JUDGING BY THE COVER: ON THE RELATIONSHIP BETWEEN MEDIA COVERAGE ON CRIME AND HARSHNESS IN SENTENCING

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Does the mass media affect judicial decisionmaking? This first of its kind empirical study delves into this long-lasting question, and investigates the relationship between media coverage of crime and criminal sentencing. To do so, I construct a novel data set of media reports on crime, which I link to administrative state court sentencing records. The data span five years and more than forty-three thousand sentencing decisions across three jurisdictions that differ in their judicial selection models: Pennsylvania, Maryland, and Virginia. I find that crime coverage increases sentencing harshness. I also find evidence to suggest that this effect is mitigated through a state’s method of judicial selection. The findings go beyond traditional, case-study scholarship on the nexus between the media and the judiciary, offering evidence that the media can affect judicial decisionmaking in broader contexts. These findings hold significant implications for policy and judicial politics and raise questions at the core of the criminal justice system. Particularly, they call for renewed attention to the media as an important factor in the criminal process and a potential obstacle towards achieving the

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constitutional ideal of fair trials. The Article concludes by suggesting methods for countering such media effects.

TABLE OF CONTENTS
INTRODUCTION..................................................................................................................1123
I. ON THE NEXUS BETWEEN THE MEDIA AND THE JUDICIARY .................................................................1129
II. ASSESSING THE IMPACT OF THE MEDIA ON THE JUDICIARY
   A. CONSCIOUS MOTIVATION-BASED RESPONSES TO THE MEDIA..........................................................1133
   B. UNCONSCIOUS RESPONSES TRIGGERED BY THE MEDIA ...............................................................1138
III. THE CONTROVERSY AROUND JUDICIAL ELECTIONS ........................................................................1143
   A. INSTITUTIONAL BACKGROUND ...........................................................................................................1143
   B. THE ARGUMENTS: ELECTED V. APPOINTED .........................................................................................1147
   C. THE ARGUMENTS: PARTISAN V. NONPARTISAN SYSTEMS ..................................................................1150
IV. METHODOLOGY AND DATA ..................................................................................................................1151
   A. SENTENCING DATA .................................................................................................................................1154
   B. MEDIA DATA .........................................................................................................................................1155
   C. COURT AND COUNTY SPECIFIC DATA ..................................................................................................1159
V. PRELIMINARY CONSIDERATIONS .........................................................................................................1162
VI. MAIN EMPIRICAL FINDINGS ...................................................................................................................1165
   A. INTENSITY AND SENTENCING TIME TRENDS .......................................................................................1165
   B. DOES MEDIA COVERAGE AFFECT SENTENCING: MAIN REGRESSION RESULTS .................................................1166
   C. INTER-STATE ANALYSIS; COMPARING JUDICIAL SELECTION SYSTEMS ...............................................1169
   D. DOES RACE MATTER—COVERAGE AND THE RELATIONSHIP TO RACIAL IDENTITY OF OFFENDERS .........................................................1171
VII. DISCUSSION ........................................................................................................................................1173
   A. MEDIA EFFECTS ON SENTENCING LENGTH ............................................................................................1174
   B. INTER-STATE LEVEL ANALYSIS: CONTRIBUTION TO THE DEBATE ON JUDICIAL ELECTIONS .................1177
   C. POLICY IMPLICATIONS—DEBIASING MEDIA EFFECTS AMONG THE JUDICIARY .......................................1178
CONCLUSION ................................................................................................................................................1178
APPENDIX ..................................................................................................................................................1183
“[Judges may] take into account . . . the climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.”
Hon. Ruth Bader Ginsburg, 1993

INTRODUCTION

In a case that captured the hearts and minds of many Americans, stirred deep emotions, and stoked political polarization, serious criminal allegations were brought against B. The media frenzy prior to and during the trial was unprecedented. The President himself publicly declared B’s guilt, suggesting that if B evaded punishment the presiding judge must be removed. The presiding judge in turn stated that “it would be difficult or dangerous for a jury to acquit B, however innocent they might think him.”

Lawyers and judges raised concerns about the effects of such intense pretrial publicity on the administration of justice and B’s constitutional right to fair treatment by the criminal justice system. Alas, at the end of the day, the jury found B not guilty. The year was 1807 and the defendant was Vice President Aaron Burr, who was tried for treason.

3. Burr became a candidate for the vice presidency after the Revolutionary War. He was arrested for plotting to annex Spanish territory (with British assistance) in the western lands in order to establish a new republic. He was also famous for his duel with Alexander Hamilton, leading to the latter’s death. See United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692); DAVID O. STEWART, AMERICAN EMPEROR: AARON BURR’S CHALLENGE TO JEFFERSON’S AMERICA 3–5 (Simon & Schuster hardcover ed., 2011); FRANCIS F. BEIRNE, SHOUT TREASON: THE TRIAL OF AARON BURR 7–17 (Hastings House, 1st ed. 1959).
4. In 2018, after lengthy legal proceedings, Bill Cosby was found guilty of drugging and sexually assaulting Andrea Constand at his home in 2004. On June 25, 2019, Bill Cosby appealed the decision. Cosby’s trial has been considered the first celebrity-trial of the #MeToo era, and as such was the subject of extensive coverage in both traditional and social media. In an analysis of the evolution of the media coverage of the trial, Vernon tracks the changes in the media’s approach to the case, suggesting a narrative shift that culminated in his trial. Pete Vernon, A Culmination and Continuing Questions in the #MeToo Era, COLUM. JOURNALISM REV. (Apr. 27, 2018), https://www.cjr.org/the_media_today/brokaw-nbc-cosby.php [https://perma.cc/24LW-TMSQ]; see also Graham Bowley, Bill Cosby, Calling His Trial Unfair, Files a Formal Appeal, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/arts/television/bill-cosby-new-trial.html [https://perma.cc/NA3G-WXZJ].
O.J. Simpson, to name a few. These, and many other high-profile criminal cases, illustrate the everlasting tension between the media’s freedom to cover criminal cases and the potential effects of such coverage on a defendant’s right to a fair trial.

While the core of the debate has remained as it was in 1807, the media’s presence in the public sphere has exponentially increased. While in Burr’s day newspapers served as the main—if not only—outlet, today we are overwhelmed by a cacophony of information, from news articles and blog posts to tweets and popular media. It is simply impossible to escape these heaps of media messages, which shape our views and perceptions about the world. Concerns about the potential effects of the media on judicial processes, particularly in criminal settings, have therefore never been more pressing or acute.

Current scholarship on courts-media relationships suffers from three key limitations. First, it is trapped in the same old paradigm: how the coverage of high-profile cases can affect outcomes in those specific criminal trials. Consequently, existing literature offers quite limited settings to

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5. In what may still be considered the most publicized murder trial in American history, O.J. Simpson was brought to trial under the accusation that he murdered his former wife and her friend. He was eventually acquitted. For more on the Simpson trial, see JERRIANNE HAYSLETT, ANATOMY OF A TRIAL: PUBLIC LOSS, LESSONS LEARNED FROM THE PEOPLE VS. O.J. SIMPSON (2008); Joanne Armstrong Brandword, You Say “Fair Trial” and I Say “Free Press”: British and American Approaches to Protecting Defendants’ Rights in High Profile Trials, 75 N.Y.U. L. REV. 1412 (2000) (discussing at length Simpson’s trial as an illustration of a media circus).


7. There is still debate regarding the direction of the effects, however, with some suggesting that pretrial publicity does not necessarily lead to convictions. See Brandwood, supra note 5, at 1418–20. In any event, these cases are just an illustration of high-profile cases that received meaningful media coverage, and I pass no judgment about their outcomes.

8. See, e.g., LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 151-53 (2008) (note for example Baum’s analysis of Justice Blackmun’s behavior with regards to Roe v. Wade, 410 U.S. 113 (1973)); HAYSLETT, supra note 5; Armstrong, supra note 5; Robert E. Drechsel, An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests about the Fair Trial-Free Press Issue, HOFSTRA L. REV. 1 (1989) (suggesting that high-profile cases, rather than the day-to-day reality of court proceedings have informed most debates around the media-judiciary relationship); H. Patrick Furman, Publicity in High Profile Criminal Cases, 10 SAINT THOMAS L. REV. 507 (1997) (focusing, as the title indicates, on high profile criminal trials); James R. P. Ogloff & Neil Vidmar, The Impact of Pretrial Publicity on Jurors, 18 LAW & HUM. BEHAV. 507 (1994) (focusing on media effects in one child sex abuse case); Giorgio Resta, Trying Cases in the Media: A Comparative Overview, 71 LAW & CONTEMP. PROBS. 31 (2008) (discussing the free press-fair trial debate through case studies of high profile cases such as O.J. Simpson and the Duke Lacrosse case); Christine L. Ruva et al.,
engage with questions of criminal law and procedure. Such an approach cannot sufficiently add to our understanding of the broader, more complex ways through which the media might affect outcomes in criminal cases more generally. It assumes pretrial publicity is the main, if not the only, mechanism through which the media can influence trial outcomes. Moreover, captivating as they may be, high-profile cases represent a tiny fraction of the day-to-day work of criminal courts. As such, current scholarship leaves most of the terrain on media effects uncovered. Second, such scholarship treats juries and judges interchangeably and reaches conclusions accordingly. The result is that, while there is considerable discussion on the effects of pretrial publicity on juries, few studies address the effects on the judiciary. Moreover, the few studies investigating the judiciary more directly focus largely on Supreme Courts (state or federal), where only a small fraction of criminal cases is heard. In 2016, for example, approximately eighty thousand criminal cases were filed in the federal district courts, compared to a whopping 17.8 million criminal cases that were filed in state trial courts.9 Third, there is a dearth of empirical scholarship that systematically assesses media effects on judicial decisionmaking, particularly with regards to case outcomes.

The result of these limitations is that we seem to know the least about media effects where they matter the most—in the vast majority of criminal cases and the day-to-day activity of the courts.

This Article diverges from the traditional scholarship on media-courts relationship on all these counts. First, it goes beyond the exploration of particular high-profile cases to offer an empirical examination of the media’s interaction with the day-to-day decisionmaking process of judges in criminal cases. Second, the study focuses on the judiciary, and investigates the multifaceted ways through which the media can affect judges’ decisionmaking both through conscious and unconscious triggers. Moreover, it is among the first few studies to study media-judiciary relationship in the underexplored terrain of state trial courts. As such, this study is likely relevant in the vast majority of criminal cases and for the vast majority of defendants.

The intricate role of the media when reporting on crime is a key

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underlying motivation of the study. The media not only provides information to the judiciary. It also serves as a social barometer; reflecting changes in public views, alongside offering a forum for discussing controversies and for exposing social fears and concerns. The media can also directly shape perceptions about the world. For example, it has been argued repeatedly that increased coverage on crime fuels social fear of crime.\(^\text{10}\) Moreover, cognitive psychology and media studies have shown that the media particularly exacerbates fear of racialized crime, for example by creating and corroborating stereotypical thinking on the involvement of particular racial groups in particular kinds of criminal activity.\(^\text{11}\) This study suggests there is no reason to assume judges are immune to such effects.

The study also queries, however, whether judges may be better equipped to mitigate media effects than the general public. It hypothesizes that judicial incentives might mitigate such effects. I use judicial selection systems as a potential prism through which to explore variation in judges’ incentives. The judicial selection system of a particular jurisdiction has long been recognized to have an effect on judicial behavior.\(^\text{12}\) That is, under the traditional scholarly dichotomy, judges in appointive systems that do not face public elections will be less sensitive to external pressures (such as media coverage), compared to judges in elective systems.\(^\text{13}\) This study thus exploits variation in judicial selection systems to assess whether different incentives affect judicial susceptibility to media effects. In the specific


\(^{11}\) The cognitive mechanism behind this phenomenon will be discussed in more detail, infra Section II.B. In general terms, the theory posits that repeated racially-skewed messages in turn become a heuristic (cognitive shortcut) to understand race-crime relationships more broadly and that heuristic will be used in judgments. Travis L. Dixon, Crime News and Racialized Beliefs: Understanding the Relationship Between Local News Viewing and Perceptions of African Americans and Crime, 58 J. COMM. 106, 107 (2008) (“News viewing may be part of a process that makes the construct or cognitive linkage between Blacks and criminality frequently activated and therefore chronically accessible”); Travis L. Dixon, Good Guys Are Still Always in White? Positive Change and Continued Misrepresentation of Race and Crime on Local Television News, 44 COMM. RES. 775 (2017); Franklin D. Gilliam, Jr. & Shanto Iyengar, Prime Suspects: The Influence of Local Television News on the Viewing Public, 44 AM. J. POL. SCI. 560, 560 (2000) (showing that scripts have “become an ingrained heuristic for understanding crime and race”).

\(^{12}\) See infra Parts II, III.

\(^{13}\) See infra Sections II.B–C.
context of the study, I hypothesize that average Americans have been pushed over the years towards greater retributivism and that as the intensity of crime coverage increases (and consequently exacerbates social fear of crime), elected judges must capitulate to such sentiments more than appointed judges.

While these working assumptions are intuitively plausible, they have not been systematically studied thus far. Bridging this gap, this Article assesses whether there is a link between coverage on crime and judges’ sentencing decisions, and more broadly whether the information provided by the media is reflected in the daily work of the judiciary. It further asks what may explain those links, and whether these may and ought to be minimized.

The Article builds on three large data sets: (1) a new and comprehensive data set of five years of Washington Post (“The Post”) coverage on crime, both at the national and local level coverage, constructed for this study; (2) a data set of over forty-three thousand sentencing decisions in U.S. state courts in Maryland (MD), Virginia (VA) and Pennsylvania (PA); and (3) a data set of unique court and county characteristics for the same three states. Given the lack of a comprehensive dataset on state court judges and their characteristics in the above jurisdictions, another new dataset containing the latter information, was constructed for this study. Using these data, I address three questions. First, I investigate whether general trends in media coverage on crime over time are associated with harshness in sentencing. Second, I exploit the variation in the judicial selection mechanisms of each of the analyzed states to ask whether the relationship between coverage and harshness in sentencing differs based on judicial selection mechanism. Third, I explore whether these associations are race-dependent and change as the race of the offender changes.

The findings are intriguing and provocative. First, I find evidence to suggest that indeed coverage on crime affects harshness in sentencing, so that the increased intensity of coverage is related to longer prison terms imposed on criminal offenders. These relationships hold even when controlling for a host of case, county, and court characteristics. Second, I find, that the elective selection systems (PA, MD) are more sensitive to media coverage than the appointive selection system (VA). I further find suggestive evidence that the effect size of coverage on sentencing is the largest in a nonpartisan elective system (MD), compared to both partisan elective (PA) and appointive (VA) selection systems. Third, I find only preliminary evidence that media coverage is associated with longer sentences imposed on Black offenders more than on non-Black offenders, thus providing weak support to the racial priming theory.
The findings provide empirical support for the assertion that judges can be sensitive to media coverage in broader contexts than simply through coverage of a particular high-profile case. Given theories on media effects and the relationship between the media and the judiciary, I suggest the fear of crime feedback loop model to explain these relationships and discuss three causal mechanisms that are likely working in conjunction in affecting judicial decisionmaking: audience-based, strategic, and narrow-legalistic.

The findings also suggest, however, that the magnitude of media effects might differ based on the design of the incentive structure under which judges operate. They particularly support the notion that judges in elective systems are more susceptible to public pressure compared to appointive systems. Moreover, the study provides new evidence that runs counter to the conventional wisdom that depicts nonpartisan elective systems as less vulnerable to external pressures compared to partisan elective systems. Given the small number of states I study, these findings should be interpreted as primarily suggestive. They are consistent, however, with the hypothesis that, because they cannot rely on party affiliation to support their reelection bids, judges in nonpartisan systems are more sensitive to public pressure and feel a need to “please the crowd” to get reelected. In the context of media and crime, judges feel pressured to respond to public concerns regarding increasing crime rates, as exacerbated by heightened media coverage on crime. Identifying the relative resilience of the judiciary to media effects in the appointive model suggests that the strategic approach indeed plays a meaningful role in the overall decisionmaking process, and that it may mitigate media bias. Moreover, identifying the largest media effects in MD, especially compared to the partisan election system in PA, suggests that in addition to the general conscious and unconscious mechanisms that operate in the judicial process, special attention should be given to career goals in the nonpartisan model. In light of these findings, and through three leading debiasing techniques recognized in the literature: training, nudges, and changes in incentive structure, the Article discusses policy implications for state courts and offers a set of methods to counter media effects among the judiciary.

The Article shows that judges—like the rest of us—are sensitive to a host of external influences that can affect the decisionmaking process. Such effects may be broad, unpredictable, and not necessarily attached to a specific event (or a particular high-profile case). This Article thus serves as a call to revisit how we think, discuss, and understand the media-judiciary relationship. Providing evidence to the sensitivity of elective systems to external pressures compared to appointive systems and specifically to the
sensitivity of nonpartisan elective systems, the Article also adds to the debate on judicial elections. More broadly, the Article contributes to scholarship on judicial accountability in the current era of digital democracy. In particular, it raises concerns regarding the integrity of criminal justice institutions under heightened media environments. These times of fake news and social media stress the importance of furthering discussions on the media-judiciary relationship in a world of shifting technologies, that this Article starts to advance.

