Impartial Judges? Race, Institutional Context, and U.S. State Supreme Courts

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ABSTRACT

We address a fundamental question in judicial politics: other factors being equal, do African-American judges behave differently than white judges? Many presume that white judges differ from their minority counterparts in terms of sentencing, deliberation, and propensity to overturn decisions. However, to date, little empirical evidence exists to suggest systematic differences in behavior between these judges. Here, we utilize the newly created judge-level U.S. State Supreme Court Database to assess whether judicial decisionmaking is affected by the race of the judge. Looking at all criminal cases decided by U.S. state supreme court judges from 1995 to 1998, we find evidence of differences between white and non-white judges, but only in states lacking an intermediate appellate court. This finding suggests the effects of race on judicial decisionmaking are conditioned by the institutional structure of the court system.

THE STUDY OF MINORITY GROUP representation is an enduring area of inquiry in political science. Ever since Pitkin (1967), political scientists have focused on two types of representation: descriptive and substantive. A political institution is descriptively representative when, for example, the percentages of African Americans, Hispanics, Asians, and Native Americans in the institution approximate the percentages of minorities in the community the institution serves. In contrast, substantive representation deals with the degree to which the institution represents the interests of the constituents or the community it governs, regardless of the characteristics of the representatives (Pitkin 1967).

The question of whether race affects judicial decisionmaking has become an important topic of inquiry in recent years as more and more African-American judges have ascended to the bench. Since 1853, when the first African-American judge was appointed to Boston's magistrate court, relatively

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few racial minority judges made it to higher levels of the court system. The past 20 years have witnessed a large and growing number of minorities entering legal careers, although the number of whites at every level of the legal field still far outweighs the number of racial minorities. Bonneau (2001) reports that in 1980–81, only 0.6 percent of the judges on state supreme courts were not white; however, this number jumped to 8.7 percent in 1994 and 11.6 percent in 2000. Moreover, Hurwitz and Lanier (2001) find that in 1999, 7.3 percent of judges on state appellate courts were nonwhite and 11.4 percent of federal courts of appeals judges were minorities.

While neither the legislative nor the executive branches can be said to be descriptively representative, many empirical studies have found evidence of substantive representation of minorities in these two branches. The judiciary is unique in that few studies exist on substantive representation and those that have been conducted are inconsistent; some studies find evidence of representation while others find little to no evidence. In this article, we seek to better explain how substantive representation manifests itself on courts by hypothesizing that descriptive representation is translated into substantive representation only when the political and institutional context is favorable.

Since the link between descriptive and substantive representation relies on the assumption that minority and non-minority actors behave differently when faced with the same set of factors, we analyze whether there are differences in the way white and African-American judges decide cases.[1] If race does not affect judicial decisionmaking, then we suggest that increasing the number of African-Americans on the bench would have no effect on judicial outcomes. Thus, we would feel confident concluding that while the judiciary is not broadly representative of racial minorities, such lack of representation is not affecting the outcomes of cases before the court.[2] At the same time, if there are no differences between white and African-American judges, then it also means that there is no substantive representation on the bench. After all, if African-American judges are deciding cases the same way as white judges, then neither group is representing the interests of minorities. In sum, the concept of substantive representation implies that judges of different races will decide cases *differently*.[3]

REPRESENTATION IN POLITICAL INSTITUTIONS

The degree of representation in American political institutions has been closely examined by scholars, but with differing results. The link between descriptive and substantive representation relies on the expectation that

minority and non-minority actors behave differently when faced with the same set of facts. Specifically, minority actors are expected to behave in such a way that is sympathetic to their own minority group. Scholars have consistently found that minorities behave differently than their non-minority counterparts in both the bureaucratic and legislative arenas (e.g., Keiser et al. 2000; Nicholson-Crotty and Meier 2002; Preuhs 2006, 2007; Wilkins 2007). However, findings are rather fewer and more varied in the courts. Courts appear to be the outlier in that some studies have found differences between white and African-American judges (Uhlman 1978; Gottschall 1983; Welch, Combs, and Gruhl 1988; Steffensmeier and Britt 2001), while others have found no such difference (Spohn 1990a; Spohn and Welch 1986; Walker and Barrow 1985; Farhang and Wawro 2004).[4]

What makes the judiciary different from legislatures and bureaucracy in terms of representation? We seek to answer this question in this article by analyzing judge votes on a variety of U.S. state supreme courts. Here, we utilize the newly created judge-level State Supreme Court Database (Bonneau, Brace, and Arceneaux 2006) to assess whether judicial decisionmaking is affected by race. Looking at nonunanimous criminal cases decided by all state supreme court judges from 1995 to 1998, we find little evidence of differences between white and African-American judges in terms of propensity to overturn convictions and sentences. Nonetheless, we do find evidence of racial differences in states without intermediate appellate courts. We argue that the institutional context of courts plays a key factor in whether or not race matters. Race affects judicial decisionmaking, but only under certain institutional arrangements. We suggest the primary reason for the inconclusive results thus far has to do with the failure to examine the *conditions* under which judges make decisions.

