013-14 by those coded as criminal justice themed and containing “attack” or “contrast” tones). In total there were only eight negative criminal justice themed ads. These ads constitute 82 percent of ad spots attacking candidates because of the frequency with which they aired.
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- 21 *Worst*, CAMPAIGN FOR 2016 (Oct. 28, 2014), <http://newpoliticsreport.org/spot/campaign-for-2016-worst-2/>.
- 22 GREYTAK, BANNON, FALCE & CASEY, *supra* note 5, at 39-40.
- 23 *See* BANNON, VELASCO, CASEY & REAGAN, *supra* note 4, at 25, 40.
- 24 *Sentenced to Death*, WILL T. SCOTT, SUPREME COURT JUSTICE (Oct. 26, 2012), <http://newpoliticsreport.org/spot/scott-sentenced-to-death-2/>.
- 25 BANNON, VELASCO, CASEY & REAGAN, *supra* note 4, at 40.
- 26 *Id.* at 10.
- 27 *Hardly Tough on Crime*, MICHIGAN REPUBLICAN PARTY (Oct. 19, 2012), <http://newpoliticsreport.org/spot/mirp-hardly-tough-on-crime-2/>.
- 28 *See* BANNON, VELASCO, CASEY & REAGAN, *supra* note 4, at 7.
- 29 *McCormack Freed Terrorist*, JUDICIAL CRISIS NETWORK (Oct. 30, 2012), <http://newpoliticsreport.org/spot/judicial-crisis-mccormack-freed-terrorist-2/>.

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- 31 JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 32 (Charles Hall ed., 2010), *available at* <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>.
- 32 *Shadowy Special Interests*, GABLEMAN FOR SUPREME COURT (Mar. 14, 2008), [http://www.brennancenter.org/sites/default/files/legacy/video/Judicial%20Ads%2008/WI/boards/03-14-08%20STSUPCT\\_WI\\_GABLEMAN\\_SHADOWY\\_SPECIAL\\_INTERESTS.pdf](http://www.brennancenter.org/sites/default/files/legacy/video/Judicial%20Ads%2008/WI/boards/03-14-08%20STSUPCT_WI_GABLEMAN_SHADOWY_SPECIAL_INTERESTS.pdf).
- 33 *See* SAMPLE, SKAGGS, BLITZER & CASEY, *supra* note 31, at 32.
- 34 BANNON, VELASCO, CASEY & REAGAN, *supra* note 4, at 32.
- 35 Brennan Ctr. For Justice, Justice at Stake & Nat'l Inst. on Money in State Politics, *TV Ad Archive, State Supreme Court Elections*, NEW POLITICS OF JUDICIAL ELECTIONS, [http://newpoliticsreport.org/spots/?qmt%5Belection\\_cycle%5D%5B%5D=22&qmt%5Btopic%5D%5B%5D=31&qmt%5Btone%5D%5B%5D=26](http://newpoliticsreport.org/spots/?qmt%5Belection_cycle%5D%5B%5D=22&qmt%5Btopic%5D%5B%5D=31&qmt%5Btone%5D%5B%5D=26) (last visited Nov. 19, 2015) (filtering advertisements from 2013-14 by those coded as containing criminal justice themes and having a promote tone).
- 36 *Tough on Predators*, LAW ENFORCEMENT ALLIANCE OF AM. (May 9, 2014), <http://newpoliticsreport.org/spot/lea-tough-on-predators-2/>.
- 37 EQUAL JUSTICE INITIATIVE, *supra* note 6, at 4.
- 38 *Id.* at 4, 14; *See also Methods of Judicial Selection: Alabama*, NAT'L. CTR. FOR STATE COURTS, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=AL](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=AL) (last visited Nov. 19, 2015).
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- 46 *Id.* at 248.
- 47 *Id.* at 251.

48 PA. CONST. art. 5, § 15(a).

49 Huber & Gordon, *Accountability and Coercion*, *supra* note 6, at 261.

50 *Id.* at 258.

51 Berdejó & Yuchtman, *supra* note 6, at 741.

52 WASH. CONST. art. 4, § 5.

53 Berdejó & Yuchtman, *supra* note 6, at 754 (“We estimate that the difference in sentence length between the beginning and the end of a judge’s political cycle is around 10 percent of the average sentence for serious crimes on the person.”).

54 *Id.* at 745.

55 *Id.* at 742.

56 SHEPHERD & KANG, *supra* note 6.

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58 *Id.* at 15.

59 *Id.* at 18-19.

60 *Id.* at 15.

61 *Id.* at 20.

62 *Id.* at 21.

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64 Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI. 107, 108 (2007) (“Employing data on felony convictions in Kansas and several econometric approaches, we demonstrate that judges in partisan competitive systems sentence significantly more punitively than those in retention systems.”).

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67 *Id.* at 133.

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- 74 *Id.* at 496.
- 75 *Id.* at 496-97.
- 76 Hall, *Electoral Politics and Strategic Voting*, *supra* note 6, at 428, 443.
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