The Article proceeds as follows. Part I provides a brief setting to understand the evolving nature of the judicial-media relationship and on the surprisingly limited empirical scholarship on the topic. Part II establishes the interdisciplinary theoretical framework on which this study is grounded, exploring the different mechanisms through which the media can potentially affect decisionmaking. Part III zooms in on judicial selection in the United States as a proxy for the incentives that might affect judicial decisions. It provides a brief history of the debate around selection mechanisms. The section further connects the debate on judicial selection to the current study and to the judiciary-media relationship. Part IV discusses the unique data and the methodology utilized in the study, aiming to overcome the empirical gap in studies on the relationship between the media and sentencing decisions. I discuss in brief some of the challenges and limitations of the study and how these were addressed. Part V includes the preliminary and main findings, both at the intra-state and inter-state level. Part VI discusses the findings, elaborates on a suggested model for judicial decisions given media coverage, and offers three potential causal mechanisms that can explain the links identified in the study. I further discuss the contribution of the study to debates regarding judicial elections, and future research directions with regards to the scholarship on racial bias in sentencing. Finally, to address the concerns regarding the distortion of the criminal process caused by media coverage of crime, I offer policy recommendations based on the three leading debiasing techniques: training, nudging, and changes in incentives.

I. ON THE NEXUS BETWEEN THE MEDIA AND THE JUDICIARY

Does the media affect judicial decisionmaking? While lay intuition is likely to answer this question in the affirmative, most judges would deny such a nexus, particularly with respect to case outcomes such as sentencing. However, even among the judiciary one can find proponents to the notion that the mass media has at least some effect on judicial decisionmaking. This idea is reflected in Justice Rehnquist's speech, delivered shortly after becoming Chief Justice, suggesting that reporting does affect judges:
Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs. And if a judge on coming to the bench were to decide to hermetically seal himself off from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead by the state of public opinion at the time that he came onto the bench.14

However, as Peleg indicates based on interviews conducted with judges, there is no consensus among judges as to the extent of such effects. In fact, some judges are willing to acknowledge image-building attempts15 or a willingness to embed “the media logic” into court decisions,16 but draw the line at the stage of decision outcomes (such as sentencing terms in criminal cases).17

Such a view was expressed, for example, by Justice William O. Douglas commenting on Justice Hugo Black’s change of heart on an issue, due to media pressures.18

[Justice William O.] Douglas: Hugo tells me that now he wouldn’t go with you in the Gobitis case.

15. BAUM, supra note 8, at 138–39; ANAT PELEG, OPEN COURT 74–77 (2012) (providing evidence that judges indeed care for their reputation and are sensitive to the ways the media covers cases).
16. This phenomenon, in which the media penetrate the political arena and become a dominant political player, is known as “mediatization.” The consequences of this process are that state and civil society institutions adopt the “media logic” in their daily activities, that is, surrender themselves to the structural challenges and principles that control the media industry. See Gianpietro Mazzoleni & Winfried Schulz, “Mediatization” of Politics: A Challenge for Democracy?, 16 POL. COMM. 247 (1999).
17. Moreover, if judges are willing to admit the media might affect judicial decisions, it is unlikely to be their decisions. It might, however, affect the decisions of their peers. This proposition is known as the “Third Person Effect,” in which subjects tend to portray themselves as resilient to media effects but acknowledge their existence and point out how the media affects others. See Leo W. Jeffres et al., Integrating Theoretical Traditions in Media Effects: Using Third-Person Effects to Link Agenda-Setting and Cultivation, 11 MASS COMM. & SOCY. 470 (2008). Interviews and statements by judges identified third-person effects, with judges publicly claiming decisions rendered by their colleagues were affected by coverage on crime. See PELEG, supra note 15, at 75. Such a bias is more broadly recognized in the behavioral scholarship as a blind-spot bias—that is, a bias that “prevents us from seeing our own cognitive biases, yet allows us to see them in others.” Mark W. Bennett, Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw, 104 J. CRIM. L. & CRIMINOLOGY 489, 491 (2014) (focusing on blind spot bias in the judicial context); see also Daniel Geiger & Elena Antonacopoulou, Narratives and Organizational Dynamics: Exploring Blind Spots and Organizational Inertia, 45 J. APPLIED BEHAV. SCI. 411 (2009); Emily Pronin et al., The Bias Blind Spot: Perceptions of Bias in Self Versus Others, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002).
18. The conversation was reported by Justice Frankfurter, referring to Minersville School District v. Gobitis, 310 U.S. 586 (1940). The Gobitis case dealt with the requirement that public-school students salute the flag. Justice Black was part of the majority that shifted position a few years after Gobitis was decided in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[Justice Felix Frankfurter]: Has Hugo been re-reading the Constitution during the summer?
[Justice William O.] Douglas: No—he has been reading the papers.¹⁹

Justice Frankfurter himself wrote in his diary that he was concerned that some of his fellow justices were too preoccupied with the opinions of outside commentators. Interestingly, according to Davis, Justice Frankfurter was known for his attempts to help the press cover the courts, which included attempts to find a former clerk of the court that could write “an intelligent newspaper story” about decisions after they are announced.²⁰

Views that were well established in the fifties and sixties have persisted. In fact, perceptions regarding the potential effects of the media on the judiciary have become even more prevalent with technological developments and increased media presence in courts. The O.J. Simpson trial—still referred to as one of lowest points in the relationship between the U.S. media and the judiciary and considered a “black flag” of media coverage of judicial proceedings—is just one of many examples in which the judiciary was criticized for being affected by media coverage.²¹ Such concerns go well beyond U.S. borders; for example, Peleg expressed similar views in the Israeli setting, illustrating the growing awareness and recognition of the media power in the judicial arena.²²

Moreover, with the explosion of social media since the mid-2000’s, the media (including both traditional and alternative sources) has immensely increased its presence in the public space, and has accordingly increased its potential to affect—and distort—the judicial process. Former federal judge Jeremy Fogel recently addressed these concerns in a talk at Berkeley Law School:

I don’t know of any judges who wake up and read Twitter and figure that’s how they’re going to decide their cases that day. But what’s happened is it’s harder and harder to insulate yourself from what’s going on in the community. You see the stuff people are saying and the ways people are

²¹. HAYSLETT, supra note 5; Ralph E. Roberts, Jr., An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings, 51 SMU L. REV. 621, 635–36 (2016) (reporting on a Gallup poll conducted from October 19 to October 22, 1995, in which individuals were asked to share their perceptions of the actors in the O.J. Simpson trial. The public perception seemed to favor most of the participants in the trial, except for two of the defense participants—O.J. Simpson and Johnnie Cochran, his attorney).
²². PELEG, supra note 15, at 78.
This concern with modern media also goes beyond the U.S. courts. Only recently the Lord Chief Justice of England and Wales expressed deep concerns that “judges are ... under intolerable pressure by social media,” a pressure that consequently “undermines the rule of law and damages confidence in the judiciary.” Moreover, as a reflection of the global threat to judicial integrity and independence posed by the media, in November 2018, the UN’s Global Judicial Integrity Network gathered twenty-five judges and judicial experts from five continents in Vienna to discuss the threats and challenges posed by the current social media environment on judicial behavior and ethics.

Of course, any consideration of the media’s growing presence in courts and judicial proceedings must strike a balance between the principles of free press and open courts, on the one hand, and the guarantees of due process and fair trials, on the other. The importance of these questions compels rigorous study of the complex interrelations between the judiciary and the media. Consequently, writings on the potential influence of mass media on judicial decisionmaking have mushroomed over the years, addressing different elements of judicial behavior. As discussed, such scholarship in the U.S. tends to focus on federal courts, most dominantly the Supreme Court or, to a lesser extent, on state Supreme Courts. It thus overlooks the media-judiciary relationship in the state court setting, despite the fact that these


courts play a major role in the American justice system and deal with more than 90% of felony (and civil) cases. Moreover, the existing scholarship investigates the relationship through the narrow paradigm of pretrial publicity in the context of particular cases. Less emphasis is given to the broader mechanisms through which the media might affect trial outcomes, and again captures only a small fraction of the day-to-day life of criminal law. On top of that, when one looks for empirical evidence to understand the media-judiciary relationship, there is little to be found.

The challenge is therefore threefold: first, to offer an analysis that is not focused only on federal courts and state Supreme Courts. Second, to move beyond the discussion on potential interrelations between media coverage and judicial decisionmaking, supported by either theories or anecdotes, to an empirical assessment of such connections. Third, to address one of the crucial parts of judicial decisionmaking—trial outcomes in a context broader than a particular high-profile case. Despite the importance of this issue, courts and academics alike are facing difficulties in overcoming these challenges. The next section will elaborate on the current literature pertaining to media effects on judicial decisionmaking, address some of its limitations, and identify the contributions of this study to the debate.

II. ASSESSING THE IMPACT OF THE MEDIA ON THE JUDICIARY

The media can affect judicial decisionmaking through two main channels. The majority of scholarship on media-judiciary relations claims that the media may first activate conscious responses among the judiciary,

27. Chris Guthrie, Jeffrey Rachlinski & Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 3–4 (2007) (explaining the importance of studying trial courts while emphasizing the rarity of such studies). In 2015–2016 alone, in the thirty-one states participating in the Court Statistics Program, more than 17.8 million criminal cases were filed. See National Overview, CT. STAT. PROJECTS, supra note 9.

28. Traditionally, models of judicial behavior are divided into three dominant groups: legal, attitudinal, and strategic models. BAUM, supra note 8, at 4–20; see also Keren Weinshall-Margel, Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel, 8 J. EMPIRICAL LEGAL STUD. 556 (2011). Most of these models focus on higher courts and suggest that the key goal behind judicial decisionmaking is to advance better law and policy. However, over the years other goals besides good law and policy have been recognized in the literature as potentially affecting judicial behavior. Such goals increased the externalities of judicial behavior. Among those goals (that are external in the sense that they are not directly related to the law or policy under discussion and are not only ideologically driven), one can find career concerns, workload, popularity, power, influence, and more. See Melinda Gann Hall, Justices as Representatives: Elections and Judicial Politics in the American States, 23 AM. POL. Q. 485 (1995); Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. POL. 427 (1992) (providing examples on the effects of career concerns); see also BAUM, supra note 8 (offering a dynamic perspective on the relationship between judges and their “audiences” suggesting that judges are generally motivated by the need to be perceived positively). Law and economic scholars have advanced this latter approach claiming, under rational-choice models of decisionmaking, that judges are rational maximizers of their own utility
that in turn affect its decisionmaking process. These responses are often considered motivation-based under the view of judges as strategic players in the public sphere. However, an overlooked domain in the studies of judges and media relates to the unconscious triggers the media may activate. This domain of the cognitive effects of media coverage is well explored by media scholars and cognitive psychologists with regards to the general population (including juries), but less so in the domain of judges. I will now address the current literature on media effects on both the strategic-conscious and the unconscious domains.

and reach their decisions based on their own, mostly conscious goals including prestige, popularity, desire to move the docket, and more. See Lee Epstein & Stefanie A. Lindquist, Preface to THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 5 (Lee Epstein & Stefanie A. Lindquist eds., 1st ed. 2017) [hereinafter OXFORD HANDBOOK] ("[J]udges are rational actors (meaning they make decisions consistent with their goals and interests."); William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & ECON. 875 (1975) (a seminal article from 1975 representing one of the first examples of this approach); Richard Posner, Judicial Behavior and Performance: An Economic Approach, FLA. ST. U. L. REV. 1259, 1259–60, 1266–69 (2005) (emphasizing the importance of addressing variations in incentives across different judicial systems); Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 SUP. CT. ECON. REV. 1 (1993) (providing a more recent example focusing on career concerns); see also LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); Stephen J. Choi et al., What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals, 28 J.L. ECON. & Org. 518 (2012). Following that path, scholars today suggest abandoning the traditional dichotomy between competing interest-based models, and instead call for a more holistic approach taking into account not only ideology and legalism, but also the importance of personal motivations. OXFORD HANDBOOK, supra. The transition from the good-law-good-policy paradigm to one recognizing the potential importance of other goals in the judicial process has highlighted the potential role of the media in affecting judicial behavior.

Alongside the literature on judicial goals, other models aspiring to decipher judicial behavior have been advanced. However, rational-choice models have been criticized within the law and economics literature. Given that judges are generally insulated from market incentives and their decisions in particular cases do not directly affect their own wellbeing, some argue that standard economic analysis is not particularly helpful in explaining judicial behavior. This has pushed researchers toward greater exploration of behavioral models on judicial decisionmaking. According to these models, judges—like any other human beings—are susceptible to unconscious effects of cognitive biases and psychological phenomena, such as framing, priming, compromise effect, and racial bias. Social and cognitive psychologists support similar views. See Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195 (2009) (identifying the effects of racial bias on judicial decisionmaking). Other biases include anchoring, hindsight bias, egocentric bias, framing, and representativeness heuristics. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, The “Hidden Judiciary” - An Empirical Examination of Executive Branch Justices, 58 DUKE L.J. 1477 (2009). For a detailed discussion, see infra Part II. Traditionally, conscious and unconscious components of the judicial decisionmaking process were studied in isolation. This Article diverts from the somewhat anachronistic dichotomy between rational-choice and behavioral models of judicial decisionmaking, assuming both these vectors function in tandem. However, Guthrie, Rachlinski, and Wistrich’s “intuitive-override” model, Guthrie, Rachlinski & Wistrich, supra note 27, at 1; see discussion infra Part II, is closest to the view I espouse.
A. Conscious Motivation-Based Responses to the Media

The media can potentially affect judicial goals and incentives for two main reasons. First, because the media act as an intermediary between judges and the audiences they care about. As such, judges consider the media as both shaping and reflecting views among the general public. According to the dominant models of judicial decisionmaking, judges will generally not care about their audiences as an end of itself, but only as means to advance other goals. These could be narrow-legalistic, that is, promote good law or policy or strategic, that is, advance career goals. Applying this approach to the media context suggests that media messages will affect judicial decisions so long as they promote the above goals.

However, some claim that such an approach is too narrow and somewhat unrealistic as judges do care for their reputation and self-esteem regardless of the outcomes these would yield. This audience-based approach, as advanced by Baum, provides the second potential explanation for the media’s effect on judicial decisionmaking. It assumes that judges generally prefer seeing positive review of their judicial work, under the assumption that such a review will become their judicial watermark—the impact they have during their tenure and the legacy they leave after they retire. Therefore, the media might affect judicial decisions simply because it has a role in building a judge’s image and reputation. The examples in Part I, relating to Supreme Court justices, provide evidence to this approach as Supreme Court justices are unlikely to be concerned by career goals, yet they still show considerable interest in how the news media covers the Court.

Indeed, it may be hard to separate the two explanations of the media’s role in affecting conscious responses among the judiciary as judges are likely to be affected simultaneously by both dimensions. Baum, for example, discusses this complexity and provides evidence of the ways through which both elected and appointed judges wish to influence coverage of their decisions, especially in the criminal setting.

While one can find theories on how the media might advance motivation-based responses, there is much less empirical scholarship that directly investigates the role of the media in judges’ strategic calculation. Two recent extensive field studies conducted by economists start addressing these questions and test the hypothesis that the media can trigger strategic,

30. See supra note 28.
31. BAUM, supra note 8, at 22–23; Schauer, supra note 26 at 627–28.
32. See generally BAUM, supra note 8.
33. BAUM, supra note 8, at 136–37; see Kate Shatzkin, Judge Takes His Case to Court of Talk Radio: Byrnes Tells Public Why He Sentenced Sgt. Pagotto to Prison, BALT. SUN, Mar. 12, 1997, at 1.
conscious decisionmaking processes among state judges in their court rulings in criminal and civil settings.\textsuperscript{34} Lim focused on the ideological triggers the media might pull, and found that in areas with frequent media coverage there is little difference in damage awards in civil litigation between liberal and conservative jurisdictions, while in areas with little newspaper coverage liberal jurisdictions tend to grant substantially larger damage awards. Lim, Snyder, and Strömberg found that when judges are covered in newspapers they impose harsher sentences only in systems where judges are elected through contested nonpartisan elections.\textsuperscript{35} Notwithstanding their importance, these studies lacked legal nuance, regarding matters such as differences between bench and jury trials in the civil setting, and other institutional settings such as the political compositions of courts or whether judges are up for reelection. Moreover, they based their findings on limited data directly related to media coverage, creating a proxy for this coverage through the market penetration of particular newspapers. Also, neither of these studies addressed the potential unconscious effects of the media on decisionmaking and their analyses thus differs from the one offered in this study.