REPRESENTATION ON STATE SUPREME COURTS

To examine descriptive representation on courts, we can compare the percentage of minorities on the bench to the population of the state as a whole or to the population of lawyers in the state, since being an attorney is a de facto qualification for becoming a state supreme court judge.[5] By either measure, state supreme courts cannot be characterized as descriptively representative because the percentage of minority judges is far from equaling the African-American population or number of attorneys. "[W]hile women and minorities have made notable inroads into the legal profession, including the judiciary, they must continue to be considered political minorities because their numbers on the bench lag far behind those of white males in both

absolute and relative terms" (Hurwitz and Lanier 2003, 330). A quick look at the numbers makes this clear. From 1985 to 1999, the rate of non-white males (females and racial minorities) on state appellate courts doubled from about 13 percent to about 27 percent (Hurwitz and Lanier 2001). However, the increase in judges from racial minorities was less than 1 percent. The news was slightly better for women; in 1985, the rate was less than 7 percent and it was more than 21 percent in 1999. These numbers lead Hurwitz and Lanier (2001, 92) to conclude: "[W]hile the presence of political minorities in the judiciary has become somewhat more representative over time, most appellate judges in the United States are still white males."

Examining substantive representation requires us to look at the actual decisions political actors make. For example, the African-American community would be "represented" if the judiciary made decisions consistent with the interests of the African-American community, regardless of the composition of the judiciary. Advocates for diversification of the judiciary have suggested that this will strengthen the judiciary's legitimacy as a democratic and responsive institution (Walker and Barrow 1985; Tobias 1990; Smith 1994). That is, racial minorities and women on the bench might be more concerned with—and responsive to—questions of racial and gender discrimination in the judicial process, issues that strike at the heart of the fairness of the judicial system. Ultimately, these judges might render decisions more favorable to plaintiffs in such cases given that women and minority judges are more likely than their white counterparts to have personally encountered discrimination at some point in their lives (Tobias 1990; Beiner 1999; Ifill 2000).

As previously mentioned, the link between descriptive and substantive representation relies on the expectation that minority and non-minority actors behave differently when faced with the same set of facts. Specifically, minority actors are expected to behave in such a way that is sympathetic to their own minority group. It has long been assumed that white judges differ from their minority counterparts in terms of sentencing, deliberation, and propensity to overturn decisions. However, to date, evidence on whether there are systematic differences in behavior between these two groups of judges has been largely elusive.

There are powerful theoretical reasons for why race should affect judicial decisionmaking. Given the history of African Americans in the United States, African-American judges might be more sympathetic to less fortunate people (Goldman 1979; Gottschall 1983; Smith 1983). Since most criminal defendants are either poor or racial minorities (Smith 1983; Mitchell 1980), it is not hard to imagine that African-American judges would be more sympathetic to defendants because of their own negative experiences in society. That

being said, there are also good reasons to think race will not affect judicial decisionmaking. First, African-American judges tend to be more Democratic (e.g., Goldman 1997) and hence more liberal. In our data, 58.3 percent of the votes by white judges in nonunanimous cases were cast by Democrats; for African-American judges, it was 96.0 percent. Thus, after controlling for ideology, race might not be a significant independent determinant of judicial behavior. Second, the vast majority of judges do not serve a life term; they are dependent on either the electorate or elites (the governor or legislature) for reappointment. Consequently, these judges have to be attuned to the preferences of external actors (either the governor, the legislature, or the electorate), and as indicated by both scholarly studies (Roberts and Stalans 1997) and campaign rhetoric, none of these external actors favor positions that are sympathetic to criminals.

This raises a fundamental question about judicial behavior and the impartial administration of justice: when weighing the facts of the case and interpreting the law, does the race of the judge affect his/her decision? This question is particularly relevant for state supreme court judges, because these judges are (essentially) the final arbiters on most matters, including criminal convictions, sentence length, and even whether a convicted criminal should be executed.

TRANSLATING DESCRIPTIVE INTO SUBSTANTIVE REPRESENTATION ON STATE SUPREME COURTS

To date, empirical judicial behavior scholarship has come up short of a conclusive answer on whether racial minority judges behave differently than their white counterparts. Intuitively, given that the United States has a long history of racial disparity, one would think that it is likely that the race of judges and their life experiences shaped by that race would weigh heavily on their decisions and policymaking. As we noted above, some studies have found differences between white and African-American judges (Uhlman 1978; Gottschall 1983; Welch, Combs, and Gruhl 1988; Steffensmeier and Britt 2001), while others have found no such difference (Spohn 1990a; Spohn and Welch 1986; Walker and Barrow 1985; Farhang and Wawro 2004). Many of the differences in the literature are due to the level of the court examined and/or the limited nature of the data.

In one of the earliest studies on the effects of race on judicial behavior, Uhlman (1978) found that while African-American trial judges sentenced defendants somewhat more harshly than white judges, race accounted for very few of the differences in individual decisionmaking. He theorized that case

facts had more importance on judicial behavior than group differences. The conformity of African-American judges could be due to the internal and external pressures of compliance with their colleagues on the bench. In contrast to Uhlman, Welch, Combs, and Gruhl (1988) found that African-American trial judges are more even-handed in their treatment of defendants than white judges are. Moreover, having more African-American judges increases the equality of treatment. Thus, Welch, Combs, and Gruhl find evidence of substantive representation. Most recently, Steffensmeier and Britt (2001) provide mixed evidence on the effects of race and judicial behavior at the trial court level: they find that African-American judges are slightly more punitive than white judges are when convicting defendants but ultimately exhibit similar patterns as their white counterparts when determining sentence length. Further, they find that race is a significant factor when determining criminal convictions because life experiences and "courtroom organizational pressures facing African-American judges differ somewhat from those of white judges" (762), ultimately influencing their judicial decisonmaking.[6]

Despite some areas of disagreement, all of the studies discussed above conclude that there are differences between white and nonwhite judges at the trial court level. In stark contrast to these studies, Spohn (1990a) and Spohn and Welch (1986) conclude that race is not a significant predictor of judicial behavior, in terms of either conviction or sentencing. This result is confirmed by Walker and Barrow (1985), who examine the effects of race on judicial decisionmaking of the Carter appointees to the Federal District Courts. They utilized a matched-pair strategy of matching each African-American Carter appointee with a corresponding white appointee and compared the outcomes of their separate decisions in personal liberties, criminal rights, federal economic regulation, and women's and minority issue cases. All results produced insignificant differences between white and African-American judges.