For the audience-based approach, empirical evidence directly relating to the media is even more limited. Indeed, there are stories and anecdotes about how judges interact with the media, mostly aiming toward enhancing the image of the judiciary.\textsuperscript{36} Moreover, it is plausible to assume that, insofar as judges care for their public image, the incentive to preserve this image would play a role in their decisionmaking process and outcomes. Such an image-building concern may not, however, always affect judges’ choices in deciding cases. Indeed, studies aiming to address this question are either doctrinal, anecdotal, or lack multidimensionality in discussing potential effects.\textsuperscript{37} For example, Baum argues that the desire to be praised by The New

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\textsuperscript{35} Lim, Snyder, & Strömberg, supra note 34, at 103 (finding such effects only for nonpartisan elected judges).

\textsuperscript{36} See, e.g., ROBERT E. DRECHSEL, NEWS MAKING IN THE TRIAL COURTS 96–134 (1983) (revealing how Minnesota judges’ actions are partly explained through their cooperation with journalists); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 145 (1998) (noting that some Supreme Court judges keep clippings and editorials about ongoing cases in their files); Daniel Wise, Justices Launch New Campaign to Boost Image, 229 N.Y.L.J. 1 (2003) (exposing how an organization of trial judges in New York State hired a public relations firm to counter editorials in the New York Daily News).

\textsuperscript{37} With some exceptions, and see, for example, Peleg’s attempt to evaluate media effects on the Israeli Supreme Court through interviews and qualitative analysis of a few case studies. See generally PELEG, supra note 15.
York Times helped “convert” Supreme Court justices towards a liberalist approach.\textsuperscript{38} Baum indeed provides some empirical support to show changes in positions of conservative justices that can be associated with the paper’s coverage, though he admits these effects cannot be isolated from the general turn toward liberalism among Washington elites during those days.\textsuperscript{39}

Outside of the media context, however, discussions on the effects of motivation-based consideration on judicial work seem to attract more theoretical and empirical literature. As for the narrow-legalistic goal, it has been repeatedly argued that judges gain satisfaction from the feeling that they are making or contributing to good policy.\textsuperscript{40} While there is little objection to the idea that judges indeed aspire to achieve this goal, estimating the extent to which this goal is dominating judicial decisionmaking remains challenging.\textsuperscript{41} In fact, much of the work investigating judicial decisions tends to focus on strategic motivations, strongly tied to the view of judges as strategic political actors. The literature has identified a large set of strategic motivations that might affect judicial decisionmaking including career concerns, workload, influence and more.\textsuperscript{42} In the strategic context, studies in the United States often refer to political ideology\textsuperscript{43} or incentives stemming from political pressures imposed on judges due to the unique American judicial selection mechanism, namely public elections.\textsuperscript{44} The dominant incentives identified in the literature are related either to partisan loyalty of judges or to the effects of periodic review of judges who stand for reelection.\textsuperscript{45} For instance, Huber and Gordon found strong evidence that


\textsuperscript{39} Baum, supra note 8, at 142–55.

\textsuperscript{40} Landes & Posner, supra note 28, at 887 (“He derives personal satisfaction from preferring . . . one policy over another.”); Posner, supra note 28, at 1259; \textit{OXFORD HANDBOOK}, supra note 28.

\textsuperscript{41} Baum, supra note 8, at 10–11.

\textsuperscript{42} See supra note 28.


\textsuperscript{45} See Carlos Berdejó & Noam Yuchtman, \textit{Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing}, 95 REV. ECON. & STAT. 741 (2013) (showing that judges in Washington state are susceptible to political pressures and sentence serious crimes 10% more severely before election cycles compared to the beginning of the term); Brandice Canes-Wrone & Tom S. Clark, \textit{Judicial Independence and Nonpartisan Elections}, 2009 Wis. L. REV. 21 (finding that public opinion about abortion affects judges in nonpartisan election systems); Hall, supra note 28 (providing evidence that state supreme court judges are influenced by their electoral backgrounds, experiences, and general electoral conditions when voting to uphold or overturn capital murder cases); Michael S. Kang & Joanna
elected state judges in Pennsylvania become more punitive as their reelection approaches and Lim showed that elected judges have much larger variability in their decisions than do appointed judges. 46

What the studies discussed above emphasize, however, is the importance of studying media effects on the judiciary through the perspective of judicial selection systems. As I will elaborate in Part III, each selection mechanism carries different expectations with regards to the incentive structures affecting the work of judges under it, particularly judicial responsiveness to public concerns. From the viewpoint of the media-judiciary relationship, and assuming that the media serves as a channel through which public concerns are manifested, this study hypothesizes that each selection system will advance a different reaction to an increased public concern of crime.

B. UNCONSCIOUS RESPONSES TRIGGERED BY THE MEDIA

There is a rich body of literature discussing the psychological effects of the media on the viewing public. From an historical perspective the scholarship on cognitive media effects resembles a pendulum swing—from theories claiming for strong and direct effects of the media (The Hypodermic Needle Theory and its evolvement as cultivation theory) 47 through theories of limited effects (for example, the Functionalist, Uses and Gratification, 48 and the Third Person Effect), and then back to theories of strong media effects. The latter group of theories suggests that the media has a dominant role in dictating the public agenda (“Agenda Setting”), 49 changing the standards through which the public judges issues in the public realm.


46. See generally Huber & Gordon, supra note 44; Claire S. H. Lim, Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges, 103 AM. ECON. REV. 1360 (2013).


(“Priming”), and defining the dominant frameworks that will be discussed by the public (“Framing”).

Furthermore, studies have shown that the ways through which the media covers crime heightens fears and concerns in society, particularly with regards to violent crime that receives disproportionally larger coverage than the true occurrences of violent crimes in society. It should be noted, that crime stories in the media are usually detached from the reality of crime in society, particularly with regards to violent crime that receives disproportionally larger coverage than the true occurrences of violent crimes in society. See generally Jonathan Intravia et al., Investigating the Relationship Between Social Media Consumption and Fear of Crime: A Partial Analysis of Mostly Young Adults, 77 COMPUTERS HUM. BEHAV. 158 (2017). It should be noted, that crime stories in the media are usually detached from the reality of crime in society, particularly with regards to violent crime that receives disproportionally larger coverage than the true occurrences of violent crimes in society. See generally Jon A. Krosnick & Donald R. Kinder, Altering the Foundations of Support for the President Through Priming, 84 AM. POL. SCI. REV. 497 (1990) (showing that support for President Reagan was affected by the Iran-Contra disclosure).

In the context of crime, greater intensity in media coverage can exacerbate public fear, making ‘the problem of crime’ more immediate when judgments are required. Studies also address the phenomenon of racial priming, where the prevalence of a specific narrative or script (such as, crime is violent, perpetrators are non-white while victims are white) becomes “an ingrained heuristic” for understanding crime and race. Moreover, it has been shown that schemas that are constantly activated by repeating racial cues remain on the top of the mental bin making them highly accessible in


51. Tankard, supra note 49.

52. See supra note 10 (discussing priming and the fear of crime). The link between media consumption and fear of crime was identified with respect to traditional media content, and recently also in the domain of social media, showing how social media increases an individual’s fear of crime. See generally Jonathan Intravia et al., Investigating the Relationship Between Social Media Consumption and Fear of Crime: A Partial Analysis of Mostly Young Adults, 77 COMPUTERS HUM. BEHAV. 158 (2017). It should be noted, that crime stories in the media are usually detached from the reality of crime in society, particularly with regards to violent crime that receives disproportionally larger coverage than the true occurrences of violent crimes in society. See generally Itay Ravid, True Colors: Crime, Race and Colorblindness Revisited, 28 CORNELL J.L. & PUB. POL’Y 243 (2018).


54. See generally Jon A. Krosnick & Donald R. Kinder, Altering the Foundations of Support for the President Through Priming, 84 AM. POL. SCI. REV. 497 (1990) (showing that support for President Reagan was affected by the Iran-Contra disclosure).

55. Gilliam & Iyengar, supra note 11, at 561; see Dixon, supra note 11, at 107.
judgments and policy considerations. Crime schemas affect not only what is reported in the media, but also what is left out of media messages. Accordingly, constant and repeated racialized crime scripts serve as “cognitive fillers” even in stories when no information on race is presented, so that audiences will still attribute criminal activity to Blacks and victimhood to whites. The immediate social consequence of this distorted coverage is the continuous fear of Black criminals. These studies have also shown this fear directly contributes to harsher penal policies. These studies thus suggest the media is exacerbating social fear of crime in a specific racial context.

A number of studies indeed show that judges are intuitive in their decisionmaking process, and as such are susceptible—to unconscious cognitive phenomena and mental shortcuts, regardless of the media. Rachlinski and Johnson illustrate how unconscious racial biases affect trial judges, and Guthrie, Rachlinski, and Wistrich find support for a

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56. David Domke, *Racial Cues and Political Ideology: An Examination of Associative Priming*, 28 COMM. RES. 772, 774–75 (2001) (illustrating how subtle racial cues trigger racial stereotypes that “are mentally available for most individuals by adulthood; that is, they are present in long-term memory”); Thomas K. Srull & Robert S. Wyer, Jr., *Person Memory and Judgment*, 96 PSYCHOL. REV. 58, 59–60 (1989) (offering a theoretical model for the processes underlying the formation of people’s impressions, and inter alia, confirming the hypothesis that “[i]f subjects already have a general expectation for the target’s traits, they use these traits as bases for their interpretation”).

57. Dixon, supra note 11, at 107; Gilliam and Iyengar, supra note 11, at 561–62. In both these studies, racially unidentified suspects were remembered by participants as Blacks, lending support to the thesis on the role of schemas as fillers of information when one is not provided. For more on criminal racial priming, see Ravid, supra note 52, at 253–54.

58. Some argue this fear has become the key feature in defining Blacks in modern day America, a definition that later justifies what is often referred to as “modern racism.” See generally ALEXANDER, supra note 26; NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT (2016) (offering a story of the criminal justice system and racial inequalities in the largest criminal courthouse in the country).

59. See Dixon, supra note 11, at 107; Gilliam & Iyengar, supra note 11, at 561–62; Ravid, supra note 52, at 255

60. Guthrie, Rachlinski, & Wistrich, supra note 27, at 6–10. Based on the cognitive model developed by Daniel Kahneman and Shane Frederick, the authors suggest a dual-process model of judicial decisionmaking. First, an automatic heuristic-based intuition and second, a deliberative process which involves mental efforts, motivation, concentration, and the execution of learned rules. They refer to this model as the intuitive-override model. Id.

host of cognitive effects such as anchoring, hindsight bias, egocentric bias, framing, and representativeness heuristics. For instance, on anchoring, they discover that demands made at prehearing settlement conferences anchored judges’ assessment of the appropriate amount of damages. Other studies suggest that, despite their image as objective figures led by legal doctrine, judges are in fact vulnerable to emotional decisionmaking.

Given the above, there is no reason to assume that, if the media affects the cognition of the general population, such an effect would completely bypass the judicial mind. Therefore, this study hypothesizes that the media contributes to judges’ own concerns regarding the increased presence of crime in society. Moreover, the study also hypothesizes that the media amplifies such a fear particularly with respect to minority groups (predominantly Blacks). Studies suggest, however, that judges may be less susceptible to cognitive biases. For example, they are less likely to develop new racially-biased sentiments due to racial priming. This can partially be explained through the intuitive-override model of decisionmaking, according to which judicial decisionmaking combines a first phase of intuitive judging with a second phase of deliberative thinking. While the intuitive decisionmaking is usually simple and quick, the deliberative

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63. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 CORNELL L. REV. 778 (2001). Although the authors found all these biases had a significant impact on the decisionmaking process, they found that judges might be less susceptible to some of these biases compared to a lay audience. The cognitive biases literature is closely aligned with behavioral law and economics approaches to decisionmaking processes, contending that judicial decisionmaking involves information processing, analysis of alternatives, and selection among those alternatives and therefore cannot be fully explained under an incentive-based framework. Lawrence Baum, Motivation and Judicial Behavior: Expanding the Scope of Inquiry, in THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING 3 (David Klein & Gregory Mitchell eds., 2010).


65. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?, 93 TEX. L. REV. 855 (2015) ("[U]nlike jurors, judges are expected to put their emotional reactions to litigants aside. Can they do it? The first reported experiments on the topic... suggest that they cannot."); Holger Spemann & Lars Kohn, Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges, 45 J. LEGAL STUD. 255 (2016) (showing that precedents do not have stronger effects than defendant characteristics on judicial decisions).


override can be complex and slow.

However, despite the vast literature discussing judicial sensitivity to cognitive effects and the literature identifying the cognitive effects of the media, the studies addressing these in conjunction are few and far between. One exception is Chen’s field study pointing at priming effects within a U.S. court of appeals.68 Using data from 1925–2002 on U.S. appellate judges, he attributes behavioral changes of the judiciary (such as increased number of dissents) occurring before presidential elections—when the media is saturated with politically-oriented coverage—to the effect of priming. According to Chen, although priming is well documented through laboratory experiments, field studies addressing concerns about external validity had lesser success in inducing priming effects.

To conclude, this Article pushes the scholarship on the links between media coverage on crime and judicial decisionmaking a step forward. First, I offer an empirical look that focuses on the extent to which the media may divert judicial discretion in reaching decisions. Second, I take into account the multifaceted dimensions through which the media might affect judicial behavior through both conscious motivation-based decisions and unconscious cognitive triggers. More specifically, I explore how an increase in media coverage on crime cognitively advances concerns about the presence of crime in society among the judiciary, how these concerns are mitigated through motivation-based considerations, and how these all play out in sentencing decisions. This approach, so I argue, offers a more realistic perspective to understand the relationship between the judges and the media.

As discussed earlier, a key feature in the study’s design is the selection of three jurisdictions that differ in their judicial selection mechanism. The variation in selection mechanisms allows me to assess how institutional design may play a role in enhancing or mitigating media effects. Given the importance of this feature to the study, the next chapter will provide a brief overview on the scholarly debate around judicial elections in the United States and will point out how this debate informs our understanding of the media-judiciary relationship.

III. THE CONTROVERSY AROUND JUDICIAL ELECTIONS

A. INSTITUTIONAL BACKGROUND

While American exceptionalism has traditionally been a topic of much debate, there are few issues that raise more non-American eyebrows than the concept of judicial elections in state courts. Within the United States, however, judicial elections are well-established and receive much public support. Nevertheless, what might have been considered at times a natural extension of the Jacksonian idea of popular control of government, the merit of judicial elections is currently one of the most pressing issues on the American legal and political agenda. The debate, as understood today, contains two levels of discussion: (1) whether to appoint or elect judges, and (2) if the latter, whether the election system should be partisan or nonpartisan (or perhaps some other system).

The history of judicial selection mechanisms in the United States reveals a tension between two ideas: increasing the institutional independence of the judiciary on the one hand, and their public accountability on the other. In the first decades after U.S. independence, British tradition heavily influenced U.S. practices and judicial selection remained outside the control of the popular vote; state legislators or governors held the power to appoint the judiciary for lifetime terms. In those days neither independence nor accountability received particular emphasis, in part because the courts were considered weak institutions that did not require public scrutiny.

Judicial elections—then by default partisan—appeared for the first time

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70. Canes-Wrone & Clark, supra note 45, at 22–24; Kang & Shepherd, supra note 45, at 71; Shepherd, supra note 45 at 625–26. See generally CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (providing empirical evidence to the claim that judicial elections “enhance the quality of democracy and create an inextricable link between citizens and the judiciary”); CHARLES GARDNER GEYH, WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA’S JUDGES (2019) (a most recent book project on judicial elections, suggesting to depart from the dichotomy between elective and appointive systems towards a more complex view regarding internal checks and balances within jurisdictions).

71. See generally Canes-Wrone and Clark, supra note 45 (exposing the sensitivity of judges in nonpartisan systems to public pressure); Kang & Shepherd, supra note 45 (calling for reforms to replace partisan elections with nonpartisan methods).

72. While many scholars perceive judicial elections mainly as a threat to judicial independence, Shugerman offers a different read of the history of judicial elections, one that considers the story of judicial election part of “the ongoing American pursuit of judicial independence.” JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 5–7 (2012).

73. BONNEAU & HALL, supra note 70, at 4. In fact, the selection of judges those days paralleled the selection of federal judges.
in 1812, in Georgia’s lower courts. However, the general trend toward instituting judicial elections is traditionally associated with the “more populist strain of democratic judicial accountability” that began with the election of President Andrew Jackson in 1828. Under this wave of second generation democratic republicanism, calls were made to curb judicial power: first, by changing tenured appointments and, second, by putting judges under the democratic light of public elections. This appeal for judicial accountability remained dominant for many years after Jackson left office, but its rationale expanded beyond Jacksonian ideas and general hostility to courts. In fact, many of those supporting judicial partisan elections supported a strong judiciary and believed judges would be more “independent-minded” if they built their authority through public elections rather than through political nominations. In other words, the move to partisan elections was supposed to advance independence and accountability. By 1900, 33 of the 45 states selected judges through partisan elections.