While most of the studies have been conducted at the trial court level, evidence at the appellate level is similarly mixed. Gottschall (1983) examined the Federal Courts of Appeals and found a dramatic difference between African-American and white judges in criminal and prisoner rights cases: African-American judges voted to support these rights to a significantly greater extent than white judges. In contrast, Farhang and Wawro (2004) looked at discrimination cases on the Federal Courts of Appeals in 1998 and 1999 and found that for every type of discrimination case, the race-of-judge effects failed to reach statistical significance. Thus, the authors conclude that on the Federal Courts of Appeals, racial minority judges do not hold views different from white judges. Just as at the trial level, the evidence for racial differences in judicial behavior on the Federal Courts of Appeals is mixed.

Since the translation of descriptive into substantive representation relies on the expectation that there are differences between white and African-American judges, we need to dissect why past studies of representation on courts come to such divergent and inconsistent results. What could explain the lack of consensus in the literature? First, most studies are limited to a handful of states or cities. For example, Welch, Combs, and Gruhl (1988) look at trial courts in a northeastern "Metro City," while Steffensmeier and Britt (2001) examine four counties in Pennsylvania. It is possible that the selection of states and cities affects the results; there could be differences in judicial behavior in some areas of the country or in some cities, but not in others. Second, the time period covered by each study varies widely as well. Welch, Combs, and Gruhl (1988) look at decisions between 1968 and 1979, while Steffensmeier and Britt (2001) examine decisions between 1991 and 1994. The same is true for the differences between Gottschall (1983) and Farhang and Wawro (2004) at the appellate level. It is possible that while race affected judicial decisions in the past, this is no longer the case, either because the ideological distribution of white and nonwhite judges is identical, the nature of the cases has changed, or some other reason.

While we cannot rule out those potential explanations, we argue that the lack of consensus may come from misspecification of the empirical models. Rather than simply searching for whether Judge A differs from Judge B, we should be looking for the institutional and political conditions under which the race of the judge might allow Judge A to differ from Judge B. Scholars have largely ignored the question of how and under what circumstances racial presence is translated into substantive representation on courts. Substantive representation does not necessarily manifest itself at all times, but rather when the political and institutional context is favorable. Here, we specify *when* and *how* representation will manifest itself, utilizing the framework set up by Keiser et al. (2002) in the bureaucratic setting. Specifically, we contend that descriptive representation is translated to substantive representation when the court has discretion over their docket and thus an intermediate appellate court is present, when the court is faced with a racialized issue (here, we deal with criminal cases), and when judges are elected rather than appointed.

Recently, the representative bureaucracy literature has moved in the direction of analyzing the role that the institutional and political context plays in the translation of descriptive representation into substantive representation (Keiser et al. 2002; Nicholson-Crotty and Meier 2002; Wilkins 2007). Beginning with Keiser et al. (2002), bureaucracy scholars have taken a neo-institutional perspective on representation, arguing that minority character-

istics (sex specifically) result in increased representation only when certain institutional and political circumstances are present. Specifically, Keiser et al. (2002) argue that two necessary (but not sufficient) conditions must exist for sex to facilitate the translation of passive into active representation. First, the bureaucrats must have discretion over the policy area. Second, the policy issue must be a gendered one. For instance, child support and public education have been identified as gendered policy areas (Keiser et al. 2002; Wilkins and Keiser 2006). Keiser et al.'s (2002) theoretical structure for researching representative links is useful for the exploration of the effects of minority presence in other branches of government besides the bureaucracy.

In this article, we use state supreme court judge votes as the unit of analysis because we can make useful distinctions between whether the court has discretion over its docket and whether judges are elected or appointed—two key institutional contexts that might facilitate the translation of descriptive representation into substantive representation. Regarding docket control, in some state courts have almost complete control over the docket; in others, they have very little control. That is, while the state supreme courts (SSCs) in some states are like the United States Circuit Courts of Appeals (USCCA), others are more like the United States Supreme Court (USSC). This is important because the docket of most USCCAs consists of "routine" cases. Since there is a right to an appeal, USCCAs (and those state supreme courts without docket control) must rule on *all* cases, including those that have little or no merit. In contrast, having discretionary jurisdiction allows some SSCs to choose to hear cases that are "tough" or more ambiguous in terms of the proper outcome. The more routine the case, the less discretion judges have; the more ambiguous the case, the more discretion judges have (e.g., Kalven and Zeisel 1966). Ambiguity in the law means that judges' preferences can more easily enter into the decisionmaking process.[7] At the same time, the removal of routine cases can lead to ideology or other factors dwarfing the effects of race in states that have intermediate appellate courts. Thus, if African-American judges are more sympathetic to defendants, we should see racial differences in states without intermediate appellate courts since these courts will deal with more cases that allege trial court error, cases that have not been filtered out by intermediate appellate courts. Other factors being equal, African-American judges should be more sympathetic to allegations of error. Consequently, the presence of an intermediate appellate court could be an important institutional structure that conditions the effects of race on judicial behavior.

Regarding method of selection, in some states judges are elected while in others they are appointed. Moreover, the vast majority of judges on SSCs do not serve life terms. Rather, they must initially be either elected by the

electorate or appointed by the executive or legislature and then continue to be elected or appointed to retain their jobs. Thus, they can be held accountable for their decisions while on the bench. This relative lack of judicial independence on SSCs is also likely to affect the behavior of judges. Moreover, one cannot ascertain this simply by looking at one state or at the federal system. In sum, we should be careful about simply extending the prior (mixed) findings of the effects of race on judicial decisionmaking to judges on SSCs and rather aim for identifying specific institutional and political contexts where descriptive representation is likely to translate into substantive representation.

These are two major institutional differences among courts that should affect the nature of judicial decisionmaking (Brace and Hall 1995, 1997; Arceneaux, Bonneau, and Brace 2008). Thus, any study that seeks to evaluate judicial decisionmaking must explicitly take into account the context under which that decisionmaking occurs.

DATA AND HYPOTHESES

In this article, we use the judge-level state supreme court database (Bonneau, Brace, and Arceneaux 2006). This dataset contains the votes in all cases of all judges serving on state courts of last resort from 1995 to 1998.[8] Thus, our unit of analysis is the judge-vote in each case. Consistent with past research, we limit our focus to criminal cases because of the racialized nature of the issue (e.g., Uhlman 1978; Welch, Combs, and Gruhl 1988; Steffensmeier and Britt 2001; Spohn 1990a, 1990b; Spohn and Welch 1986; Gottschall 1983).[9] Specifically, we examine all instances where an individual convicted of a crime (or a current prisoner) appeals an adverse decision to the state supreme court and the decision of the court is not unanimous.[10] We choose to focus on nonunanimous cases because these cases provide legitimate disagreement about the proper outcome in the case. This limit leaves us over 9,000 judge-votes in our analysis.

Estimation Technique

Since our dependent variables are dichotomous, we use probit to estimate our basic models of the effects of the independent variables discussed below on the likelihood of a judge overturning a conviction or a sentence. In all models, we use robust variance estimators clustered on judge, which are robust to assumptions about within-group (i.e., judge) correlation.

In addition to simply testing if race affects decisionmaking, we also examine whether or not race matters in different institutional contexts. Specifically,

as discussed above, the presence of an intermediate appellate court has been found to affect decisionmaking in fundamental ways (Arceneaux, Bonneau, and Brace 2008). Consequently, we use seemingly unrelated probit to test for the effects of race in different institutional contexts. This allows us to test if the coefficients are statistically different from each other across the two partitioned models (IAC vs. no IAC).[11] Table 1 suggests that differences in the likelihood of overturning a conviction (but not necessarily a sentence) might exist in states without intermediate appellate courts compared to states with such courts. Indeed, fully one-third of all votes by judges in states without intermediate appellate courts were votes to overturn a conviction compared to one-fourth of those in intermediate appellate court states.

Dependent Variables

We examine two dependent variables in this analysis. The first is whether or not a judge votes to overturn a criminal conviction (*conviction*). Second, we examine whether a judge votes to overturn a criminal sentence (*sentence*). In both cases, a vote to overturn is a vote to grant relief to an individual convicted of a crime (and can be termed a liberal decision). That being said, overturning a conviction is a more liberal form of relief than simply reducing a sentence. Having a conviction overturned could allow the accused to go free, while overturning a sentence often returns the case to a lower court for resentencing. While overturning a sentence is significant, in general it is considered a less liberal decision by prosecutors and lower court judges. That is, prosecutors would much prefer to have a sentence overturned than a conviction set aside. Thus, we estimate separate models for each type of behavior.

Table 1. Propensity to Overturn Convictions and Sentences by Presence of IAC, Nonunanimous Decisions

	Votes to Overturn Conviction	Votes to Overturn Sentence
IAC	24.6% (2,140 of 8,683)	28.1% (2,403 of 8,549)
No IAC	33.7% (378 of 1,122)	27.9% (274 of 981)
χ^2 Test of Significance	Pr = 0.000	Pr = 0.907

Table 2. Propensity to Overturn Convictions and Sentences by Race, Nonunanimous Decisions

Race of Judge	Votes to Overturn Conviction	Votes to Overturn Sentence
White	25.8% (2,197 of 8,509)	28.1% (2,322 of 8,256)
Black	22.3% (203 of 911)	26.8% (241 of 899)
χ^2 Test of Significance	Pr = 0.020	Pr = 0.403

In Table 2, we show the propensity of state supreme court judges to overturn convictions or sentences, based solely on race. As Table 2 shows, surprisingly, African-American judges are statistically less likely to overturn a conviction than white judges are, but not a sentence. In over 22 percent of the votes, African-American judges vote to overturn a conviction, compared to almost 26 percent for white judges. Looking at sentences, African-American judges overturn them 26.8 percent of the time, while white judges do so 28.1 percent of the time (this difference is not statistically significant). A first look at the data suggests some differences based on race in the propensity of judges to overturn convictions, but not sentences.

Independent Variables

The literature on representation and judicial behavior suggests several factors should affect the likelihood of a judge overturning a conviction or sentence. For convenience, we detail these variables and their measurement in Table 3.[12]

Judge Characteristics. Our primary independent variable is the race of the judge (*white*). Given that we are looking at a highly racialized area (crime), we expect that African-American judges will be more likely to overturn a conviction and sentence than white judges will. However, it is important to note that Table 2 indicates that African-American judges may be less likely to do so.

Another factor that has been presumed to affect political decisionmaking is gender. Leader (1977) determined that women were more liberal than men after analyzing interest group ratings of members of Congress. Welch (1985) found that women were more likely to cast liberal votes in the House of Representatives, but that the difference decreased over time. Nonetheless, analyses in judicial behavior have failed to provide much consensus on whether female judges differ from male judges. While some studies have found slight differences between male and female judges (Gottschall 1983; Davis 1986; Allen and Wall 1987), others have found no significant differences (Walker and Barrow 1985). Most recently, Farhang and Wawro (2004) analyzed three-judge panels of the Court of Appeals and found that, while the presence of a racial minority judge on a panel did not influence the other members, the presence of a female judge induced the other judges to become more liberal. That being said, Steffensmeier and Hebert (1999) argue that female judges sentence more harshly than male judges, other factors being equal (see also Spohn 1990b). Thus, we include a variable for the gender of the judge (*female*) and hypothesize that female judges are less likely to overturn convictions and sentences.