However, as Canes-Wrone and Clark indicate, partisan elections were not very successful in promoting judicial independence or judicial prestige. On the contrary, the increased power of party politics forced judicial candidates to appeal to parties’ ideologies and interests. With the turn of the twentieth century, and the rise of the Populist and the Progressive era, a “protracted period of intense anti-court sentiment” erupted. In attempts to contain the unleashed political machine, the reformists pushed a new type of judicial elections—nonpartisan—to reduce the influence of political affiliations on the ballot. As had been the case with the idea of partisan elections, the nonpartisan method was considered an alternative method to promote judicial independence, but this time, what was needed was

74. Canes-Wrone & Clark, supra note 45, at 25.
75. GEYH, supra note 70, at 31.
76. F. Andrew Hanssen, Learning About Judicial Independence: Institutional Change in the State Courts, 33 J. LEGAL STUD. 431 (2004) (tracing the evolution of judicial selection and retention procedures used today and suggesting changes were mostly a product of agency problem).
77. GEYH, supra note 70, at 33; see Hanssen, supra note 76, at 433–40.
78. GEYH, supra note 70, at 33.
79. Canes-Wrone & Clark, supra note 45, at 27; Samuel Grimes, “Without Favor, Denial, or Delay”: Will North Carolina Finally Adopt the Merit Selection of Judges, 76 N.C. L. REV. 2266, 2273 (1998) (discussing the movement within the legal profession that pushed towards developing “a method of judicial selection that would reduce the influence of partisan politics”).
80. GEYH, supra note 70, at 34.
81. Herbert Kritzer, ‘Law Is the Mere Continuation of Politics by Different Means’: American Judicial Selection in the Twenty-First Century, 56 DePaul L. REV. 423, 429 (2007) (“While nonpartisan elections were a part of the progressive movement, eliminating partisan elections was also a goal of the reformers who sought to end the dominance of political machines in major cities and in many states.”).
independence from partisanship. North Dakota was the first state to adopt such a method and by 1927 eleven more states followed a similar path. While scholars seem to agree that through nonpartisan elections some detachment from parties cues was advanced, it is claimed that it also limited the public’s ability to make reasoned decisions, and raised concerns regarding voters’ limitations in assessing judicial qualifications. It is suggested that political parties will reemerge in order to take hold of that information gap even in nonpartisan systems.

In response to the latter concerns, the idea of merit selection was slowly advanced, mostly through the channels of the newly founded American Judicature Society. In a nutshell, this method aimed to increase professionalism among the judiciary through the creation of a pool of eligible candidates determined by committees of judges and lawyers. These candidates were then nominated by the governor or the legislature, and after a fixed term stood for reelection though without party affiliation or competition. A version of this method, today more commonly known as the “Nonpartisan Court Plan” (or “Missouri Plan”) was first implemented not in Missouri but rather in California in 1934; it slowly took hold and by the 1980s over twenty states had adopted various versions of this approach.

Today the U.S. state courts employ a variety of methods to select judges—including differences in their initial selection process, the reelection process, and the terms in which judges serve, as displayed in Table 1. This study focuses on three states that represent the main “branches” of the debate, with some variation.

82. Geyh, supra note 70. According to Geyh, another rationale stood behind the push towards nonpartisan elections: “[f]or ardent Progressives . . . the true peril of Lochner era courts lay in the courts’ perceived disdain for the will of state legislators and their allegiance to corporate overlords.” Id. at 35. Nonpartisan elections could diminish this threat, assuming that the hold of corporatons was strongly attached to political parties.
83. Id.
84. Geyh, supra note 70, at 34–35; Grimes, supra note 79, at 2273.
85. Geyh, supra note 70, at 85.
86. Canes-Wrone & Clark, supra note 45, at 28–29. The Society was founded in 1913 “with the hope that the organization would develop a new and better selection procedure.” Id. at 28.
87. Geyh, supra note 70, at 39.
89. Geyh, supra note 70, at 41. Around the 1950s the “Nonpartisan Court Plan” was renamed and is currently termed “Merit Selection” or “The Missouri Plan.”
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<td>Source: the website on judicial selection systems (The American Judicature Society <a href="http://www.judicialselection.us/">http://www.judicialselection.us/</a>). MD, PA, VA analyzed in this study are highlighted.</td>
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B. THE ARGUMENTS: ELECTED V. APPOINTED

To crystalize the problems associated with judicial elections, Geyh offers the ironic “Axiom of 80”: Up to 80% of registered voters do not vote in judicial elections. Up to 80% of the public that vote in judicial elections cannot identify the candidates for whom they voted. Up to 80% of the public think the campaign contributions in judicial elections influence judicial decision-making. And yet 80% of the public still supports judicial elections. In the debate between elected versus appointed systems a few key normative arguments emerge, some of which are grounded in empirical data.

First, those opposing judicial elections claim that subjecting judges to the popular vote will create greater sensitivity to public pressure. Under the assumptions that judges are bound by the law and do not make overtly political decisions, it is imperative they will be insulated from public pressure and electoral politics. Knowing that the public can jeopardize tenure or promotion might divert the judiciary from reaching the “right” decisions, particularly in circumstances where such decisions divert from the popular views (assuming that decisions based on legal doctrine and precedents are the right decisions). There is some empirical evidence justifying this concern, suggesting that judges are indeed affected by political pressures and change their decisionmaking process in proximity to elections in ways that conform with popular views on contested topics. In the context of crime, it is documented that judges become harsher in rendering sentencing decisions.

Second, those opposing judicial elections claim that voters are in fact ill-equipped to hold judges accountable for two reasons: they cannot do so, and they do not care. The public cannot hold judges accountable because most state judges work under the radar and voters have little information on them. If the public learns something about judges running for election, the

90. Geyh, supra note 69, at 53.
91. Geyh, supra note 70, at 78.
92. Huber & Gordon, supra note 44; Sanford C. Gordon & Gregory A. Huber, The Effect of Electoral Competitiveness on Incumbent Behavior, 2 Q.J. Pol. Sci. 107 (2007) (utilizing the within-sample variation in Kansas judicial selection systems and showing that, during campaign season, judges operating under a partisan election regime impose harsher sentences than judges operating under a retention election regime). Lim also took advantage of this Kansas oddity to show that “sentencing behavior of elected judges is far more variable than that of appointed judges. The sentencing harshness of elected judges is strongly related to the political ideology of the voters in their districts, while that of appointed judges is not.” Lim, supra note 46. Beyond the criminal context, studies suggest that in states with noncompetitive retention elections, as elections approach judges issue rulings that align more closely with the political orientation of their voters. Elisha Carol Savchak & A.J. Barghothi, The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking, 7 St. Pol. & Pol’y Q. 394 (2007).
93. Bonneau & Hall, supra note 70, at 2; Geyh, supra note 70, at 85.
information most likely comes from campaign advertising, which usually advances an evaluation of a judge based on final decisions regardless of whether these decisions were rendered according to existing laws. Moreover, the public is indifferent for related reasons; judges do not play a meaningful role in the lives of many and, as such, the judiciary is not an active arena of public political concern.

Third, judicial campaigns, especially in the aftermath of Republican Party of Minnesota v. White, pose another threat as judges that run for competitive elections under specific policy tickets bind themselves to cases they will later decide—which undermines the impartiality of the judges and the integrity of the legal process. Similar risks exist regarding campaign contributors that later become litigants or representatives of interest groups. Empirical studies provide ample evidence on the relationship between the support judges receive for their campaigns and the decisions they make.

Proponents of judicial elections would claim, first, that judges are “policymakers in robes”—they are powerful and political. Moreover, law is often more of an art than a science, and judges are artists in providing interpretation and reasoning for the “right” legal outcome. When doing so, they bring a host of ideologies and extralegal considerations that determine their decisionmaking. Appointed judges may thus feel free to disregard the intrinsic meaning of the law (if such exists) and make decisions based on their personal beliefs and ideologies. As such, the concern with appointive systems is that when it comes to the judiciary the eyes of the elites trump the eyes of the electorate which goes against principles of a representative democracy.

Second, elections enhance the judiciary’s legitimacy. Such a view has

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95. Damon M. Cann, Justice for Sale? Campaign Contributions and Judicial Decisionmaking, 7 ST. POL. & POL’Y Q. 281, 288–89, 292 (2007) (suggesting that the campaign contributions judges receive directly affect judicial decisionmaking); Shepherd, supra note 45, at 629 (studying twenty-eight thousand cases heard by 470 judges in multiple states and finding that the probability that judges selected in partisan elections will vote for litigants favored by interest groups has a statistically significant relationship with contributions from interest groups). But see Damon M. Cann, Campaign Contributions and Judicial Behavior, 23 AM. REV. POL. 261, 261 (2002) (showing that “lawyers who make campaign contributions are no more likely to win cases than lawyers who do not” and that judges who are faced by lawyers who contributed large amounts to their campaigns are more likely to recuse themselves).
96. GEYH, supra note 70, at 83.
97. Id. at 82.
98. BONNEAU & HALL, supra note 70, at 14; GEYH, supra note 70, at 83.
not changed despite *Minnesota v. White*.

*Third*, over the years local actors have increasingly utilized state courts to promote social causes, including contested issues. This increases the visibility of state courts and the public’s interest in them. The media’s increased attention to judicial campaigns also contributes to the increased salience of state courts. In a parallel process, voters become more sophisticated in understanding the state judiciary and more capable of assessing judicial qualifications.

*Fourth*, and relatedly, it is argued that in any event appointed systems do not keep up to their promises. They do not necessarily produce better merit-based judges. They also do not truly leave politics out of the game, as the “black box” of merit-selections-commissions processes were found to be highly politicized and subject to external pressure. Last, even if a merit system aims to preserve accountably through retention elections, they do not truly provide competitive contested elections as most judges are reelected, compared to competitive contested elections.


101. BONNEAU & HALL, supra note 70, at 98.

102. GEYH, supra note 70, at 92–93. The recent Judge Aaron Persky case can exemplify this latter perspective, although to my view it can also serve as a support for proponents of appointive systems. Judge Aaron Persky drew meaningful public attention when he sentenced Brock Turner, a Stanford student, to six months in prison for sexually assaulting an unconscious woman. His decision ignited a heated public debate, among law faculties and the public alike, with one strand of critique demanding to recall him from office. In June 2018, he was the first judge in eighty years to be recalled by the voters. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html [https://perma.cc/RF7G-FGXF].

103. GREG GOELZHAUSER, *CHOOSING STATE SUPREME COURT JUSTICES: MERIT SELECTION AND THE CONSEQUENCES OF INSTITUTIONAL REFORM* 110 (2016); Choi et al., supra note 28 (showing that appointed judges write higher quality opinions than elected judges do, but elected judges write more opinions, and that the large quantity difference makes up for the small quality difference).


105. BONNEAU & HALL, supra note 70, at 26.
C. THE ARGUMENTS: PARTISAN v. NONPARTISAN SYSTEMS

A secondary, yet equally important, debate revolves around which elective system better balances independence and accountability. The conventional wisdom is that nonpartisan systems are rated higher in promoting independence, and as such this type of system was even endorsed by the American Bar Association in 2003 as a preferred method.\textsuperscript{106} Indeed, studies show that the correlations between campaign contributions and decisions favoring business interests arise only for judges in partisan elections.\textsuperscript{107} However, others argue that judges under a partisan system will be under less pressure—compared to judges facing nonpartisan elections—to reach decisions that “speak to mass” and conform with public opinion. This is particularly true in the current campaign-driven environment (issue-based platforms).\textsuperscript{108} In the current reality, so it is argued, judges seeking reelection in a nonpartisan system will have to convey a very clear policy position that can be easily summarized for voters, and that is in line with public opinion (regardless of whether that position is consistent with the law).

This is particularly true in salient decisions.\textsuperscript{109} Canes-Wrone and Clark provide empirical evidence to support this claim, showing that public opinion about abortion policy affects judicial decisions in nonpartisan systems. Such a relationship was not found in partisan elective systems.\textsuperscript{110} These findings imply that judges in nonpartisan systems are more responsive to public opinion than judges in partisan systems, and as such are likely to be less independent. Along those lines, another argument in support of partisan elections is that partisan elections do a better job promoting democracy since the candidate’s political affiliation provides a package of information to the voters that helps them make informed decisions when choosing its representatives.\textsuperscript{111} Another argument against nonpartisan

\begin{footnotesize}
\textsuperscript{106}. JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 98 (2003) (“For states that cannot abandon the judicial reselection process altogether, judges should be subject to reappointment by a credible, neutral, nonpartisan, diverse deliberative body.”).


\textsuperscript{108}. Canes-Wrone & Clark, supra note 45, at 40.

\textsuperscript{109}. Canes-Wrone & Clark, supra note 45, at 40.

\textsuperscript{110}. Canes-Wrone & Clark, supra note 45, at 40. For another illustration of the sensitivity of nonpartisan elective system compared to other selection system, see Lim, Snyder & Strömberg, supra note 34.

\textsuperscript{111}. GEYH, supra note 70, at 92.
\end{footnotesize}
elections relates to the aggregate campaign spending it entails, as some scholars suggest campaign spending is overall higher in these systems. Kang and Shepard are dubious about this claim, and in any event argue that “even if we were to stipulate that nonpartisan elections increase aggregate campaign spending, we find here that the spending in nonpartisan elections appears to matter less where it counts—judicial decisions on the bench”.

The issue of judicial selection is strongly tied to the broad media-judiciary relationship, and specifically provides an important platform through which to understand the media-judiciary relationship both at the conscious and unconscious levels. At the conscious motivation-based level the argument is simple: different selection systems offer different incentives, and the media has a direct role affecting these incentives. Specifically, I suggest that with an increased concern regarding crime in society as reflected through media coverage, Americans will lean towards greater retributivism. With an eye towards reelection, I predict that judges in elective systems will be more compelled to capitulate to such a sentiment compared to judges in appointive systems. At the subconscious level, assuming that the media establishes or enhances social fears of crime, the judicial responses to this fear might differ or be mitigated based on the sensitivity of the selection system to public pressure.

To summarize, this study assesses whether the media affects judicial decisionmaking. I do this by studying whether and how an increase in media coverage on crime corresponds to sentencing harshness. In order to understand how different incentive structures affect judicial decisionmaking, I use judicial selection systems as a proxy for judicial susceptibility to public pressure, and compare this media-sentencing harshness connection in systems with different selection mechanisms.

IV. METHODOLOGY AND DATA

The study explores whether trends in sentencing decisions in U.S. state courts over a period of five years (1998–2002) are associated with the intensity of media coverage on crime for the same time. Put more simply, I ask whether changes in crime coverage over time (independent variable) can explain changes in length of sentences imposed on offenders (dependent variable). To do so, I conduct a multivariate time series regression analysis using data from three data sets:

112. BONNEAU & HALL, supra note 70, at 131. However, they claim this is true only when several other differences between the systems remain constant such as whether the election is contested, the electoral vulnerability of the incumbent, how attractive the seat is, the political/institutional context, and the candidates’ pool.

(1) Sentencing decisions in U.S. state courts, collected every other year during the years 1998-2002. This restricted dataset was obtained from the Inter-University Consortium for Political and Social Research (“ICPSR”).

(2) Newly collected dataset of crime coverage in the Washington Post during those years. I constructed the dataset for this study, and it contains information both on the national and local level coverage.

(3) Data on court-level and county-level characteristics to match the sentencing data. The data at the court-level were also uniquely constructed for this study, as there are no datasets containing information on state court judges and their characteristics at the scope and depth required for this study.

I focus on three neighboring U.S. states that differ in their judicial selection mechanisms:

(1) Maryland: judges are appointed by the governor and reelected through contested nonpartisan elections. The first term is of at least one year, and subsequent terms for circuit court judges are fifteen years.

(2) Pennsylvania: judges are selected through partisan elections, for ten-year terms, and then stand for reelection in retention elections.

(3) Virginia: judges are nominated by the legislature, for eight-year terms, and stand for re-nomination in a similar process.

Under cognitive theories on media effects (and particularly priming), an increased intensity in the coverage of crime advances perceptions of crime severity and makes fear of crime the most immediate and accessible mental shortcut to be used in judgments. Moreover, given media coverage on race, the coverage might advance fear of crime from specific racial groups. One potential outcome in the context of the judiciary may be an increase in sentencing harshness as a judicial response to the media depiction of crime, and even more so on specific groups. In the U.S. context and based on empirical studies showing a general overrepresentation of Black perpetrators in the coverage of crime, an increase in harshness can potentially have a


115. Of course, the media depiction of crime rarely—if ever—represents the actual reality of crime. See Robert Reiner et al., From Law and Order to Lynch Mobs: Crime News Since the Second World War, in CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE 13, 13–32 (Paul Mason ed., 2003) (claiming that the portrayal of crime in the media is like the “law of opposites,” so that “the characteristics of crime, criminals and victims represented in the media are in most respects the polar opposite of the pattern suggested by official crime statistics”); Vincent F. Sacco, Media Constructions of Crime, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 143 (1995) (“Analyses of media content demonstrate that the news provides a map of the world of criminal events that differs in many ways from the one provided by official crime statistics.”).
disparate racial effect. This theoretical background was used to establish what I will later refer to as the first and third hypotheses of the research.