Table 3. Variables for a Model of Criminal Convictions/Sentencing

Variable	Variable Description
Dependent Variables	
Conviction	1 if a judge voted to overturn a criminal conviction 0 otherwise
Sentence	1 if a judge voted to overturn a criminal sentence 0 otherwise
Judge Characteristics	
White	1 if the judge is white 0 otherwise
Female	1 if the judge is female 0 otherwise
Ideology	Brace, Langer, and Hall (2000) measure of justice ideology, ranging from 1 (conservative) to 100 (liberal)
Prosecutor	1 if the judge was formerly a prosecutor 0 otherwise
Case Facts	
Violent	1 if the person is convicted of assault, manslaughter, murder, kidnapping, or rape 0 otherwise
Drugs	1 if the case involved drug offenses 0 otherwise
Death penalty	1 if the court is reviewing the imposition of the death penalty by a lower court 0 otherwise
Public defender	1 if the person was represented by a public defender 0 otherwise
State Institutional Arrangements	
Election	1 if the judge is subject to reelection (partisan or nonpartisan) 0 otherwise
No IAC	1 if the state does not have an intermediate appellate court 0 otherwise

One of the dominant findings in judicial politics is that a judge's ideology affects his/her judicial decisions (e.g., Segal and Spaeth 2002). This is especially the case for judges who sit on courts of last resort, since they cannot be overruled by higher courts. Although state supreme courts can technically be overturned by the U.S. Supreme Court, the fact that the U.S. Supreme Court hears so few cases and state supreme courts hear so many means that state supreme courts effectively serve as the end of the judicial process for all but the rarest of cases. Thus, ideology should matter for state supreme court judges just as it does for justices on the U.S. Supreme Court. We measure ideology using Brace, Langer, and Hall's (2000) PAJID scores.

The variable is a party-adjusted ideology score for each judge created by comparing states based on the party affiliations of their elites and the ideological disposition of the electorate at the time the judge was elected to the high bench. Brace, Langer, and Hall (2000, 408) compared this measure to other existing measures and found PAJID to be a "valid, stable measure of preferences in state supreme courts that is better than partisan affiliation." The scores for each judge range from 1 to 100, where a score of 1 indicates strong conservatism and a score of 100 indicates strong liberalism. We expect that the more liberal a judge (*ideology*), the more likely the judge is to overturn a conviction or sentence.

Finally, we expect that a judge's prior prosecutorial experience will also have an effect on the likelihood of reversal. We expect that judges who have served as prosecutors (*prosecutor*) will be more likely to uphold a lower court conviction or sentence since these judges might be more likely to be tough on crime and more sympathetic to the state's position in criminal cases (Tate 1981; Hall and Brace 1994). In fact, Hall (1995) found that state supreme court justices who have served as prosecutors have a statistically discernible tendency to support capital punishment.

State Institutional Arrangements. Central to our purpose in this paper are the state-level institutional variations that occur from state to state. As we have discussed above, scholars have found that the institutional environment in which judges act can affect behavior (Hall 1992; Brace and Hall 1995, 1997).[13]

The method by which a judge keeps his or her job should affect his or her behavior on the bench. Scholars have documented that judges alter their behavior in the presence of elections, regardless of the type of election the judge must face (Hall 1992; Brace and Hall 1995, 1997). Specifically, judges make fewer liberal decisions in criminal cases if they must win reelection from the voters. The electorate rewards judges who are tough on crime and penalizes those who are perceived to be pro-criminal (Hall 2001). We expect that judges who must face voters to keep their jobs (*election*) will be less likely to overturn criminal convictions and sentences.

Additionally, one of the major institutional differences between state courts is the presence of an intermediate appellate court (IAC). States that have intermediate appellate courts primarily have discretionary jurisdiction; that is, they get to decide what cases they hear. But in states without such courts, the state supreme court is the only appellate court to hear a case. Not having an IAC means that the state supreme court has to hear many cases that would ordinarily be heard (and decided) by the IAC. Thus, any

errors made by the trial court have to be overturned by the state supreme court when, in states with IACs, this is a job usually performed by the IAC. We include a variable for whether the state does not have an intermediate appellate court (*no IAC*) and expect a higher likelihood of reversing a conviction or sentence in states without such courts, as in these states the courts of last resort must serve a more prominent error-correction role. We also estimate separate models for states that have IACs and those that do not, as we discussed earlier.

Case Facts. In order to properly specify our models, we also must take into account characteristics of the cases as well as characteristics of the judge and institutional arrangements (e.g., Segal 1984). Some cases are more (or less) likely to be overturned simply because of the nature of the case. In terms of criminal cases, one of the key distinctions among types of crimes is whether they involved physical violence. In general, violent crimes are more severe than nonviolent crimes. Thus, we distinguish violent offenses (manslaughter, assault, rape, murder, and kidnapping) from other offenses. Simply put, we expect that crimes involving physical violence (*violent*) will be less likely to be overturned than other crimes, other factors being equal.

Another relevant case fact that might affect judicial behavior is whether the case involved drugs (either use or possession). These cases are more likely to involve issues of illegal searches (and seizures) and thus might be more likely to result in the overturning of a conviction or sentence. Moreover, these cases are a nontrivial proportion of all criminal appeals heard by state supreme courts: 11.1 percent of the nonunanimous judge-votes in the dataset occurred in drug cases. Thus, we expect cases involving drug offenses (*drugs*) are more likely to be overturned than other cases.

A final relevant case fact involves those cases where the lower court imposed the death penalty. Scholars have found that justices are responsive to their state's political environment regarding the death penalty (e.g., Hall 1995). Given the high level of state support for capital punishment in every state (Brace et al. 2002), judges who overturn sentences of death are voting contrary to the prevailing public sentiment in their states. Consequently, we expect that in cases where the court is reviewing the imposition of the death penalty (*death penalty*), judges will be less likely to overturn a sentence.[14]

Just as all crimes are not equal, all legal representation also is not equal. While every defendant is entitled to a lawyer, the quality of representation can vary widely. Public defenders are commonly perceived as unable to provide the same level of legal service as private attorneys due to their heavy workload and lack of resources (Smith 1994; Etienne 2005). Moreover, empirical evidence

supports this perception (Welch, Combs, and Gruhl 1988; Spohn 1990a). Hence, we hypothesize that a defendant represented by a public defender (*public defender*) is more likely to have a conviction or sentence overturned.[15]

RESULTS

Table 4 examines the likelihood that a state supreme court judge will overturn a criminal conviction. As one can see from looking at Model 4.1, there are no significant differences between white judges and African-American judges. Simply put, the race of the judge is not relevant in understanding a judge's vote to overturn a criminal conviction. As a further test, we generated predicted probabilities based on the race of the judge.[16] With all variables held at their means, the probability of a judge voting to overturn a conviction was 25.1 percent. If we hold all variables at their means except the race of the judge, the probability of a white judge voting to overturn a conviction

Table 4. Likelihood of Overturning a Conviction, All Nonunanimous Decisions

	Model 4.1 All	**Model 4.2** IAC	**Model 4.3** No IAC
White	0.086 (0.064)	0.102 (0.067)	**–0.351 (0.096)**
Female	–0.030 (0.058)	–0.028 (0.064)	–0.048 (0.091)
Ideology	0.002 (0.001)	0.002 (0.001)	0.001 (0.001)
Prosecutor	**–0.138 (0.051)**	**–0.124 (0.058)**	**–0.205 (0.080)**
Violent	**–0.169 (0.037)**	**–0.210 (0.040)**	–0.001 (0.082)
Drugs	**0.303 (0.045)**	**0.248 (0.049)**	**0.506 (0.110)**
Public defender	0.012 (0.035)	–0.064 (0.041)	**0.269 (0.078)**
Election	0.097 (0.052)	0.048 (0.060)	**0.267 (0.084)**
No IAC	**0.264 (0.050)**	———	———
1995	**0.230 (0.048)**	**0.209 (0.053)**	**0.503 (0.103)**
1996	**0.182 (0.045)**	**0.230 (0.046)**	0.012 (0.123)
1997	**0.133 (0.039)**	**0.169 (0.040)**	–0.041 (0.117)
Constant	**–0.940 (0.095)**	**–0.913 (0.105)**	**–0.516 (0.164)**
N	9,083	8,021	1,062
χ^2	309.75	188.82	77.90
Prob. > χ^2	0.000	0.000	0.000
Correctly Predicted	82.206%	82.485%	78.234%
PRE[a]	–0.537%	1.040%	–22.979%

a. The proportional reduction in error (PRE) statistic measures the improvement in predicting Y over the modal category. When the dependent variable is skewed, the model can end up making many "incorrect" predictions even if there are several statistically significant covariates. We think this is what is happening here, especially since we are correctly predicting around 80 percent of the cases in all models and several of our independent variables are statistically significant. Moreover, only 17.7 percent of the votes cast were to overturn convictions and only 19.4 percent of the votes cast were to overturn sentences.

Notes: All tests of significance are two-tailed tests. Coefficients in **bold** are statistically significant ($p<0.05$). Test [IAC] White = [No IAC] White. χ^2 (1) = 14.88. Prob. > χ^2 = 0.000

is 25.3 percent; for African-American judges, the likelihood is 22.7 percent, a small but insignificant difference. No matter how we look at it, the race of the judge does not matter.

In terms of the other variables, consistent with our hypothesis, criminals who are convicted of drug-related crimes are more likely to have their conviction overturned, other factors being equal. Also as expected, those convicted of violent crimes are less likely to have their conviction set aside. Additionally, the gender of the judge is insignificant, as is ideology. We also uncover no evidence for the inadequacy of public defenders: defendants represented by public defenders are not more likely to have their conviction overturned. Nor is there any evidence that judges who are elected behave differently than those who are not.

Consistent with our expectations, we do find that judges who previously served as prosecutors are significantly less likely to overturn a conviction, other factors being equal. Judges who were previously prosecutors only voted to overturn a conviction 22.4 percent of the time, compared to 26.8 percent of the time for judges who were not prosecutors before ascending to the bench.

Also as hypothesized, the presence of an intermediate appellate court matters: in states without intermediate appellate courts, there are more votes to overturn convictions. This indicates that courts of last resort are functioning as error-correcting institutions in the absence of intermediate appellate courts. That is, in states with an intermediate appellate court, IACs take care of most of the clear-cut cases, thereby leaving the court of last resort to address the more ambiguous cases.