As discussed, other forces can also affect sentencing harshness. How judges are selected (whether by nomination, partisan or nonpartisan election) clearly influences judicial incentives and might also have a role in mitigating cognitive effects. Specifically, one would expect appointed judges to be less susceptible to public opinion on crime, judges elected in partisan elections to follow party lines, and judges elected in nonpartisan elections to accommodate public fear of crime. These expectations formed the second hypothesis of the study.

As mentioned, the dependent variable of interest is sentencing decisions. Sentencing decisions are often used by scholars to understand judicial behavior and attitudes in various spheres, as they provide a clear and quantifiable measurement of judicial discretion. These are also used as a tool to understand the underlying motivations of judicial behavior and the way this behavior corresponds with the different models mentioned above. For example, Schanzenbach and Tiller assess strategic models through the analysis of federal sentencing data, while Huber and Gordon assess the political behavior of the judiciary based on sentencing decisions. Using sentencing as the dependent variable is also telling given the unique socio-legal American context and strong connections between sentencing and political ideology—that is, the traditional dichotomy between liberals and conservatives with respect to harshness in sentencing, with liberals generally being more lenient in sentencing.

This study delves into the uncharted scholarly territory of state courts. As mentioned, most studies conducted in the United States to date focus on the sentencing decisions of either federal or appellate state courts (such as

116. Ravid, supra note 52, at 273–74 (showing clear underrepresentation of white perpetrators in the Washington Post both at the national and local level compared to actual arrest rates).
117. Lim, supra note 46.
120. But see JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2009) (suggesting that the pressure to address social malaise through the metaphor of crime became an inherent feature of modern America, demanding both Republicans and Democrats to appear “tough on crime”).
state supreme courts). Yet, as mentioned, there is no doubt that state trial courts play a major role in the American criminal justice system, handling the vast majority of cases per year. Moreover, in state courts, while juries can convict felons, judges hold the authority to impose sentences and only a small fraction of these decisions is reviewed by appellate courts. Sentencing decisions are thus a good proxy for judicial discretion and worth exploring in the context of judicial decisionmaking.

A. SENTENCING DATA

The sentencing data was obtained from ICPSR and the National Archive of Criminal Justice Data (“NACJD”) as part of their National Judicial Reporting Program. It is a sample of sentencing decisions in U.S. state courts collected from state courts and state prosecutors every other year between 1998 and 2002. It includes sociodemographic information such as age, race, ethnicity, and sex of felon. It also includes case characteristics such as the type of felony, number of felonies, the type of trial (bench, jury, plea), and more. It also includes information on the court/county where the decision was given. Race includes six categories: White, Black, American Indian or Alaskan Native, Asian, Pacific Islander, and other. Ethnicity is also defined, focusing on Hispanic origins. The NACJD 12-level-felonies classification was adopted and includes murder, sexual assault, robbery, aggravated assault, other violent (such as kidnapping and negligent manslaughter), burglary, larceny, fraud, drug possession, drug trafficking, weapon offenses, and other. Sentencing was measured in months, with death sentences

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121. In the last ten years, one can identify some changes in this tendency and a few empirical studies of state courts have been carried out. See Gordon & Huber, supra note 92; Huber & Gordon, supra note 44; Lim, supra note 46; see also Richard Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 COLUM. L. REV. 1190 (2005) (providing a general overview of sentencing policies at the State level).

122. Lim, Snyder & Strömberg, supra note 34, at 104.

123. This is also true under regimes of sentencing guidelines. See generally Lydia Tiede et al., Judicial Attributes and Sentencing-Deviation Cases: Do Sex, Race, and Politics Matter?, 31 JUST. SYS. J. 249 (2010) (emphasizing the meaningful portions of judges using their discretion when deviating from sentencing guidelines).

124. The data has been collected through two-stage stratified clustered sampling. In the first stage, counties are divided into multiple strata by their size and the number of felony convictions. Since large counties constitute a large amount of serious crimes, they are given a higher probability of being selected than small counties. At the second stage, a systematic sample of each offense category was selected from each county’s records. Rates at which cases were sampled vary by stratum and offense category. In large counties, all murder and rape cases were typically included, but other offenses were sampled. In small counties, all felony cases were taken. Since many counties are repeatedly included in the sample, the combined dataset has an unbalanced panel structure. The data cover the following counties: MD: Anne Arundel, Baltimore, Charles, Dorchester, Frederick, Howard, Montgomery, Prince Georges, Carroll, and
coded at the maximum of 1200 months.\textsuperscript{125} The final sample included 43,565 sentencing decisions.

B. MEDIA DATA

The study spans five years of coverage on crime in The Post, utilizing a newly constructed dataset. The Post was chosen, first, because it is one of the leading national newspapers particularly among elite audiences, and, second, because it also serves as a local newspaper for Maryland and Virginia and as such allows some assessment of the potential differences between national and local coverage. Pennsylvania receives only the national coverage.\textsuperscript{126}


\textsuperscript{125} In the context of analyzing sentencing length, the issue of potential bias in the estimates is often raised. Given that the subset of offenders that are incarcerated is likely to be nonrandom, a selection bias might be a concern. Bushway, Johnson and Slocum address this problem, suggesting the use of a sensitivity analysis to determine whether Heckman’s two-step correction for selection bias should be implemented. Shawn Bushway, Brian D. Johnson & Lee Ann Slocum, Is the Magic Still There? The Use of the Heckman Two-Step Correction for Selection Bias in Criminology, 23 J. QUANTITATIVE CRIMINOLOGY 151 (2007); James Heckman, The Common Structure of Statistical Models of Truncation, Sample Selection and Limited Dependent Variables and a Simple Estimator for Such Models, in 5 ANNALS OF ECONOMIC & SOCIAL MEASUREMENT 475 (1976), https://www.nber.org/chapters/c10491.pdf [https://perma.cc/5DWM-YDKV]. However, following Bushway, Johnson and Slocum’s approach requires first the analysis of the in/out sentencing decisions (comparing the case where no incarceration was included and those with at least a minimal form of confinement). The sentencing sample provided in this study includes only in decisions, that is each observation has sentencing length greater than zero. However, given that in state courts generally there is low level of censoring (as most offenders (70\%)) receive at least some form of confinement, possible selection bias is unlikely to be a problem. Moreover, other data sources relating directly to the states analyzed in the data suggest that in Virginia, for example, the numbers are even higher with approximately 90\% of the offenders receiving some sort of confinement. For a similar approach in the federal context see generally Brian D. Johnson & Sara Betsinger, Punishing the “Model Minority”: Asian-American Criminal Sentencing Outcomes in Federal District Courts, 47 CRIMINOLOGY 1045 (2009). In any event, given that the cases lacking any form of confinement (low sentencing) are also likely to receive less coverage (low intensity), even if bias does exist it is likely to be downward bias, which suggests that including these cases in the sample will likely increase the estimated effect of intensity on sentencing.

\textsuperscript{126} The Washington Post is one of the three highest-circulation daily papers in the United States. During the years when the research was conducted The Post’s average daily physical circulation was approximated at around eight hundred thousand readers. The Post’s media market contains thirty-two counties and seven independent cities in four states and the District of Columbia (MD, VA, PA, WV). In 2007, 82\% of its readership were outside of the Washington Area (including online readership). For the national level analysis, The Washington Post can also serve as a proxy for the coverage in other newspapers (for research finding news similarities across newspapers see Grant C. Atkins et al., Measuring News Similarity Across Ten U.S. News Sites, ArXiv (June 24, 2018), http://arxiv.org/abs/1806.90982 [https://perma.cc/UX4T-UJXK]). In 2016, more than 4 million unique browsers per month
Particular attention should be given to the time frame used in the analysis. The late 1990s and beginning 2000s are years that represent the era before the “explosion” of the information age, when social media outlets joined the arena and began to fight for dominance in providing public information alongside alternative online news outlets. This Article thus captures a period in which newspapers served, alongside TV, as main providers of public information. This social-cultural context offers a unique opportunity to study media effects in relative isolation. Consequently, it bolsters arguments regarding the role of The Post in providing information to the judiciary and thus for the potential effect of this information on the judicial decisionmaking process.

I adopted a “Constructed Week” sampling strategy, frequently used by scholars aiming to approximate content for larger populations of textual data in content analysis projects. This strategy ensures the sample of stories is unaffected by the seasonality of news events and coverage decisions. Studies provide compelling evidence that for daily American newspapers this method is the most effective in capturing variations within days of news coverage. I sampled four constructed weeks per year, one week per quarter, thus allowing both yearly and quarterly analysis. The final sample


128. Hunt Allcott & Matthew Gentzkow, Social Media and Fake News in the 2016 Election, 31 J. ECON. PERSP. 211 (2017). The authors claim such dominance remains also in the current “fake news” era. In fact, newspapers have seemed to regain the public’s trust, representing accuracy and “reality” (if such term can even be used when discussing media coverage; see infra Part VII).

129. Constructed week sampling is a form of stratified random sampling in which researchers identify all Sundays, Mondays, etc. within a chosen period and randomly sample from those “grouped” days to create a fictitious week (i.e., randomly pick a Sunday, a Monday, etc. until forming a week of randomly sampled days). See Harry L. Marsh, A Comparative Analysis of Crime Coverage in Newspapers in the United States and Other Countries from 1960–1989: A Review of the Literature, 19 J. CRIM. JUST. 67, 71 (1991); Daniel Riffe, Charles F. Aust & Stephen R. Lacy, The Effectiveness of Random, Consecutive Day and Constructed Week Sampling in Newspaper Content Analysis, 70 JOURNALISM Q. 133 (1993); DANIEL RIFFE ET AL., ANALYZING MEDIA MESSAGES: USING QUANTITATIVE CONTENT ANALYSIS IN RESEARCH (2d ed. 2005).

included 2,274 stories on crime; 751 national stories, and 1,523 local stories.\footnote{Lacy et al., supra note 130, at 843 (showing that selecting two constructed weeks from a year or nine weeks from five years is sufficiently efficient, unless variations are large and then ten weeks should be selected); Luke et al., supra note 131, at 87–89 (suggesting that six weeks from five years should suffice).}

The codebook was developed in two stages. First, I conducted a pilot coding process in which 35\% of a yearly data were sampled.\footnote{To avoid bias, the pilot data was not part of the data used in the final sample.} The coders were provided with an initial coding scheme containing a detailed definition of each variable. Coding began after an individual and group level training conducted by the main researcher. After the pilot reliabilities were analyzed, coders held group discussions on coding decisions, specifically where lower reliability values were obtained.\footnote{This was assessed under Cohen’s Kappa (κ) reliability measurement. For several decades, media scholars have debated what is the most efficient test to assess reliability in content analysis. \textit{See, e.g.}, Andrew F. Hayes & Klaus Krippendorff, \textit{Answering the Call for a Standard Reliability Measure for Coding Data}, 1 COMM. METHODS & MEASURES 77 (2007). Despite such debates, the review of the literature reveals the research community prefers specific tests over others, and following that norm I used Cohen Kappa’s (κ), which allows the assessment of multiple coders and has been established as a strong measure of reliability. Dixon, supra note 11; Klaus Krippendorff, \textit{Reliability in Content Analysis: Some Misconceptions and Recommendations}, 30 HUM. COMM. RES. 411 (2004).} Changes to the protocol were made based on the reliability measurements and the group discussion.\footnote{Consequently, some variables remained as originally defined, others were revised, and a few were omitted.} Overall, coders were trained at the individual and group level, a total of approximately 10–13 hours. To maximize the reliability of the coding process, Krippendorff’s recommended coding guidelines were adopted.\footnote{Krippendorff, supra note 133, at 430. Most importantly: employ pilot content analysis, indicate clear instructions for coding, use skilled coders and engage in training sessions, code independently, use clear criteria and a single classification principle. Using these guidelines increases the reliability of the coding process. \textit{See also} Revital Sela-Shayovitz, \textit{Police Legitimacy Under the Spotlight: Media Coverage of Police Performance in the Face of a High Terrorism Threat}, 11 J. EXPERIMENTAL CRIMINOLOGY 117 (2015).} In addition, 10\% of the sample was used to assess inter-coder reliability for the full sample, which ranged from 0.74 to 0.96 with an average κ coefficient of 0.82.\footnote{Cohen’s Kappa (κ) values of 0.8 and over are considered reliable.}

The units of data collection were \textit{stories} on crime in the newspaper, categorized by type of felony. \textit{Crime} was broadly defined as a behavior pertaining to a lawbreaking act, or social reaction to law breaking. The felonies coded reflect the NACJD index of felonies mentioned above.\footnote{The study excluded terror-related incidents, espionage, corporate activity, tax evasion, car accidents that do not involve negligent manslaughter, and other non-violent felonies not mentioned in the sentencing data (such as car theft). Crime stories occurring outside the United States were also excluded.} Two sections were coded: main and local, the latter categorized by the local ("Metro") section specified for each state. To provide a detailed and comprehensive account, the study covered different modes of news reports
on crime including hard news, editorials, letters from readers, and cartoons.

The analysis included a host of form and content related variables. For the purposes of this study the main variable of interest is the variable I called *Intensity*.

*Intensity* (key independent variable) captures the intensity (or salience) of the coverage on crime, based on several proxies. The overall story intensity is the sum of all these proxies running from a minimum of 1 to a maximum of 13. Under this categorization, stories that appear, for example in the front page, and include pictures and big titles, will be ranked higher on the intensity scale compared to stories that appear, for example, at the end of the edition, with no picture and include just one or two short paragraphs in small text. Given that intensity of coverage has two dimensions: (1) how a story is presented; and (2) number of stories on crime per day, the overall intensity of a day in the sample is received by adding up all stories’ intensities in each day. While I use the intensity measurement in this Article to capture the salience of crime stories, the methodology can be equally used to assess salience of coverage also in different contexts.

The coding also included a rigorous analysis of the *content* of the stories, including the type of story, felonies covered in a story, details about gender, race, and age of both defendants and victims, and more.

138. Where the story is located (page number, main or local edition), size of the story and its proportions compared to other stories in the same page, size of the headline and proportions compared to other stories in the same page, whether a visual exists, its size and proportions compared to the story and other stories, and total number of stories within a page.

139. *Race* included six categories, following the NACJD classification. See supra Section IV.A. *Identification of race*: Three ways to communicate race were considered: explicit, implicit, and visual. Under explicit mention, coders were asked to code any clear textual reference to race (that is, “… a white suspect was identified”). Under implicit mention, coders were asked to code the race based on a few indicators inferring the race (family of felon/victim) or usage of language alluding to racial stereotypes (i.e., “inner-city” or “ghetto” for Blacks). See generally Huber & Gordon, supra note 44; Kyung H. Park, The Impact of Judicial Elections in the Sentencing of Black Crime, 52 J. HUM. RESOURCES 998 (2017). To err on the side of caution, name only was not used as an implicit reference. Moreover, geographic location of neighborhoods was also not coded as implicit reference given lack of sufficient knowledge on racial composition within states during the years of the study. Under visuals, coders were asked to code the race based on the visual attached to a story, allowing multiple participants in each visual. The coding book allowed for multiple perpetrators, victims and visuals to be coded. Coders were asked to code individuals whenever the story allowed such coding and had the option of coding a group if the story did not provide any specifications pertaining perpetrators.

*Felonies* were defined based on the NACJD 12-level-felonies classification. The coding spreadsheet allowed coding of up to four felonies per story.
C. COURT AND COUNTY SPECIFIC DATA

The ICPSR sentencing data did not provide specific judge identifiers per case. To address some confounders relating to judicial characteristics, I collected data from state court libraries and archives to ascertain the names of the judges sitting in a court during the time a decision was given. Based on that list I comprised another new and comprehensive dataset that provides court-related data at the county level, such as whether the court leans liberal or conservative, share of Black judges within a court, and share of court up for re-election/re-nomination in a given year.

Given the variance in the judicial selection process among states, the lack of the traditional proxy of the party of the appointing president made it more challenging to determine ideologies of state judges, particularly for state trial courts. Given such a challenge, different techniques were utilized to assess political affiliation.

In Maryland, county circuit courts were analyzed. Judicial candidates for circuit court run for election. Often, however, candidates cross-register for both the Republican party and the Democratic party in the primary election, and the general election has no partisan affiliations on the ballot. A variety of different factors were utilized to determine the political affiliation of each elected judge. First, a general party registration search was performed. If no party affiliation was found, then secondary indicators such as media reports which would often list the party or other clearly indicative factors of the candidate’s party. In addition, if the judge was originally appointed by the governor during a non-election period as a temporary replacement, then the party of the appointing governor was used as a proxy. Finally, biographical research at times indicated that the candidate had later sought or was appointed to a different position that had a partisan affiliation by the appointing authority such as United States Attorney.