In Models 4.2 and 4.3, we estimate our model separately on votes in states with intermediate appellate courts (*IAC*) and those without (*no IAC*). Interestingly, we find here that the race of the judge does affect decisionmaking, but only in states without intermediate appellate courts. The χ^2 test indicates that the difference between the *white* coefficient in Model 4.2 and Model 4.3 is statistically significant.[17] That is, the difference we observe is a statistically significant difference. Looking at states with no IAC, with all variables at their means, the likelihood of a judge overturning a conviction is 33.6 percent; it is almost the same for white judges (33.5 percent). This is an impressively high figure; almost one-third of the votes are to overturn a conviction in state without an intermediate appellate court. This finding suggests that the lower courts are making a substantial number of errors in these cases. As high as the number for all judges is, it jumps to 47.4 percent when looking at African-American judges. Almost one-half of the votes cast by African-American judges in states without intermediate appellate courts are votes to overturn a conviction.

What could explain this result? We think it has much to do with the lack of docket control in states without IACs. In these states, the court must make a decision on all cases that come before it.[18] Thus, there are many more cases where the court is serving as an error-correcting institution; with no IAC to filter out the cases of obvious trial court error, the court of last resort has that task. This theory explains the high percentage of votes to overturn convictions. Our result for the race of the judge indicates that African-American judges are likely to be more sympathetic to allegations of trial court error, for the theoretical reasons we discussed earlier. Hence, by being more likely to take claims of errors in the process more seriously, they are more likely to overturn a conviction.

Looking at all the other variables, some other interesting differences appear between courts in states with IACs and those without IACs. Having a public defender has no effect on the likelihood of a vote to overturn in states with IACs while it increases the likelihood of such a vote in states without IACs. This is likely due to public defenders being perceived to be of lesser "quality" than private attorneys and thus more likely to make more errors. In states with IACs, these obvious errors are caught by the IAC; in states without IACs, the supreme court has to dispose of these cases. The same is true for judges who must face election: in states with IACs no relationship exists, while elected judges are more likely to overturn a conviction in states without IACs. All these results suggest fundamental differences in judicial decisionmaking depending on whether or not the state has adopted an IAC. Courts without docket control (when there is no IAC) are simply different from those who have docket control (Arceneaux, Bonneau, and Brace 2008). The presence of an IAC fundamentally affects the nature of the judicial decisionmaking process. Failing to recognize and model this could lead scholars to make erroneous inferences.

In Table 5, we examine the likelihood of a judge voting to overturn a sentence handed down for a conviction. Model 5.1 shows the results for all judges, Model 5.2 for judges in states with IACs, and Model 5.3 for judges in states without IACs. A familiar finding is displayed in Table 5: no differences between white and nonwhite judges when looking at all cases. However, once again we see African-American judges are significantly more likely to overturn or reduce a sentence in states without an intermediate appellate court. Our explanation for this result (discussed above) is further supported by the fact that the ideology of the judges only matters in these cases for judges in states with IACs. With no docket control, ideology has no significant effect. However, ideology is an important predictor of overturning a sentence when judges can pick-and-choose the cases they want to hear. The effects of the race of the judges might be dwarfed by the effects of ideology in these states.

Table 5. Likelihood of Overturning a Sentence, All Nonunanimous Decisions

	Model 5.1 All	**Model 5.2** IAC	**Model 5.3** No IAC
White	0.061 (0.101)	0.083 (0.096)	**–0.346 (0.117)**
Female	–0.095 (0.076)	–0.116 (0.080)	0.025 (0.141)
Ideology	**0.004 (0.001)**	**0.004 (0.001)**	0.000 (0.002)
Prosecutor	–0.076 (0.070)	–0.045 (0.071)	–0.118 (0.112)
Violent	0.043 (0.043)	0.012 (0.047)	**0.216 (0.093)**
Drugs	**0.236 (0.054)**	**0.186 (0.058)**	**0.577 (0.135)**
Death penalty	**–0.110 (0.046)**	**–0.104 (0.046)**	**–0.759 (0.238)**
Public defender	0.083 (0.046)	0.001 (0.052)	**0.417 (0.056)**
Election	–0.052 (0.059)	**–0.177 (0.060)**	**1.026 (0.123)**
No IAC	–0.063 (0.092)	———	———
1995	**0.234 (0.070)**	**0.189 (0.073)**	**0.897 (0.175)**
1996	–0.114 (0.067)	**–0.154 (0.070)**	**0.450 (0.188)**
1997	**0.229 (0.041)**	**0.211 (0.041)**	**0.517 (0.151)**
Constant	**–0.854 (0.137)**	**–0.752 (0.135)**	**–1.839 (0.240)**
N	8,788	7,897	891
χ^2	147.34	207.72	177.86
Prob. > χ^2	0.000	0.000	0.000
Correctly Predicted	80.818%	80.777%	77.597%
PRE	1.353%	1.142%	–15.212%

Notes: All tests of significance are two-tailed tests. Coefficients in **bold** are statistically significant ($p<0.05$). Test [IAC] White = [No IAC] White. χ^2 (1) = 8.00. Prob. > χ^2 = 0.005

CONCLUSION

We began this article asking if there were any differences between white and African-American judges on state supreme courts. Based on the representation literature (from legislatures, bureaucracies, and courts), we looked for an effect in the place where we were most likely to find it: on an issue salient to African-American judges under conditions where there was no docket control. After specifying our model a variety of ways and looking at two separate dependent variables, one conclusion is apparent: African-American judges are more sympathetic to those convicted of crimes, but only in states with no intermediate appellate courts. The effects of race on judicial behavior are conditioned by institutional arrangements. Additionally, factors such as ideology (for sentencing, under some conditions), the nature of the crime, and the presence of an intermediate appellate court affect the likelihood that a judge will overturn a conviction or sentence.

Our findings do not mean that the race of the judge does not matter more generally in other circumstances. For example, it is entirely possible that in trial courts, where judges see the defendant and have to make dozens of rulings that affect the outcome of the case, the race of the judge plays a significant role. So, we would not dismiss studies that find that white judges

sentence more harshly than African-American judges (e.g., Welch, Combs, and Gruhl 1988) or that African-American judges are more likely to convict (Steffensmeier and Britt 2001). We do feel confident, however, that at the appellate level, the differences between white and African-American judges are primarily conditioned by the institutional arrangements of the courts. Future research should further explore these differences.

In addition to the institutional structure of courts, another reason for the lack of difference between white and African-American judges in general might have to do with the relative homogeneity of state supreme court judges. The vast majority of judges (elected and nonelected alike) are distinguished jurists with years of experience in the judicial system. These judges are also socialized the same way (both in law school and in the legal profession). This homogeneity in socialization and experience—largely unique to the judiciary—may serve to mitigate any racial differences that exist.[19] Moreover, crime is an issue salient to elites and voters alike (e.g., Hall 2001); thus, most judges (white and African-American alike) who sit on state supreme courts are relatively homogeneous in terms of their positions on criminal cases. One is not able to become a state supreme court justice (regardless of whether one is appointed or elected) if one is soft on crime. This homogeneity might not exist at the trial court level, where judges are more diverse in terms of their experience and approach.

In terms of representation, our findings suggest the presence of substantive representation on state courts of last resort, depending on the institutional context. African-American judges in states with no intermediate appellate court are more sympathetic to criminal defendants than white judges. In addition to the benefits of a diverse bench, increasing the number of African-American judges could significantly change the outcome of cases decided by state supreme courts, at least under certain institutional arrangements. No evidence suggests that African-American judges decide cases differently than white judges in general; however, when the institutional context is favorable, there are differences in the way African-American judges and white judges decide criminal cases, other factors being equal.

ENDNOTES

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1. We deal exclusively with African-American judges in this article, consistent with the literature. There are only 80 (0.8 percent) nonunanimous Hispanic judge-votes and only 119 (1.2 percent) nonunanimous Asian judge-votes in our dataset.

2. This is not to say that descriptive representation is unimportant. To the contrary, there are many reasons why institutions should reflect the characteristics of their constituencies, such as the perceived legitimacy of the institution (Hurwitz and Lanier 2003). This does mean, however, that descriptive representation simply does not affect the nature of the decisions.

3. It is important to note that we are not making the argument that race causes judges to behave differently. We are simply testing whether or not African-American judges systematically behave differently (or consider different factors when making their decisions) than do white judges.

4. This is also true for female judges. Some studies have found differences between female and male judges, such that female judges are more protective of women's issues (Allen and Wall 1987; Davis 1986; Gottschall 1983; Steffensmeier and Hebert 1999), while other scholars have found no such differences between female and male judges (Walker and Barrow 1985).

5. During the period of this study, all state supreme court judges had a law degree. For an interesting report of how this is not necessarily the case for local judges, see Glaberson (2006).

6. Steffensmeier and Britt (2001; 754, 761) also discuss the influence of "token" reasoning: African-American judges fear being perceived as "soft" on crime because African Americans are more often associated with crime than whites.

7. This is similar to the "liberation hypothesis" first introduced by Kalven and Zeisel (1966) in their study of juries.

8. The universe of cases for each state in each year is included up to 200 cases. For states in which more than 200 cases are decided in a year, a random sample of 200 cases was used. Most states in most years decide fewer than 200 cases.

9. Because we limit our focus to criminal cases, we use cases decided by the Texas Court of Criminal Appeals and Oklahoma Court of Criminal Appeals. These two states have two courts of last resort, one that deals exclusively with civil cases and one that deals exclusively with criminal cases.

10. We first selected all criminal cases in the dataset. Then, we deleted all cases that did not involve individuals convicted of crimes or current prisoners. (Petitioner codes 1021 and 1026.) We also ran the models without this further screen; our results regarding race are identical.

11. We also ran our analysis running separate models for judges who are elected and those who are not elected. However, we found no differences between white and African-American judges when we partitioned our sample in this manner. *White* was insignificant in both models (elected and non-elected) and there was no statistical difference in the coefficients for *white* between the models.

12. Some scholars have included the race of the defendant as an independent variable and hypothesized that nonwhite judges are likely to treat nonwhite defendants better than white judges (Steffensmeier and Britt 2001; Smith 1983; Welch, Combs, and Gruhl 1988). However, we do not include a variable for the race of the defendant for two reasons. First, it is not possible to gather the race of defendant information in a systematic fashion. Sometimes it is mentioned in the case; most often, it is not. Second, we are dealing with

appellate courts rather than trial courts. In many of the cases in the dataset, the judges are likely to be unaware of the race of the defendant since the defendant is not present in the court during oral arguments or at any other time (unless the defendant is representing himself/herself).

13. Additionally, controlling for theoretically motivated state-level variations allows us to ascertain the precise mechanisms by which states differ, as opposed to simply putting in fixed-effects for each state.

14. We have no reason to think that this will affect the likelihood of overturning a conviction, since we already control for the nature of the crime in the model. Thus, we only include this variable in the sentencing models.

15. This variable measures whether a public defender represents a defendant on appeal.

16. All predicted probabilities were calculated using CLARIFY (King, Tomz, and Wittenberg 2000).

17. Coefficient tests for the other variables in the models can be obtained from the authors.

18. Nevertheless, the court does not have to hear oral arguments or render a formal written opinion.

19. Indeed, in no other institution of the government is the socialization so homogenous. The fact that all state supreme court judges must have a law degree ensures that they are all socialized similarly.

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