In Virginia, county circuit courts were analyzed. Virginia, unlike most states, does not use elections for the selection of the state judiciary. Circuit judges in Virginia are selected by the legislature. In the legislature, the

140. Although not a complete proxy, Republican-affiliated candidates were considered as Conservatives while Democratic-affiliated candidates were considered as Liberals.

141. Studies have shown that judges change their sentencing patterns in proximity to judicial elections and so I added information on proximity to re-election or re-nomination in each of the states based on available public information. Huber & Gordon, supra note 44, at 258. Park, supra note 139, at 100.

142. See Shepherd, supra note 45, at 629 (providing a related strategy to identify political affiliation).

143. The exception is during a recess of the legislature the governor may appoint circuit judges who then must be approved by the legislature or be removed. Judicial Selection Overview, COMMONWEALTH
judges of the circuit courts require a majority vote of each house of the General Assembly (Senate and House of Delegates) in order to be appointed. As such, the identifiers of political affiliation in states that use elections are not useful for uncovering the ideologies of Virginia judges. Instead, a more tenuous proxy must be used. The method I used utilized the fact that the party in control of the legislature was highly likely to appoint candidates that would mirror its political preferences. Thus, during the stretches when one party controlled both legislative houses, the political affiliation of the judicial candidate tended to match the party. However, if there was a split legislature then secondary methods such as biographical information, media reports, and party of appointing governor (if applicable) were used. Finally, the location of the county where the judge was appointed could often be correlated with strong partisan affiliations and was used as a last resort when no other data were available.

In Pennsylvania, courts of common pleas were analyzed. Candidates run in partisan primaries followed by general elections in which the primary winners from each party compete. As in Maryland, there may be interim appointments to the bench to fill vacancies but such appointees must stand for retention at the next election. With the addition of incorporating local party committee endorsements for judicial candidates, the same methodology was employed in identifying political affiliation as in Maryland.

County-specific demographics were also included in the model as controls, including log population, log per capita, log land area size, log employment, education (twenty-five year old with twelve years of education or more), crime rates (log number of crimes known to police), share Black, and share votes for Democratic party in recent presidential elections. Table 2 provides summary statistics for the key dependent and independent variables; both at the sentencing and the media panel data.

<table>
<thead>
<tr>
<th>Variable</th>
<th>N</th>
<th>Mean</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Panel A: Media Coverage</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intensity (national and local)</td>
<td>2,274</td>
<td>4.60</td>
<td>1.88</td>
</tr>
<tr>
<td>Intensity (national only)</td>
<td>751</td>
<td>5.40</td>
<td>2.31</td>
</tr>
<tr>
<td><strong>Panel B: Sentencing Panel</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Full Panel (1998-2002)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sentence</td>
<td>43,565</td>
<td>44.4</td>
<td>82.7</td>
</tr>
<tr>
<td>Log Sentence</td>
<td>43,565</td>
<td>3.17</td>
<td>1.12</td>
</tr>
<tr>
<td><strong>Maryland (1998-2002)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sentence</td>
<td>3,282</td>
<td>61.4</td>
<td>113.1</td>
</tr>
<tr>
<td>Log Sentence</td>
<td>3,282</td>
<td>3.16</td>
<td>1.54</td>
</tr>
<tr>
<td>Sentence</td>
<td>11,671</td>
<td>34.2</td>
<td>85.5</td>
</tr>
<tr>
<td>Log Sentence</td>
<td>11,671</td>
<td>2.53</td>
<td>1.4</td>
</tr>
<tr>
<td>Sentence</td>
<td>28,612</td>
<td>46.6</td>
<td>76.6</td>
</tr>
<tr>
<td>Log Sentence</td>
<td>28,612</td>
<td>3.43</td>
<td>0.78</td>
</tr>
</tbody>
</table>

Notes: The summary refers to all stories from both the national and local sections. Intensity is a variable bounded between 1 and 13. Sentencing is in months. Log Sentence are the log-transformed values of sentencing. To address concerns regarding the sensitivity of the linear models to extreme sentencing decisions, the log-transformed values were utilized in the linear regression models discussed below. These indeed produced the most normal distribution of the residuals.
V. PRELIMINARY CONSIDERATIONS

In an ideal experimental setting, testing the impact of the media on sentencing length would require randomly assigning media coverage quarter by quarter, so that states, or counties within states, will receive varying level of coverage. However, this is an unrealistic setting given that all states receive media coverage and, moreover, some crime stories are likely to appear in different media venues across states, and even across the nation. Therefore, in lack of such an ideal experimental setting, one needs to address the concern that intensity of coverage might be endogenous to harshness in sentencing. This could be because severe crimes, which naturally receive longer sentences, might attract media attention; or other case, court, and county characteristics might explain sentencing outcomes (such as crime prevalence). To the extent possible, I took several steps to address this concern.

First, I used a lagged media variable. The use of lagged explanatory variables is a common strategy among social scientists to address endogeneity concerns. Moreover, regarding the causal direction of the effect, I hypothesize that media coverage affects judicial decisionmaking. Yet, it is possible that causality runs the other way. The lagged media variable addresses some of the reverse-causality concerns. Specifically, in the regression models, intensity was measured one quarter before the dependent variable was measured. The data allow analysis with lags of a year as well, but according to the literature media effects are highly unlikely to last a full year, so shorter periods provide a more compelling interpretation regarding the mechanism that can explain the potential effects of the coverage, whether through priming or other mechanisms.144

Second, I controlled for the likely sources of bias by including a rich and diverse set of variables at the case, judicial, and county level as mentioned earlier (for example, severity of crime, political affiliation, prevalence of crime, democratic vote share in presidential elections, proximity to reelection at the state level and more).

However, it is of course possible that some unobservable factors are driving the relationship between media and sentencing. To investigate this possibility, I took a third step, and conducted additional set of regressions to study the relationship between factors that seem likely to affect sentencing and the intensity variable, following my main specification but excluding the time-varying controls. One key concern is that severe crimes, which receive

144. See, e.g., Chen, supra note 68 (discussing priming effects in cycles of three months).
more coverage, also tend to get longer sentences. For these purposes, I regressed the lagged intensity measurement on the type of felony, including only the time-invariant fixed-effects (FE). Table 3 displays the results. These suggest that lagged intensity of coverage is not systematically correlated with the type of crime (aggravated assault as the reference group), and thus the severity of crime is unlikely to cause a spurious relationship between intensity of coverage in one quarter and sentence length in the subsequent quarter.\textsuperscript{145} I further tested the relationship between intensity and additional factors that are likely to affect sentencing. For example, I tested the relationship between observed case characteristics and lagged coverage intensity given that observed case characteristics are key predictors of sentencing length. The data analyzed in this study support this intuition.\textsuperscript{146} I found no meaningful relationships for the vast majority of the observed case characteristics. I also tested the relationship between crime prevalence (measured through crime rates) and intensity and found it is also not associated with the intensity of coverage.

Although I cannot rule out the possibility that other unobserved time-varying factors are driving the results, the above analyses are consistent with the possibility that the variation in media intensity is as good as random, providing support for my identification strategy.\textsuperscript{147}

\textsuperscript{145}. The results were also robust to the inclusion of county fixed-effects. I could not include quarter-by-year-fixed-effect in the analysis as these are fully collinear with the intensity variable of interest. I thus used half-year fixed effects instead.

\textsuperscript{146}. Based on the increase in values of R-squared when case characteristics are included in the models.

\textsuperscript{147}. While this analysis addresses key endogeneity concerns, there could still be other factors that are correlated with lagged intensity that affect sentencing. For these purposes, I further analyzed whether the variation of sentencing, as predicted by the observable case, court and county characteristics, is correlated with the intensity of coverage for the quarter preceding the sentence. Through this method I am able to infer the degree of selection on unobservable characteristics based on the estimated selection on observable characteristics. The rationale behind this strategy, used in many empirical analyses when instrumental variables cannot be utilized, is to infer that the correlation between intensity and unobserved heterogeneity that affects sentencing is likely to be small if the estimated correlation between intensity and observed heterogeneity that affects sentencing is small. I thus first obtained predicted value of sentencing (\textit{Sentencing}) using the set of observed characteristics used in the main analysis, while excluding the media intensity variable and the time-invariant fixed-effects. I then estimated the relationship between the predicted value of sentencing and lagged intensity. The analysis suggests that the correlation between lagged intensity and predicted sentencing is statistically insignificant, see Appendix Table 1. For an illustration of similar analysis, see Lim, Snyder, & Strömberg, supra note 34.
### Table 3. Regression of the (Lagged) Media Intensity on Felony Type

<table>
<thead>
<tr>
<th>Variables</th>
<th>Pooled Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burglary</td>
<td>0.001</td>
</tr>
<tr>
<td></td>
<td>(0.007)</td>
</tr>
<tr>
<td>Drug Possession</td>
<td>-0.006</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
</tr>
<tr>
<td>Drug Trafficking</td>
<td>0.007</td>
</tr>
<tr>
<td></td>
<td>(0.008)</td>
</tr>
<tr>
<td>Fraud</td>
<td>-0.003</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
</tr>
<tr>
<td>Homicide</td>
<td>0.003</td>
</tr>
<tr>
<td></td>
<td>(0.008)</td>
</tr>
<tr>
<td>Larceny</td>
<td>-0.01</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
</tr>
<tr>
<td>Other Felonies</td>
<td>0.006</td>
</tr>
<tr>
<td></td>
<td>(0.006)</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>0.001</td>
</tr>
<tr>
<td></td>
<td>(0.005)</td>
</tr>
<tr>
<td>Robbery</td>
<td>0.01</td>
</tr>
<tr>
<td></td>
<td>(0.008)</td>
</tr>
<tr>
<td>Weapon</td>
<td>0.01</td>
</tr>
<tr>
<td></td>
<td>(0.02)</td>
</tr>
<tr>
<td>Other violent</td>
<td>-0.004</td>
</tr>
<tr>
<td></td>
<td>(0.007)</td>
</tr>
<tr>
<td>Observations</td>
<td>43,565</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.54</td>
</tr>
<tr>
<td>State FE</td>
<td>Yes</td>
</tr>
<tr>
<td>Half-year FE</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Notes: The table shows OLS regressions results. Standard errors, clustered by county, are in parentheses. Aggravated Assault as reference group; all models include time-invariant state and time FE. As mentioned, all time-variant controls were excluded from the model. No statistically significant relationships between intensity of coverage and felony type were identified.

*** p<0.01, ** p<0.05, * p<0.1.
VI. MAIN EMPIRICAL FINDINGS

A. INTENSITY AND SENTENCING TIME TRENDS

As a first-level analysis, I descriptively explore trends in sentencing length and in intensity of crime coverage over time for the full data. Figure 1 captures the trend line of sentencing and lagged intensity of crime coverage by quarter (so that the intensity data refer to the quarter preceding the average sentences). It displays this trend for the full data—average sentences in all three states and media coverage on crime at the national level.

The Figure first suggests that the trend lines of crime coverage and sentencing are dynamic and tend to change over time. A host of reasons might explain such dynamic trends that are beyond the scope of this Article. For the purposes of this project, Figure 1 clearly illuminates the relationships between intensity of coverage and sentences length. As is evident from the Figure, lagged intensity of coverage is for the most part closely aligned with the trends in sentencing, so that on average an increase or decrease in coverage is followed by an increase/decrease in mean sentencing length the quarter that follows.
Figure 1. Sentencing and Intensity Over Time

Notes: Data on the “Intensity of coverage” on crime are based on the Washington Post national crime coverage for the years 1998–2002, and is lagged by a quarter. Sentencing data are based on the ICPSR and NACJD restricted data.

I further provide a more granular look at sentencing and coverage trends at the state level. For the purposes of the state level analysis, I also considered coverage at the local level when appropriate (that is with regards to the analysis for Maryland and Virginia). For these states the coverage thus includes both national and local level data. Appendix Figures 1–3 display the relationship between coverage and sentencing at a-state-by-state level. Appendix Figure 1 displays these patterns for Maryland, Appendix Figure 2 for Virginia, and Appendix Figure 3 for Pennsylvania. Similar to the trends identified for the full data set, the state-level observations generally allude to the positive relationship between coverage and sentencing in the quarter that follows to suggest that trends in coverage are reflected in sentencing length trends.

B. DOES MEDIA COVERAGE AFFECT SENTENCING: MAIN REGRESSION RESULTS

As much as the descriptive Figure 1 above is informative in understanding the dynamics between the intensity of coverage and
sentencing length, it does not suffice to assess the relationships between those variables. To further explore these relationships, I conducted a set of time-series multivariate regression analyses. Given the continuous nature of the outcome variable I used ordinary least squares regression model (OLS), commonly used in similar settings. I first ran the analysis for the full sample (PA, MD, VA) and for coverage at the national level. Two models were specified: (1) basic model (regressing lagged intensity of media coverage on sentencing length); and (2) the preferred model: the basic model including controls, state and half-year fixed effects. The FE model controls for observable and unobservable time-invariant factors at the state level.\textsuperscript{148}

The equation for the main preferred model is:

$$LogSentence_{it} = \beta_0 + \beta_1 Intensity_{(t-1)} + \beta_2 X_{it} + \delta_s + \mu_t + \epsilon_{it}$$

Where $LogSentence_{it}$ is the measure for sentence $i$ in time $t$. $Intensity_{(t-1)}$ is intensity of coverage in time $(t-1)$, $X_{it}$ contains the control variables, $\delta_s$ is a vector of state-fixed effects, $\mu_t$ is a vector of time-fixed effects.

Table 4 below displays the results of the regression models for the full data for VA, MD, and PA.\textsuperscript{149}

\textsuperscript{148} As mentioned, ideally I would have included quarter fixed-effects but these are perfectly collinear with the lagged intensity variable of interest, and so I used half-year fixed-effects instead. The inclusion of time-fixed effects capture state-level trends that affect all judges but vary over time, for example, trends in conservatism or changes in the law.

\textsuperscript{149} I subjected the models to a set of robustness checks, including re-estimating the linear models with the original sentencing variable, while considering the potential sensitivity of the linear regression model to extreme outliers (using a method known as winsoring: converting high values of data points to the highest data-point that is not considered an outlier. I winsorized at 5% and 95%, so that all the values below the 5th percentile and above the 95th percentile were converted). The results didn’t divert from those provided in Table 4, similarly supporting a positive and statistically significant relationship between the lagged intensity of coverage and sentencing (tables with author).
### TABLE 4. Regression Results Sentencing on Lagged Intensity

<table>
<thead>
<tr>
<th>Variables</th>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intensity of Media Coverage</td>
<td>0.09***</td>
<td>0.042**</td>
</tr>
<tr>
<td>Observations</td>
<td>43,565</td>
<td>43,300</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.0017</td>
<td>0.20</td>
</tr>
<tr>
<td>Controls</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>State FE</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Half-year FE</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Notes: This table reports OLS regression results. The Intensity of coverage is measured a quarter before sentence is given. Standard errors, clustered by county, are in parentheses. Model 2 includes state and half-year FE. Controls include (1) case-specific information; type of felony, number of charges, nature of conviction (jury, bench, plea), race, gender, age of felon, and age-square (2) court specific characteristics; share democrats, share Black, share up for re-election/re-nomination, share male, and (3) county specific characteristics; log employment, log area size, log population, log per capita income, log crime known to authorities, county share Black population, share vote for democratic candidate in recent presidential elections, county education. Sample sizes vary based on missing values.

*** p<0.01, ** p<0.05, * p<0.1

The analysis reveals that both models support the illustration in Figure 1, to suggest an overall media effect on sentencing, and point at statistically significant positive associations between the intensity of coverage and length of imposed sentencing, that is, that an increase in the intensity of coverage increases sentencing. As the table shows, on average, an increase in one unit of coverage intensity is associated with 4.2% increase in sentencing length. One unit increase of intensity could reflect, for example, an average increase in the inclusion of visuals in front-page crime stories. Naturally, an increase in more than one unit of intensity equally increases sentencing length. For example, quarters with more front-page stories on crime, large pictures and titles (compared to quarters with more stories located in the middle pages, with small titles and no pictures) reflect an increase of 3 intensity units, and can thus increase the average sentences in the quarter that follows by approximately 12.5%.

In sum, the findings illustrated in Table 4 provide support to the first hypothesis of the study, that indeed judges are sensitive to general coverage of crime and that such a sensitivity may be reflected in their decisionmaking process.
At the next stage of the analysis, I move beyond the discussion on the main effect across jurisdictions and further explore differences between the analyzed states.

C. INTER-STATE ANALYSIS; COMPARING JUDICIAL SELECTION SYSTEMS

A key feature in this study’s design relates to the variation in the judicial selection mechanisms in each of these states. According to the literature discussed above, and given the difference in incentive structures, different selection mechanisms can potentially affect the extent to which media coverage is related to sentencing decisions. In particular, systems with appointed judges are expected to be more resilient to media coverage than elected judges when it comes to concerns regarding public opinion. That is, as American society is socialized into a “tough on crime” narrative, leniency in sentencing might be less favored by the majority of lay voters. Moreover, a few studies showed that even among elected judges, those under nonpartisan regimes are more likely to be affected by media coverage.

To address these questions, I conducted additional analysis this time including state dummies and interacting it with the lagged media intensity variable. The estimation equation for this model is:

\[
\log\text{Sentence}_{it} = \beta_0 + \beta_1 \text{Intensity}_{(t-1)} + \beta_2 \text{Intensity}_{(t-1)} \times VA \\
+ \beta_3 \text{Intensity}_{(t-1)} \times PA + \beta_4 X_{it} + \delta_s + \mu_t + \epsilon_{it}
\]

Where \(\log\text{Sentence}_{it}\) is the measure for sentence \(i\) in time \(t\). \(\text{Intensity}_{(t-1)}\) is intensity of coverage in time \((t-1)\), \(\text{Intensity}_{(t-1)} \times State\) (\(State = VA\) or \(PA\)) is the interaction term which allows the relationship between intensity and sentencing to vary by state, \(X_{it}\) contains the control variables, \(\delta_s\) is a vector of state-fixed effects, and \(\mu_t\) is a vector of time-fixed effects.

Table 5 displays the results for the interaction model at the national panel (interacting intensity with VA and PA, MD as reference state). The results suggest there is indeed a statistically significant difference between the jurisdictions. The effect size of coverage on sentencing length in Pennsylvania and Virginia is 10% (\(p<0.05\)) and 17% (\(p<0.01\)) smaller than in MD, respectively.

150. See discussion supra Sections III.B–C.
TABLE 5.  Regression Results Interaction Model Virginia, Maryland, and Pennsylvania

<table>
<thead>
<tr>
<th>Variables</th>
<th>Log Sentencing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lagged Intensity</td>
<td>0.13***</td>
</tr>
<tr>
<td></td>
<td>(0.05)</td>
</tr>
<tr>
<td>Lagged Intensity × PA</td>
<td>-0.1**</td>
</tr>
<tr>
<td></td>
<td>(0.05)</td>
</tr>
<tr>
<td>Lagged Intensity × VA</td>
<td>-0.17***</td>
</tr>
<tr>
<td></td>
<td>(0.07)</td>
</tr>
<tr>
<td>Controls</td>
<td>Yes</td>
</tr>
<tr>
<td>State FE</td>
<td>Yes</td>
</tr>
<tr>
<td>Half year FE</td>
<td>Yes</td>
</tr>
<tr>
<td>R-square</td>
<td>0.26</td>
</tr>
<tr>
<td>Observations</td>
<td>43,300</td>
</tr>
</tbody>
</table>

Notes: The table shows OLS regression results. Standard errors, clustered by county, are in parentheses. Maryland as reference group. The model includes state and half-year fixed-effects. Controls include (1) case-specific information: type of felony, number of charges, nature of conviction (jury, bench, plea), race, gender, age of felon, and age-square (2) court specific characteristics; share democrats, share Black, share male, share up for re-election/re-nomination, and (3) county specific characteristics; log population, log land area size, log per capita, education, share Black, log employment, log crime known to authorities, share votes for democratic candidate in recent presidential elections. To understand the differences in effect size between PA and VA another interaction model was specified, this time with PA as a reference group. The findings show that the effect size in VA is also smaller in 6% than the effect size in PA (p<0.1), tables with author. *** p<0.01, ** p<0.05, * p<0.1. 151

These findings provide support to the second hypothesis of the study, according to which the judicial selection systems under which judges function might predict the judiciary’s sensitivity to media coverage. The findings provide strong evidence to such differences between elected and appointed systems, and also evidence to these differences between partisan and nonpartisan elective systems.

151.  I once again subjected the models to additional sensitivity analysis, including using the winsorized sentencing variable. The results were qualitatively similar, with the effect size in VA and PA smaller than in MD. The differences between VA-MD and VA-PA remained statistically significant, but the relationship between PA-MD turned insignificant.
D. DOES RACE MATTER—COVERAGE AND THE RELATIONSHIP TO RACE OF OFFENDERS

The literature on news media representations of Blacks consistently shows how Blacks are overrepresented in the news media when crime and criminality are discussed, especially with respect to violent crime.152 As I showed in a different study, the specific media data used in this study suffer from similar biases, where crime stories on Black perpetrators are associated with greater salience compared to stories on non-Black perpetrators both at the local and national level.153 In the legal arena, studies have repeatedly shown patterns of racial disparities in sentencing decisions in U.S. courts, emphasizing the role of race in judicial decisionmaking.154 Both of these realities beg the question: what is the relationship between the often-distorted portrayal of Blacks in U.S. media and repeated claims of racial disparities in sentencing?

To begin answering these questions, I conducted another layer of analysis, this time specifically focusing on whether the relationship between intensity of coverage and sentencing decisions differ by race. Given existing literature, the racially imbalanced coverage of crime is more likely to prime judges to associate the phenomena of crime in society with minority groups, particularly Blacks. This in turn might yield harsher sentences imposed on this racial group. I thus specified another model, interacting Black offenders with lagged intensity, and implemented it at the intra-state level. As in previous models, I included case specific, court, and county controls, alongside county and half-year fixed-effects. Table 6 below displays the results, showing that while the point estimate for the effect of intensity on sentencing is higher for Black offenders compared to non-Black, it is statistically insignificant.


153. Ravid, supra note 52, at 269.

### TABLE 6. Regression Results Interaction Model Intensity and Race

<table>
<thead>
<tr>
<th>Variables</th>
<th>Log Sentencing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lagged Intensity</td>
<td>0.008</td>
</tr>
<tr>
<td></td>
<td>(0.019)</td>
</tr>
<tr>
<td>Lagged Intensity × Black</td>
<td>0.005</td>
</tr>
<tr>
<td></td>
<td>(0.02)</td>
</tr>
<tr>
<td>Controls</td>
<td>Yes</td>
</tr>
<tr>
<td>County FE</td>
<td>Yes</td>
</tr>
<tr>
<td>Half year FE</td>
<td>Yes</td>
</tr>
<tr>
<td>R-square</td>
<td>0.28</td>
</tr>
<tr>
<td>Observations</td>
<td>43,300</td>
</tr>
</tbody>
</table>

**Notes:** The table shows OLS regression results. Standard errors, clustered by county, are in parentheses. The model includes state and half-year fixed-effects. Controls include (1) case-specific information; type of felony, number of charges, nature of conviction (jury, bench, plea), race, gender, age of felon, and age-square (2) court specific characteristics; share democrats, share Black, share male, share up for re-election/re-nomination, and (3) county specific characteristics; log population, log land area size, log per capita, education, share Black, log employment, log crime known to authorities, share votes for democratic candidate in recent presidential elections. *** p<0.01, ** p<0.05, * p<0.1

To further investigate this question, I conducted additional analysis, this time separately by state. As Table 7 indicates, the point estimate for the effect of intensity on sentencing remains higher for Black defendants in each state. It is only significant in Pennsylvania, however, indicating that an increase in one unit of intensity leads to a 2% (p<0.05) larger increase in sentencing length for Black defendants compared to non-Black defendants.
TABLE 7. Regression Results Interaction Model Intensity and Race, by State

<table>
<thead>
<tr>
<th>Variables</th>
<th>Maryland</th>
<th>Virginia</th>
<th>Pennsylvania</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Logged Sentence</td>
<td>Logged Sentence</td>
<td>Logged Sentence</td>
</tr>
<tr>
<td>Lagged Intensity</td>
<td>0.01 (0.1)</td>
<td>0.01 (0.04)</td>
<td>0.012* (0.007)</td>
</tr>
<tr>
<td>Lagged Intensity × Black</td>
<td>0.02 (0.14)</td>
<td>0.01 (0.05)</td>
<td>0.02** (0.01)</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.27</td>
<td>0.36</td>
<td>0.39</td>
</tr>
<tr>
<td>County FE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Half year FE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Observations</td>
<td>3,282</td>
<td>11,568</td>
<td>28,450</td>
</tr>
</tbody>
</table>

Notes: The table shows OLS regression results. Standard errors, clustered by county, are in parentheses. All models include county and half-year fixed-effects. Controls include (1) case-specific information; type of felony, number of charges, nature of conviction (jury, bench, plea), race, gender, age of felon, and age-square (2) court specific characteristics; share democrats, share Black, share male, share up for re-election/re-nomination, and (3) county specific characteristics; share Black, log crime known to authorities, share votes for democratic candidate in recent presidential elections, log employment, log per-capita income, log area size, log population. Due to multicollinearity court share Black judges, log population, log per capita, log area size, log employment, county education were omitted for Maryland. For consistency similar specifications were used in Virginia and Pennsylvania. I ran sensitivity analysis for Virginia and Pennsylvania with additional controls, but the results did not change. *** p<0.01, ** p<0.05, * p<0.1.

The overall analyses thus provide only a weak support to the third hypothesis of the paper relating to the theory of racial priming, predicting a positive relationship between racially distorted media portrayals and harsher sentences imposed on Black offenders. The analyses do indicate, however, that media, race, and sentencing decisions may be potentially connected, and call for further investigation into this domain to better understand the potential ties between the characteristics of jurisdictions and their sensitivity to racial bias in the media.

VII. DISCUSSION

This Article offers the first empirical evidence to answer a long-discussed question: what is the relationship between the ways the media covers and discusses crime, on the one hand, and sentencing decisions in trial-level criminal courts, on the other? Diverging from the traditional focus on high-profile cases, and on federal and appellate courts, the Article captures the multifaceted and complex ways through which the media can
influence the judiciary in pervasive and surprising ways. I will address each part of the findings separately.

A. Media Effects on Sentencing Length

The first key finding of the Article raises intriguing questions. I find evidence that the media can indeed affect sentencing decisions, so that on average an increase in the intensity of coverage increases sentencing length. These findings hold even when multiple alternative explanations to changes in sentencing were considered, including specific case characteristics, unique court-level considerations, county-level demographics, and general time trends.

To explain these findings, I offer here the fear of crime feedback loop model. This model diverges from previous approaches to offer a broader, more complex, and more realistic view of these relationships. Its novelty lies, first, in the way it addresses both conscious and unconscious media effects on the judiciary and, second, in positioning the judiciary as an institution that is deeply embedded within society and sensitive to public fears and concerns.

According to this model, as a first stage, the intensity on crime coverage has a subconscious effect on the judiciary’s understanding regarding the phenomenon of crime in society. As discussed earlier, there is a consistent stream of research showing that traditional and new media cultivate fear of crime in society. These media effects can be explained through the priming framework discussed earlier. According to priming theory, the intense media coverage on crime in society primes the public, and the judiciary alike, to make the problem of crime most cognitively immediate, and in turn be used in evaluations and judgments (not only on crime related issues). Indeed, the scholarship on priming is split when it comes to evaluating priming effects on different groups in society, particularly across education, gender, race, or profession, claiming that unique group characteristics might result in different susceptibility to priming effects. For example, Huber and Lapinski suggest that the more educated members of society would be less sensitive to racial priming. However, there is little reason to believe judges are 156

155 See supra note 10; Intravia et al., supra note 52. Moreover, as discussed, the media’s portrayal of crime has a direct effect on the public’s conceptualization of crime in society and on assigning roles in criminal settings: that Blacks are typically considered offenders while Whites are typically considered victims. Ravid, supra note 52; Gilliam & Iyengar, supra note 11.

156 Huber & Lapinski, supra note 66 (suggesting that racial priming may occur only among the less educated subset of the population, and that the more educated will most likely reach decisions already
entirely immune to such effects. For example, as discussed above, Guthrie, Rachlinski, and Wistrich offer a dual-stage model of the judicial role that combines intuition with deliberative legal consideration. Their model suggests that judges can potentially mitigate subconscious effects when making decisions, although they often tend not to do so.\(^{157}\)

Drawing on these concepts, the hypothesis here is that the media contributes to judges’ own concerns regarding the increased presence of crime in society. Specifically, the media amplifies such a fear with respect to minority groups (predominantly Blacks). For this study’s purposes, I assume that judges may or may not be aware of the potential effects of the media on their own views. The findings of this study—namely, the overall relationship between media coverage and sentencing length—provide evidence to support this hypothesis. The finding that in one jurisdiction this relationship depends on the race of the perpetrator provides some support—if limited—to the racial priming hypothesis. Juxtaposing the above literature, the empirical findings, and the judicial decisionmaking literature, I offer three potential causal mechanisms that can explain judicial behavior in response to crime concerns advanced by media coverage.

The first suggests that a judge is generally interested in preserving her popularity and esteem, regardless of a direct outcome. Under this *audience-based* approach,\(^{158}\) because the media exacerbates the public’s fears about crime in society, judges will adhere to a tough-on-crime approach, corresponding to increased media coverage of crime, to earn popular regard. Moreover, as society perceives one group as the greatest threat, judges are similarly induced to be harsher in their decisions regarding that group.

The second explanation is a *strategic-based mechanism*. This mechanism is more outcome driven, particularly the assumption that adopting a tough-on-crime approach increases the likelihood of a judge being reelected or reappointed. Under this model, judges are highly motivated by their career goals when making decisions. Accordingly, the incentive structure might change depending on the constituents that are most likely to affect their tenure and career prospects. I will address this model more closely under the inter-state level analysis. The findings at the inter-state level analysis indeed suggest this mechanism may be dominant in the linked with racial predisposition regardless of the messages they receive). Their findings were heavily criticized by Mandelberg, who provides a compelling argument for broad priming effects regardless of education. Tali Mendelberg, *Racial Priming Revived*, 6 PERSPECT. ON POL. 109 (2008).

\(^{157}\) Guthrie, Rachlinski & Wistrich, supra 27, at 6–12; see also Wistrich, Rachlinski & Guthrie, supra note 65, at 863–64. However, they claim, that "because intuitive judgments are faster and effortless, people often rely too heavily on intuition alone. . . . [J]udges also commonly favor compelling intuitive reactions over careful deliberative assessments—even when the intuitive reactions are clearly wrong." Id. at 864. Specifically, this model helps explain the presence of racial bias among the judiciary.

\(^{158}\) BAUM, supra note 8.
decisionmaking process.

The third explanation may seem simple and a surprise to legal realists. I refer to it as the *narrow-legalistic mechanism*. Under this mechanism it could be that judges in fact believe that when crime in society is on the rise, they are professionally obliged to address this problem. As such, increasing sentence length can be considered a good policy solution to this problem—first, because it keeps those who have inflicted harm on society behind bars for longer periods, and, second, because it functions as a deterrence mechanism for future offenders.

The reality of how media coverage on crime affects sentencing is likely a combination of these mechanisms, which this study does not presume to disentangle.

While providing only weak evidence to the racial priming theory, these findings call to further explore the relationships between coverage on crime and racial disparities in sentencing. There are few issues that raise more concern among scholars of criminal law and criminal justice than the consistent documentation of deep racial disparities in the criminal justice system. In the United States, one of every nine Black men between the ages of twenty and thirty-four is behind bars, and they are incarcerated at nearly seven times the rate of white men.\textsuperscript{159} The data in this study similarly demonstrate this trend, showing that in all three states the sentencing lengths for Blacks are on average longer than for non-Blacks, even when controlling for the type of crime, the number of offenses, the gender, and the age of the offender. Numerous studies, empirical and others, attempt to understand these gaps and to investigate whether such disparities stem from differences in criminal behavior or differential treatment under the criminal justice system.\textsuperscript{160}

This study explores these questions from a new angle, making the first empirical link between racial disparities in sentencing and unequal racial representations in the media. Indeed, the research finds only suggestive evidence that increased coverage on crime and the increased presence of Black perpetrators in the news can contribute to increased sentences imposed on Blacks more than on other racial groups. The findings suggest, however, that while it may be harder to mitigate media effects more broadly, the racial context of such effects may be minimized. This does not suggest, however, that judges are generally immune to racial bias, and one prima-facie piece of evidence for such a bias is indeed reflected in the overall longer sentences


\textsuperscript{160} See supra note 154.
imposed on Black defendants. This study cannot provide definite answers to these complex and important questions. It does, however, lay the groundwork for future investigations into the relationship between skewed racial coverage in the media and racial disparities in sentencing.

B. INTER-S TATE LEVEL ANALYSIS: CONTRIBUTION TO THE DEBATE ON JUDICIAL ELECTIONS

This study also engages with the scholarship on judicial elections in the United States. It provides yet another dimension through which the debate regarding appointive versus elective systems may be addressed, but also contributes to a more nuanced consideration of partisan versus nonpartisan election systems. As discussed, I show that the effect size of coverage on sentencing is consistently larger in elective systems compared to appointive. I also provide evidence that the effect is the largest in the nonpartisan elective system.

The study thus reminds us of a simple but important truth—that the goal of achieving an absolutely independent judiciary, one that is hermetically insulated from external influences, is likely unrealistic. However, it suggests that the institutional design of judicial selection might contribute to improving judicial independence with respect to the “weather of the day” and mitigate some of the effects attributed to what newspapers are reporting.  

The findings that the effect size of media coverage on sentencing was smallest in VA, the appointive system, compared to both elective systems, follow the expectations as defined by the traditional dichotomy between elective and appointive system, which predict that appointive systems would be less sensitive to media effects. They also suggest that media bias might be reduced through institutional design. We should remember, however, that this dichotomy was found too rigid; a host of circumstances can potentially affect the susceptibility of judges even in appointive systems, including the nomination process and the forces behind it, the reelection process, and length of terms. Particularly in VA’s unique selection model, where the legislature appoints judges for relatively short terms of eight years and reappoints in a similar process, it appears that a highly politicized process may still limit the amount of true independence such a model produces.

The data shed light not only on the appointive/elective divide, but also on the differences between elective models, suggesting that the extent to which coverage affects sentencing can differ across models. In particular, it

161. See Ginsburg, supra note 1.
162. BONNEAU & HALL, supra note 70; GEYH, supra note 70; Lim, Snyder & Strömberg, supra note 34.
provides evidence that the relationship between these factors in MD, a nonpartisan election system, is larger than in both PA (partisan) and VA (appointive). The findings that nonpartisan systems are more sensitive to public pressure than are partisan or appointive systems are aligned with previous quantitative studies on the sensitivity of nonpartisan elective systems.\textsuperscript{163} It is important to note, however, that while these findings were qualitatively consistent across different specifications, they were sensitive to different specifications.

These findings provide new evidence against the (still) conventional wisdom, which prefers nonpartisan systems over partisan elective systems for promoting more independence among the judiciary, particularly by detaching the judge from the political machine.\textsuperscript{164} As discussed earlier, the model I offer to understand the media’s relationship to judicial decisionmaking creates a tight connection between the judiciary, the media, and public opinion. It explains the findings primarily based on judicial predictions regarding the preferred outcome from the public’s perspective.

C. POLICY IMPLICATIONS—DEBIASING MEDIA EFFECTS AMONG THE JUDICIARY

The research provides robust empirical evidence on the links between coverage on crime and sentencing length. What scholars have long supposed is now substantiated in ways that should clearly raise concerns for advocates of fair trials and the independence of the judiciary, alongside those aiming to minimize racial disparities in sentencing. What is particularly meaningful relates to the insights on the complex and subtle ways in which the media interact with judicial decisions and the large scope of this interaction—one that goes well beyond a particular case, even a high-profile one.

From a policy perspective this is a difficult problem to tackle. If the constitutional right to freedom of the press is protected in particular high-profile cases, it should clearly be protected with respect to the media’s routine crime reporting process, which is the focus of this study. Indeed, limiting the media’s prerogative in covering crime is probably the least reasonable response.

Moreover, there is a normative question on whether the fact that the judiciary is attentive to the concerns of the public is in fact a problem or

\textsuperscript{163} These findings correspond to the evidence provided in Canes-Wrone & Clark, \textit{supra} note 45, and Lim, Snyder, & Strömberg, \textit{supra} note 34, similarly showing susceptibility of nonpartisan systems to external influences compared to partisan system, and both partisan and appointive systems respectively.

\textsuperscript{164} Kang & Shepherd, \textit{supra} note 45; Shepherd, \textit{supra} note 45.
simply a positive sign for the accountability of the state-level judiciary. For many, this is what we should expect from the judiciary. Such an accountability claim seems either cynical or naïve, however, when one considers the scholarship on the disparities between media coverage on crime and the reality of crime. This scholarship repeatedly emphasizes that media coverage on crime and the true reality of crime reflect “the law of opposites”: the media tend to present a depiction of crime that is often inaccurate and usually exaggerated with respect to the real problem of crime in society.\(^\text{165}\) It is inaccurate because it tends to emphasize specific types of crimes despite their marginal presence in the overall crime map. It is also inaccurate because it portrays the relative share of particular groups in crime, traditionally across racial lines, as larger than it really is. Thus, perhaps we should rephrase the normative question: is there a problem with the judiciary being attentive to the public will if the public reaches its conclusion based on limited or missing information? And should this distorted perception affect the lives of criminal offenders? Moreover, should we applaud judicial responsiveness that is detached from basic notions of individual justice? All these arguments suggest that although advocating for responsive judiciary may be deemed desirable through traditional accountability arguments, the complex reality of crime and coverage on crime hinders on this somewhat simplified accountability argument.

At a minimum, I argue, the findings suggest that a deeper exploration regarding the media-judiciary relationship is in order. Although difficult, courts should aspire to counter the bias introduced through media effects, in order to protect rights to a fair trial, without prejudice, for every defendant. This requires, first and foremost, recognizing the sensitivity of the judiciary to the news media. This first step might seem elementary. The history of the media-judiciary relationship reveals, however, the deep skepticism of the judiciary in realizing that the media can have direct impact on their decisionmaking process.\(^\text{166}\) This becomes particularly sensitive against the backdrop of race relations and the concern that judges, like all of us, might fall prey to racial bias that is in part corroborated by the media.

\(^{165}\) Reiner et al., supra note 115, at 15 (claiming that the portrayal of crime in the media is like the “law of opposites,” so that “the characteristics of crime, criminals and victims represented in the media are in most respects the polar opposite of the pattern suggested by official crime statistics”); see Sacco, supra note 115, at 143 (“Analyses of media content demonstrate that the news provides a map of the world of criminal events that differs in many ways from the one provided by official crime statistics.”); Damion Waymer, Walking in Fear: An Autoethnographic Account of Media Framing of Inner-City Crime, 33 J. COMM. INQUIRY 169, 169–70 (2009).

\(^{166}\) In the media literature discussed earlier the third person effect was identified among the judiciary, so that judges refused to acknowledge they are affected by the media, while acknowledging that their peers were affected. As mentioned, this effect is closely aligned with the bias blind spot. See supra note 17.
I suggest, however, that we go beyond recognition of the mere existence of media bias and explore different approaches that might assist in overcoming the tendency toward biased decisionmaking. Indeed, significant scientific efforts were taken to investigate a host of debiasing techniques, particularly for experts and professionals. The literature identifies three leading approaches that have been adopted over the years and have shown some success in affecting biased decisionmaking: training, nudges, and changing incentives.  

None of these, however, have fully and independently achieved the debiasing goal.

*Training* was proven a successful debiasing method particularly when experts were asked to recognize accurate patterns and select appropriate responses (for example, in weather forecasting). Training was also found more effective contingent on specific external circumstances such as feedback, frequency of the outcome of interest, and the complex explanatory model of the outcome. In judicial settings, training seems to be a good debiasing method to respond to media bias. As a first stage, for example, more emphasis on educating judges on the ways through which the media can affect the public seems essential. Training was also found effective in reducing blind spot bias, thus it may be helpful to assist judges to recognize the potential effects of the media on judicial outcomes in their own courtrooms. In the specific context of racial priming, studies have shown that audience-centered training approaches have a positive impact in reducing effects of racial priming. In these approaches experts train media consumers to discuss and critically engage with media messages during or after exposure. This in turn could increase the likelihood of judges putting greater emphasis on recognizing the intuitive part of their decisionmaking and intentionally attempt to move towards a more deliberative stage. In other words, this would serve as a competing priming paradigm to the fear of (Black) crime as advanced by the media. As research suggests, the efficacy of training is likely to improve if the relationship between coverage and sentencing can be systematically observed and evaluated. A challenge for the success of the training methods in the context of sentencing decisions relates to the multiple variables involved in this process.

*Nudges* (or optimizing choice architecture) are often related to changes in the manner by which information is presented and provided, aiming to...
“steer people in particular directions, but . . . also allow them to go their own way”,\textsuperscript{170} and they have been systematically proven to change behavior. In the context of media effects and their distortion of reality, one potential nudging avenue would be to provide judges with easily accessible, ongoing crime statistics, including the involvement of particular groups in crime, to offset the effect of the distorted media portrayal of crime.\textsuperscript{171} Similarly, message-centered approaches were also identified to mitigate racial priming. These indirect approaches can be categorized as nudges and usually present media consumers with counter-stereotypical exemplars to contradict existing stereotypes.\textsuperscript{172} However, some models on bias reduction have shown that message-centered approaches in fact may fall prey to confirmation bias so that the counter examples will be considered as the exceptions and the actual stereotype will remain intact.\textsuperscript{173}

Changing incentives has also proven to be an effective technique for debiasing decisionmaking. Of course, this method is far from perfect as incentives might demotivate behavior if they are insufficient or discontinued. Changing the incentives model among the judiciary seems difficult given the rigid structure of judicial work and the fact that promotion may be in the hand of different constituents whose interests may differ. However, the discussion on incentives is strongly tied to the findings at the inter-state level analysis. The data suggest that particular incentive structures, as embedded within the institutional design of the selection mechanisms, are better than others in countering media effects. In particular, appointive systems in general seem to provide a better incentive structure than elective systems. Moreover, the incentives for reelection in the nonpartisan election model seem to be least successful in countering media effects, given the susceptibility of judges in this system to public pressure. Changes to the


\textsuperscript{171} With the hope of advancing a more informed decisionmaking process that is based on more accurate information (part of the rationale behind transparency). For more on implementing nudges in the justice system, see Edie Greene & Brian H. Bornstein, \textit{Nudging the Justice System Toward Better Decisions}, 103 J. CRIM. L. & CRIMINOLOGY 1155, 1168 (2013) (emphasizing the ways nudges could be used to benefit the criminal justice process). While the efficacy of nudging judges has less empirical grounding, one can find other randomized control trials using, for example, peer comparison as a way to nudge other professionals to change behavior without financial incentives, such as health care professionals. See, e.g., Adam Sacarny et al., \textit{Effect of Peer Comparison Letters for High-Volume Primary Care Prescribers of Quetiapine in Older and Disabled Adults: A Randomized Clinical Trial}, 75 JAMA PSYCHIATRY 1003 (2018). The intervention I offer here does not compare judges to each other, but rather provides the judiciary a sort of objective benchmark to think about their perceptions regarding the prevalence of crime in society.

\textsuperscript{172} Ramasubramanian, \textit{supra} note 168, at 248–50.

\textsuperscript{173} \textit{Id.} at 248–50
basic judicial selection mechanism, or at least changes within the system (for example, moving to retention, when judges are voted on a yes/no basis and do not compete against each other as opposed to reelection where they are competing against other candidates), might transform the incentives structure and consequently reduce bias introduced by media effects; however, the literature suggests there is a meaningful trade-off in such a decision—such as a decrease in democratic participation—that should carefully be considered.

Overall, countering media bias is a complex and unpredictable process that may require a combination of a host of methods and techniques—some may be implemented separately while others should be used in conjunction. The methods suggested are by no means comprehensive, nor are they feasible under all scenarios and in all judicial systems; the decision of which methods to adopt is heavily dependent on context and court. However, these suggestions indeed provide a preliminary framework to think about and engage with activities that might address concerns of distorted decisionmaking processes that can be attributed to media bias.

Last, a few words of caution about the implications of this study are in order. First, regarding the external validity of the study. While offering a robust and comprehensive analysis on the relationship between coverage on crime and sentencing decisions, it is important to note that the study was conducted in three jurisdictions. While some of the features of these jurisdictions are generalizable, the study cannot predict differences between jurisdictions that may yield different outcomes. Moreover, one can suggest alternative explanations to the differences in the size of media effects between these jurisdictions that do not stem solely from the differences between their judicial selection system. Still, the differences in effect size across states indeed provide additional evidence that aligns with some of the existing literature on the different incentives structures produced by different judicial selection systems. Similarly, while the dual role of The Post as a national and local newspaper strengthens the external validity of the study particularly at the national level, more research utilizing various media sources with different political orientations should be further explored.

Second, while the models I suggest in the study go a long way in assessing the relationship between the media and judicial outcomes, they can only cautiously infer the causal role of the media in explaining sentencing decisions, or explain the causal mechanisms behind these relationships. The

174. For example, Ramasubramanian conducted an experiment showing that a combination of audience-centered and message-centered media bias reduction techniques work and may reduce racial stereotypes activated by news stories. Id.
models I discuss, and the implications suggested by the findings, however, are reasonably intuitive.

Third, and as discussed, the decade when the study was conducted provides an invaluable opportunity to isolate media effects given the relative limited media sources consumed those years. Given that the goal was to provide empirical evidence on the relationship between coverage on crime and sentencing, such a setting seems ideal. Moreover, focusing on the intensity of coverage, the study sheds light more broadly on the potential outcome of heightened media environments. However, the world we know today has—on its face—changed significantly, and the media environment has become more fragmented; national and cable TV, newspapers and online platforms, blogs, posts, and social media—all participate in the collective process of providing (“true” and “fake”) information. Under these conditions one might claim that messages coming from the media are less unified, and hence less effective in cultivating biases. While this claim is not new, the literature studying media messages in the current era generally tends to find that indeed there are more media sources than ever, but these do not reflect a meaningful diversity in narratives so that “some common messages and lessons—regarding violence, victimization, gender, power, class, race, and much more—are remarkably persistent.”175 As such, the discussion on media coverage that cultivates fear of crime seems equally relevant today as it was during the years of the study. Future work should continue to unravel the media-judiciary relationship in the current era.

CONCLUSION

This Article provides the first empirical support to a key concern in the media-judiciary relationship: the fear that, at least under certain conditions, coverage on crime can affect, not to say distort, judicial decisionmaking in criminal trials. Moreover, it shows that the institutional design of judicial selection mechanisms can potentially affect judicial independence and can be found useful to mitigate concerns regarding media biases among the judiciary. Last, it provides preliminary, albeit suggestive, evidence of the mutually constitutive relationships between criminal law, race, and the media, and particularly supports repeated claims on the media’s contribution to the racial bias imbued in the criminal justice system. More broadly, the Article shows the complex and multifaceted ways through which the media can affect judicial decisionmaking—a combination of conscious and unconscious triggers that are ultimately reflected in final judicial outcomes. It shows that the traditional focus

175. Michael Morgan et al., Yesterday’s New Cultivation, Tomorrow, 18 MASS COMM. & SOC. 674, 686 (2015). Moreover, studies have shown that in the era of fake news there is a hierarchy of trusted information, with newspapers still remaining a trustworthy source for information gathering and understanding the world. Allcott & Gentzkow, supra note 128.
on high-profile cases may be only the tip of the iceberg with regard to the effects of the media on decisionmaking processes.

The study provides insightful findings that should advance candid conversations between media representatives and the judiciary regarding its normative and practical implications. As mentioned, the pressure on the judiciary from both traditional and new media is on the rise. There is a thin line that needs to be drawn; on the one hand, the media’s role as a democratic accountability mechanism for the judiciary is established and should be preserved. On the other hand, this study suggests that pressure from the media can affect the integrity of the judiciary and the criminal justice system as a whole. This is clearly not in the interest of the judiciary, nor of the media. While I offer here a few policy recommendations that can help counteract the bias introduced through media effects, these are just the beginning; we need a host of other collaborative efforts to promote a more balanced relationship between an independent judicial branch and a strong and meaningful “fourth branch.” While there are no easy solutions to these long-lasting problems, recognizing both their presence and consequences may be a crucial first step.
APPENDIX

APPENDIX TABLE 1. Regression of Predicted Sentencing on Lagged Intensity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Pooled Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lagged Intensity of Coverage</td>
<td>0.58</td>
</tr>
<tr>
<td>Coverage</td>
<td>(0.40)</td>
</tr>
<tr>
<td>Observations</td>
<td>43,300</td>
</tr>
<tr>
<td>R-squared</td>
<td>0.09</td>
</tr>
<tr>
<td>State FE</td>
<td>Yes</td>
</tr>
<tr>
<td>Half-year FE</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Notes: The table shows OLS regression results. Standard errors, clustered by county, are in parentheses. The following set of variables was used to predict sentencing: (1) case characteristics: type of felony, gender, race, age and age-square of defendants, type of trial, number of felonies (2) county characteristics: log employment, log area size, log population, log per capita income, log crime known to authorities, county share Black population, share vote for democratic candidate in recent presidential elections, county education (3) court characteristics: share democratic judges in court, share Black judges, share male, share judges up for reelection. *** p<0.01, ** p<0.05, * p<0.1. The model includes time-invariant state and time FE. The results were also robust for the inclusion of county fixed-effects.
APPENDIX FIGURE 1. Sentencing and Intensity Over Time (Maryland)

Notes: Data on the “Intensity of coverage” on crime are based on the Washington Post local and national crime coverage for the years 1998–2002, and is lagged by a quarter. Sentencing data are based on the ICPSR and NACJD restricted data.
Notes: Data on the “Intensity of coverage” on crime are based on the *Washington Post* local and national crime coverage for the years 1998–2002, and is lagged by a quarter. Sentencing data are based on the ICPSR and NACJD restricted data.
APPENDIX FIGURE 3. Sentencing and Intensity Over Time (Pennsylvania)

Notes: Data on the “Intensity of coverage” on crime are based on the Washington Post national crime coverage for the years 1998–2002, and is lagged by a quarter. Sentencing data are based on the ICPSR and NACJD restricted data.